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Cape of Good Hope Supreme Court.
65

"CAPE TIMES" LAW REPORT

OF ALL CASES DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE YEAR 1903

(WITH INDEX OF CASES AND DIGEST).

REPORTED BY

S. H. ROWSON, B.A., LL.B.

ADVOCATE OF THE SUPREME COURT.

VOL. XIII.

1903

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DE VILLIERS, Right Hon. Sir J. H., P.C., K.C.M.G., LL.D. (Chief Justice).

BUCHANAN, Hon. Sir E. J., Knt. (Senior Puisne Judge), sat from January 12th till April 9th, and also in November and December.

MAASDORP, Hon. C. J. (Junior Puisne Judge).

KOTZE, Hon. J. G. (Judge of the E. D. Court), sat from April 14th till December 21st.

ATTORNEY-GENERAL:

The Hon. T. L. GRAHAM.

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N.B.—The Editor begs to express his regret that the two cases of *Moll v. Holmes* (12 C.T.R. 1050) and *Ndube v. Holmes* (13 C.T.R. 813) are both incorrectly stated to have been appeals from the Resident Magistrate of Nqamakwe.

The former case was heard in the Court below by the Acting Assistant R.M. and the latter by the Assistant R.M.

S.H.R.

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"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1903. Jan. 12th.

Mr. P. S. Jones moved for the admission of Claude Leonard Howard as an attorney and notary.

Order granted and the oaths administered.

Mr. Searle, K.C., moved for the admission of George Gerhard Gie as a conveyancer.

Order granted and the oaths administered.

Mr. Benjamin moved for the admission of James Frederick Wege as an attorney and notary.

Order granted and the oaths administered.

PROVISIONAL ROLL.

BOSMAN, POWIS AND CO. V. LYNDON.

Mr. Upington moved for provisional judgment on a promissory note for £130 1s. 7d., less £20 paid on account, with interest from due date.

Provisional sentence granted as prayed.

HEYDENRYCH V. BURBILL AND ANOTHER.

Mr. Russell asked that this matter be allowed to stand over until February 1.

Postponement allowed.

Postea.

PITTMAN V. BENNETT.

Mr. Russell moved for provisional judgment on a mortgage bond for £2,000, with interest due. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted and the property declared executable.

PRINCE, VINTCENT AND CO. V. BROWN.

Mr. Buchanan moved for the final adjudication of defendant's estate as insolvent.

Order granted as prayed.

SANDERS AND SONS V. JOHNS.

Mr. Benjamin moved for the final adjudication of defendant's estate as insolvent.

Order granted as prayed.

STEYN V. LLOYD.

Mr. Upington moved for provisional sentence for the sum of £1,800, less £200 paid on account, due on a broker's note, with interest.

Provisional sentence granted as prayed.

HURTON V. KENTNOR.

Mr. Russell moved for a decree of civil imprisonment upon an unsatisfied judgment of the Court for £24 17s. 2d., with interest and costs. The sum of £21 had been paid on account, and there was a sum of £15 11s., interest and costs, now outstanding.

Order granted as prayed.

ESTATE OF VAN DER LITT V. GUARDIAN OF THE MINOR CONRADIE AND OTHERS.

Mr. Gardiner moved for provisional sentence for £1,530 due on certain conditions of sale, with interest. It appeared that the father of the minor had entered into the contract of sale for the purchase of certain property on behalf of his son, at the time a minor, but now of age. The other defendants were one of the sureties and co-principal debtors, and the executors of the other surety and co-principal debtor.

After hearing counsel the Court said that plaintiff must go into the principal case, and in the meantime he should consider whether the son should not be made a party to the proceedings.

BOSMAN, POWIS AND CO. V. SHAWE.

Mr. M. Bisset moved for provisional sentence for £67 5s., with interest, due on a cheque drawn by defendant in plaintiff's favour, but dishonoured.

De Villiers, C.J., pointed out that there was no certificate of presentation of the cheque at the bank.

Mr. Bisset said that under section 49 of Act 19 of 1893 no certificate of protest, as in the case of promissory notes, was required.

Buchanan, J.: All that the section says is that the drawer of a cheque shall not be absolved from liability because there is no protest, but surely when you sue on a cheque you must show that you presented it at the bank and that it was dishonoured?

Mr. Bissett: There is a statement in the summons that the cheque has been duly presented and dishonoured.

De Villiers, C.J.: Has it been presented, and to whom?

Mr. Bissett: To the bank.

De Villiers, C.J.: But where is the proof of that? Of course, I quite understand that a protest is not required as against the drawer of a cheque, but surely for the purpose of obtaining provisional sentence there must be a certificate that it has been presented and dishonoured. There must be something before the Court to show that.

Buchanan, J.: The practice has always been to have a protest, in a provisional case of this kind. Otherwise a person might sue on a cheque which had never been presented at the bank.

Provisional sentence was granted as prayed, subject to the production of a certificate of presentation, the Chief Justice pointing out that in the section referred to there was nothing to say that the Court had not to satisfy itself that the cheque had been presented.

BOSMAN, POWIS AND CO. V. LYNCH. 1903. Jan. 12th.

Mr. M. Bisset moved for provisional sentence for the interest due on a promissory note. The summons was for both the principal and interest, but the principal had been paid that morning.

Provisional sentence granted as prayed.

MUNDER AND ANOTHER V. HAMPSON AND CO.

Mr. Burton moved for provisional sentence upon certain bills of exchange for £103 15s. 11d.

Provisional sentence granted as prayed.

BENDLE V. BENDLE.

Mr. Russell moved for a decree of civil imprisonment upon an unsatisfied judgment of the Court. It appeared that in an action brought against defendant by his wife he was ordered to pay her £5 per month for maintenance, and he had failed to pay for three months.

The case was ordered to stand over.

LYNCH V. HANSLO.

Mr. Greer asked that this matter be allowed to stand over until February 1.

Postponement allowed.

THORNTON V. WATKINS.

Mr. Benjamin moved for provisional sentence for £16 16s. 4d.

Provisional sentence granted as prayed.

BUCHANAN V. DUGGAN.

Mr. Buchanan moved for a decree of civil imprisonment on an unsatisfied provisional judgment of the Court, which had been granted on a judgment of the Supreme Court of Natal. The total amount outstanding was, with costs, £78 8s. 4d.

De Villiers, C.J., pointed out that the summons had been made for December 12 last, and there was nothing to

show that the defendant had consented to the postponement, although it was stated that that was the case.

The matter was allowed to stand over for a day, so that if possible an affidavit might be made, showing that defendant had consented to the postponement.

VERSFELD V. ISAACS.

Mr. Benjamin moved for provisional sentence for £50, due on a mortgage bond, with interest. The bond had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted as prayed, and the property declared executable.

NOCHAMSON V. GLASSON.

Mr. Searle, K.C., moved for provisional sentence for £212 10s., less £30 paid on account, due on a promissory note. The note had been made in favour of one Udwin, and plaintiff was now the legal holder.

Mr. B. Upington appeared for the defendant, who it appeared was seventy-six years of age, and lived on a farm forty-nine miles from Mossel Bay. In an affidavit he denied that he ever signed the promissory note, and said that he knew nothing about it.

Mr. Searle asked that the Court would as usual fix a day for the proof of signature.

It was pointed out that defendant's age would probably prevent him coming all the way to Cape Town, and it was suggested that the matter should be heard before the Circuit Court at Mossel Bay in March. The plaintiff resides at Oudtshoorn.

The Court ordered the removal of the case to the Mossel Bay Circuit Court, and ordered that the costs of this application should be costs in the cause.

ISAACS V. MARKS. { 1903. Jan. 12th.

Mr. Close applied for provisional sentence for £21 for rent for three months due on a certain lease. Counsel put in the on a certain lease. Counsel put in the lease, which, however, was not stamped on execution. The document now bore stamps. In reference to this, counsel referred to Section 12 of Act 3 of 1864.

De Villiers, C.J., said the document should have been stamped on execution. Plaintiff could proceed on payment of a fine of £3 by reason of the document not having been stamped.

Defendant denied that he owed the money. He produced a receipt for rent paid in advance up to the 31st February, 1903. The receipt was signed by Messrs. Litten Bros. and Simmonds, who were, defendant said, the plaintiff's agents. He took the house from them.

Mr. Close said plaintiff knew nothing about this receipt. The firm named were not the plaintiff's agents.

The case was ordered to stand over until February 1, defendant to file an affidavit in the meantime.

S.A. MILLING CO. AND OTHERS V. GRAND JUNCTION RAILWAYS.

Mr. Benjamin applied for a postponement of this mater until February 28.—Granted.

ILLIQUID ROLL.

ADWIN V. COHEN.

Mr. Rainsford moved under Rule 329d for judgment for £200.—Granted.

ROBERTSON AND CO V. KELLAWAY.

Mr. P. S. T. Jones moved under Rule 329d for judgment for £23 9s. 1d.—Granted.

GARLICK V. KOCK.

Mr. Buchanan applied for judgment under Rule 329d for £170 3s. 9d.—Granted.

VAN DER POEL V. COLWYN.

Mr. Chas. de Villiers moved under Rule 329d for an order on defendant to take transfer of certain property and for judgment for the sum of £1,000, the purchase price.—Granted.

ARDERNE AND CO. V. SELITZKY AND CO.

Mr. Bisset moved under Rule 329d for judgment for £267 3s. 7d.—Granted.

DE WET AND ANOTHER V. MANCHESTER.

Mr. C. de Villiers moved under Rule 329d for judgment for £50, less £25 paid on account.—Granted.

PIENAAR v. VILJOEN.

Mr. Greer moved under Rule 329d for judgment for £100.—Granted.

SCOTT v. PETERSEN AND CO.

On the motion of Mr. Benjamin, judgment was given under Rule 329d for the sum of £168 17s.

WIENER AND CO., LTD., v. JORGENSSON.

Mr. Nightingale moved under Rule 329d. for judgment for £61 18s. 7d., less £20 paid on account.—Granted.

SCOTT v. VAN DIEMAN.

Mr. Russell moved for judgment under Rule 329d for £82 9s. 3d.—Granted.

SCOTT v. JACOBS.

On the application of Mr. Russell judgment was given under the same rule for £361 17s. 10d.

SIVEWRIGHT v. ERSKINE.

Mr. Russell applied under Rule 329d for judgment for £205.—Granted.

TOWN COUNCIL v. ISAACS.

Mr. Upington moved under Rule 329d for judgment for certain amounts due for rates and water charges.—Granted.

KING BROS v. PORTER.

Mr. Greer moved for judgment under Rule 329d for the sum of £200 4s. 9d.—Granted.

KLEYN AND CO. v. HEYNES.

Mr. Benjamin moved for judgment for the sums of £30 and £4 10s. under Rule 329d.—Granted.

RIDDELL v. CLEWS.

Mr. De Waal moved under Rule 329d for judgment for the sum of £1,066 11s. 6d.—Granted.

THESEN AND CO. v. RIACH AND CO. { 1903. Jan. 12th.

This was a motion for judgment against the defendants for £84, balance of account for goods sold and delivered, together with interest *a tempore moræ*, and costs of suit.

On the motion of Mr. Benjamin, the Court granted judgment as prayed.

Defendant was in default.

REHABILITATIONS. { 1903. Jan. 12th.

Mr. Buchanan moved for an order for the rehabilitation of Abraham Christoffel Blignaut.—Granted.

On the motion of Mr. Benjamin, an order was granted for the rehabilitation of Andrew Philip Russau.

Mr. Upington moved for an order for the rehabilitation of Hermanus Wilhelm Schoonraad.—Granted.

Mr. Close moved for an order for the rehabilitation of Christian Jacobus Johannes Jooste.—Granted.

Mr. De Waal applied on behalf of Gert Lourens Bester for an order for rehabilitation.—Granted.

M. P. S. Jones applied for an order for the rehabilitation of Lodewyk Theodorus Puren.—Granted.

Mr. Charles de Villiers applied for the rehabilitation of Gerhardus Paulus Zwart.—Granted.

Application was made by Mr. J. E. R. de Villiers for the rehabilitation of Gerard Christian Bedford. Counsel said that the estate was surrendered in 1895.

The application was refused, leave being given to renew the same in six months.

Mr. J. E. R. de Villiers moved for the rehabilitation of Gerhardus Jacobus du Toit.—Granted.

Mr. Greer applied for an order for the rehabilitation of Marthinus Jacobus van Straten.—Granted.

Mr. Russell moved for an order for the rehabilitation of Thomas Harris, whose estate was surrendered in 1887.—Granted.

GENERAL MOTIONS.

WATSON v. WATSON.

Mr. Buchanan moved to make absolute a rule calling upon Mrs. Watson to show cause why a decree of divorce should not be granted, she having failed to return to her husband as ordered.—Granted.

Ex parte RHODES.

This was an application by one Peter Rhodes, of Kokstad, to have a certain rule *nisi*, granted by Mr. Justice

Buchanan in Chambers on January 1st, 1903, under the Derelict Lands Act made absolute. The applicant had purchased a certain piece of land situate in the town of Kokstad on January 2nd, 1884. He paid transfer duty, and had duly paid quit-rent and such municipal taxes as from time to time became due and payable on the said land. He had endeavoured to ascertain the whereabouts of the original grantee of the land, in order that he might be able to obtain transfer, but had not succeeded in doing so. He now asked that the provisional order granted by Mr. Justice Buchanan on January 1st be made absolute, and an order be granted authorising the registration of the title of the said land in his name.

On the motion of Mr. Buchanan, the Court granted an order as prayed.

[Applicant's Attorneys: Faure and Zietsman.]

Ex parte SAILEY. { 1903. { Jan. 12th.

This was an application under the Derelict Lands Act by one Peter Sailey, of Port Elizabeth. The petition stated that on July 11th, 1853, the petitioner had received transfer of a certain lot of ground, situate at Port Elizabeth. That in February, 1885, petitioner, accompanied by one Bartholomew Sailey, visited the property and found it in a most unsatisfactory condition, whereupon B. Sailey told petitioner that he (petitioner) would not incur any expense in repairs, but that if petitioner cared to have the property, he might take it. Petitioner accepted the gift, and proceeded to occupy the property and effect improvements thereon. That petitioner has since paid all rates and taxes thereon, but has never obtained transfer. Bartholomew Sailey having been killed, his brother Patrick was appointed executor in the estate. He has since died, and the estate being now unrepresented, petitioner is unable to obtain transfer of the property.

He, therefore, prays for an order directing the Registrar of Deeds to enregister the said property in petitioner's name.

A rule *nisi* granted by De Villiers, C.J., in Chambers, on December 12, 1902, was made absolute on the motion of Mr. Bisset.

[Applicant's Attorneys: Tredgold, McIntyre and Bisset.]

Ex parte BUDGE. { 1903. { Jan. 12th.

This was an application to make absolute a rule *nisi*, granted in Chambers by Maasdorp, J., under the Derelict Lands Act on December 12, 1902.

The petition of Emma Budge, widow of the late George Ryall Budge, and of George H. Runciman, in their capacity as the executors of the late George R. Budge, shewed:

That in 1864 the said George R. Budge purchased from one Emma Tucker certain property situate in Simon's Town. The vendor is still alive. On June 11, 1864, the said vendor passed a deed of transfer by which it was intended to convey to the purchaser the property so purchased by him; but by which, in fact, she conveyed only the remaining extent of certain land, granted to one William Warren on April 8, 1819, the greater part of which forms the garden of the property aforesaid. This land still stands registered in the name of William Warren, and has never been transferred, though the said John Tucker and his executrix have held and possessed the same as of right up to the date of the sale to the said George R. Budge. The petitioners, since the death of George R. Budge, have held this land as of right, and this right has never been disputed. Petitioners, therefore, pray that the Registrar of Deeds may be authorised to pass transfer to them in their capacity as executors of George R. Budge of the remaining extent of the land granted to Wm. Warren on April 5, 1819.

On the motion of Mr. Russell, the rule was made absolute.

[Applicants' Attorneys: Faure and Zietsman.]

Ex parte BORCHERDS. { 1903. { Jan. 12th.

This was an application to have a rule *nisi*, granted on the 16th of December, 1902, by Maasdorp, J., in Chambers made absolute.

The petition of James William Borcherds, of George Town, stated *inter alia*:—

Petitioner is the executor dative of the estate of the late Jemima A. Raubenheimer. A certain piece of ground, being the remaining extent of Erf No.

7, situate in Courtney-street, George Town, belongs to the said estate in virtue of a bequest to the deceased by the late William C. Guest and Jemima Guest. In transferring the properties bequeathed to the deceased, the executor of the estate of the late William C. Guest omitted to transfer the remaining extent aforesaid to the above deceased Jemima A. Raubenheimer, the said William C. Guest never having himself received transfer. The petitioner believes that the said W. C. Guest bought this property from one Caroline Schols, together with other erven, of which other erven he received transfer on January 21, 1871. The land in question has been claimed and occupied by W. C. Guest since 1871. On his death, Jemima Guest entered into possession of the said property, and subsequent to her decease it was in the free and undisturbed possession of one Jemima A Raubenheimer until her decease on January 4, 1901 after which date the said property has come into the possession of the petitioner in his aforesaid capacity.

Petitioner therefore prays that the Court may be pleased to authorise the Registrar of Deeds to pass transfer to petitioner in his aforesaid capacity of the said remaining extent of Erf No. 7 under the Derelict Lands Act of 1381.

On the motion of Mr. Bisset, the rule was made absolute.

[Applicant's Attorneys: Tredgold, Mc Intyre and Bisset.]

Ex parte LABUSCHAGNE. { 1903. Jan. 12th.

This was an application to make absolute a rule granted by Maasdorp, J., in Chambers, on November 27, 1902, under the Derelict Lands Act.

The petition of Catherine E. Labuschagne, of Embokotwa, Elliot, stated *inter alia*: Petitioner is the executrix testamentary of the estate of her late husband, Johannes J. Labuschagne. On October 11, 1886, a certain erf of the Embokotwa "European Communal Allotments," situate in the Xalanga district of Emigrant Tembuland, was granted to one Petrus Jacobus Ludovikus van Biljoen. On April 20, 1887, one Martinus A. Oelofse purchased the aforesaid property from P. J. L. van Biljoen, but the attorney who framed the declaration of seller and power of attorney incorrectly described the said P. J. L. van Biljoen as Piet Jacobus van Biljoen. The said attorney is now deceased, and after the sale of the said property was effected, the said P. J. L. van Biljoen left this colony, and his present whereabouts cannot now be ascertained, nor is it known whether he is still living or not. On March 17, 1897, the aforesaid Martinus A. Oelofse sold the said property to petitioner's late husband, J. J. Labuschagne, who paid the purchase price to the vendor. The said vendor signed and completed the power of attorney to pass transfer, and petitioner has paid transfer dues in respect thereof. However, M. A. Oelofse omitted to take transfer, and left the Colony, after he had sold the said property, and his present whereabouts cannot now be ascertained. Petitioner's late husband enjoyed quiet and undisturbed possession of the said property, and paid the Government quitrent dues thereon from the date of purchase by him till the time of his death, and since then petitioner, as executrix in his estate, has paid the said quitrent. The petitioner, in her aforesaid capacity, has now sold the property afore-mentioned, and is desirous of passing transfer thereof. Wherefore she prays for an order for the registration of the title to the said landed property, in the name of her late husband, Johannes Jacob Labuschagne.

On the motion of Mr. Close, the rule was made absolute.

[Applicant's Attorneys: Walker and Jacobsohn.]

ATMORE v. LOUW. { 1903. Jan. 12th.

This was an application to have a certain rule *nisi* granted by Buchanan, J., in Chambers, on December 19, 1902, whereby the respondent was restrained from alienating by sale, lease, concession, or otherwise, the farm Stikland, or any portion thereof—made absolute.

The Court granted the order, on the motion of Mr. Benjamin, on condition that plaintiff should proceed to trial during February 1903 term, with leave to the defendant to reap the crops on the land, subject to his keeping an account thereof.

Applicant's Attorneys: W. E. Moore and Son.

Ex parte NEL. { 1903. Jan. 12th.

Will—Mutual vesting—Sale of *fidei commissary* property to an executor.

This was an application for an order authorising the Registrar of Deeds to pass transfer of certain property.

The petition of Agatha Gertruida Philip Rudolph Nel (born Fourie) was as follows:

1. The petitioner was married in community of property to the late Pieter Andries Nel, who died on the 15th April, 1896, leaving eight children, issue of the said marriage.

2. Under the will of petitioner's grandparents, Philip Rudolph Botha and Agatha Gertruida Botha (born Gozen), petitioner inherited certain land, which was transferred to her on November 2, 1898, subject to a life usufruct in favour of petitioner's mother, Catherina Maria Fourie, in terms of an order of Court dated September 13, 1898.

3. The petitioner's mother died on December 31, 1900, and the petitioner is now desirous of transfering the said land to her son, Petrus Johannes Nel, and for this purpose the customary deed has been lodged with the Registrar of Deeds.

4. The petitioner and her late husband on July 14, 1886, made a will dealing with their joint estate, which came into operation on April 15, 1896, when the petitioner's late husband died, and petitioner adiated and accepted benefits under the will, a copy of which is hereunto annexed.

5. The petitioner begs to refer the Court to the petition lodged in connection with the Order granted by the Court on September 13, 1898 (5, Sheil, 472), for particulars regarding the conditions upon which the said land was bequeathed to her.

6. The Registrar of Deeds has raised the question whether the land transferred to petitioner on November 2, 1898, falls within the joint estate of petitioner, and her late husband, and is subject to the terms of the joint will of petitioner and her late husband, and he requires an order of Court before he will pass the transfer.

7 The petitioner contends that the land was vested in her after the death of her late husband, and that it does not form part of the joint estate, and consequently that she is free to deal therewith as she shall think proper. Wherefore the petitioner prays for an order authorising the Registrar of Deeds to pass transfer of the said property at present registered in petitioner's name, by virtue of the Deed of Transfer of November 2, 1898.

The clause in the joint will of P. A. Nel and A. G. P. R. Nel (his wife), on which the present application turned, was as follows:

"4th. We leave and bequeath to our children born in our marriage, or who may still be born, and on the predecease of one or more of them, then to his or her lawful descendants by representation, all our immoveable property or properties, which at our death shall belong to our joint estate, including not only such immoveable property as shall be in our possession at our death, but also such as shall then be in expectancy, on this condition, however, that the said legatee, shall not be entitled to demand transfer of the said immoveable property or properties, or to take possession during the lifetime of the survivor, but only after his or her death; it being our express will and desire that the survivor during his or her lifetime shall remain in full and undisturbed possession of all our immoveable property or properties, and shall enjoy the usufruct thereof, in order to enable them the better to maintain and educate the minor heirs till their majority.

The report of the Registrar of Deeds was as follows: "The property which forms the subject of this application was acquired by the petitioner as one of the *fidei-commissary* heirs under the will of her grandparents subject to the conditions of the said will, and to the further condition that should she pre-decease the fiduciary, her mother, her share should devolve upon her issue. The transfers executed on November 2, 1898, to the *fidei-commissary* heirs were made subject to the latter condition in accordance with an order of Court; for although the fiduciary had renounced all her interest in the property, it would, in the event of any child pre-deceasing her vest in terms of the will, in his or her children. The deed was further made subject to conditions of the will of the fiduciary and her husband, but, as these only affect such of the property as was directly acquired from them, they may be left out of consideration. On July 14, 1886, the petitioner executed a joint will with her husband, P. A. Nel, to whom she was married in community of property, and thereby they bequeathed to

their children all their immovable property, which at their death should belong to the joint estate, including not only such immoveable property as should then be in their possession, but also such as should then be in expectancy, subject to a usufruct in favour of the survivor and to the condition that transfer could not be demanded until after the death of the longest living. Nel died on April 15, 1896, and the petitioner adiated and accepted benefits under the joint will; but, notwithstanding this fact, she sold the *fidei-commissary* property to one of her sons on February 11, 1899, and proposes to pass transfer thereof to him; and she bases her right to do so on the fact that, as the fiduciary, her mother died after her husband on December 31, 1901, the property only vested absolutely in her on that date, and she is, therefore, at liberty to dispose of it without having regard to the provisions of the will of herself and husband. The question, therefore, arises whether she is not bound by its terms, and I have deemed it advisable to require that the point should be submitted to the Court for decision."

The Master's report stated *inter alia* that, as Catharina M. Fourie (born Botha) had survived the testators, it would seem that the property had vested in her absolutely. That, if this were so, it would appear that the joint will of Catharina M. Botha and her late husband, Petrus J. Fourie, governs the disposition of the property. That it would appear that on the death of P. J. Fourie (petitioner's father) the property vested in the petitioner. *Strydom v. Strydom's Trustee* (11 S.C.R., 425).

[Mr. Benjamin (for the petitioner): The whole question is whether this was a *fidei-commissary* bequest or not. If it was not it went into the joint estate. If it was, as Mrs. Nel survived her husband, it was no part of the joint estate. The case came before the Court in 1898, when your Lordships regarded Mrs. Nel's interest as *fidei-commissary* dependent upon Mr. Nel surviving her mother. (5 Sheil, 472).]

[De Villiers, C.J.: That decision only shows that the Court regarded the interest as usufructuary.]

Yes, Mrs. Fourie's interest was a fiduciary interest.

[De Villiers, C.J.: What is the Master's report?]

[Mr. Benjamin read the passages of the report cited above.

[Maasdorp, J.: I don't quite follow your case.]

Mrs. Nel has sold the property to one of the children.

[Maasdorp, J.: That is not under the will?]

No, if the property falls into the joint estate, it must go to all the eight chil- Fourie died, leaving Mrs. Nel survivwas *fidei-commissary*. When Mrs. Fourie died, leaving Mrs. Nell surviving her, the property vested in Mrs. Nel.

[De Villiers, C.J.: I do not see how there can be any question of *fidei-commissum*; the substitution, according to the Master, is direct and not *fidei-commissary*. I gather from the report that Mrs. Botha was a usufructuary and not a *fidei-commissary*.]

The point I want to put is that Mrs. Fourie was a usufructuary, and that on her death her interest was to go to her children.

[De Villiers, C.J.: But what right had she to dispose of the property?]

We say that now it has vested in her absolutely as a grandchild of the original testators. Had she not survived her mother (Mrs. Fourie) it would have gone to the children, but now it has become absolute in her.

[De Villiers, C.J.: Under which will do you claim?]

Under Botha's will. Mrs. Nel is the posterity therein referred to. She survived her mother (Mrs. Fourie), and hence the property could not have vested in the joint estate.

[De Villiers, C.J.: Mrs. Fourie took an unburdened property, and then left a will; is not that the will to which we should look?]

I rely on the words "in case our daughter should die after the death of the testators."

[De Villiers, C.J.: The will speaks only of a direct substitution; there is no *fidei-commissum*. What does Fourie say in his will?]

He ratifies the bequest in the will of the original testators. Mrs. Nel took no interest until the death of her mother, she surviving.

[De Villiers, C.J.: Do you admit that if Fourie's will refers to this property you have no right to succeed?]

Yes; but Fourie's will could not modify Botha's Will.

[De Villiers, C.J.: Your only course is to bring an action, so that we may have all the points before us.]

Ex parte WALSTON. { 1903. Jan. 12th.

This was an application to make absolute a rule *nisi*, granted by the Court on December 19, 1902, authorising the cancellation of a certain mortgage bond on a piece of ground situate at Caledon. By a mutual will the petitioner, Elizabeth Walston, and her late husband had bequeathed the said land to their two daughters. The petitioner was appointed by the said will executrix testamentary to her late husband. The said beneficiaries are now desirous of taking transfer of the said land, and petitioner is ready and willing to pass such transfer, but finds that in the books of the Debt Registry a certain mortgage bond, dated April 19, 1852, is still registered. This bond is in favour of one Johannes J. Tesselaar. Petitioner was informed by her late husband that the only burden on this property was a bond in favour of one Bourhill, which her said late husband paid off shortly before his decease, and she believes this latter bond to be identical with the one registered in the Debt Registry. To the best of petitioner's belief, her late husband never paid interest to the said Tesselaar, of whom she never before heard. She, therefore, asked for an order authorising the Registrar of Deeds to cancel the aforesaid bond.

On the motion of Mr. Benjamin, the Court made the previous rule *nisi* absolute, and granted an order as prayed.

[Applicant's Attorneys: Van Zyl and Buissinné.]

Ex parte DE WET.

Mr. Buchanan moved for the appointment of a curator to Pieter C. de Wet, who was deaf and dumb and incapable of managing his affairs.

An order was granted as prayed, and the parties mentioned in the petition appointed curators.

MAGGS V. THE TATI CONCESSIONS.

Mr. Close moved for the dismissal of the appeal which had been noted in the above case, the plaintiff having failed to proceed with his appeal within the prescribed time, and not having given security for costs.

Order granted as prayed.

Ex parte POWRIE AND ANOTHER. { 1903. Jan. 12th.

This was an application for an order authorising the petitioner to sell a certain farm.

The petition of Frank W. Powrie, Amy Powrie (born Carlisle), to whom he is married in community of property, and the said F. W. Powrie in his capacity as father and natural guardian of the marriage, shewed:—

That the petitioners executed an ante-nuptial contract on May 26, 1891, by which contract F. W. Powrie agreed to transfer a certain farm, situate in the division of Barkly East, called Elfin Glen, to Edward V. W. Cotterell, as trustee for his wife (should she survive him and not contract a second marriage) and the issue of their marriage. The farm had never been actually transferred to the trustee, and the said F. W. Powrie had been offered £2,800 for it, and desired to sell it and to hand over the proceeds to the trustee to be invested on first mortgage for the benefit of the beneficiaries under the ante-nuptial contract. The intending purchaser wished to pass a kusting brief for £1,500, leaving a balance of £1,300 for investment. The farm was let for £72 per annum, and the lessee was willing to cancel his lease. Wherefore the petitioner prayed for leave to sell the said farm on the above-mentioned terms.

On the motion of Dr. Greer, the Court granted an order as prayed.

[Applicants' Attorneys: Scanlen and Syfret.]

TOUISSANT V. TOUISSANT.

Mr. Gardiner moved that the rule *nisi* granted in the above matter by the Court on December 19, 1902, be made absolute, giving the plaintiff leave to sue her husband in *forma pauperis*.

Rule made absolute, Mr. Gardiner being appointed counsel and Mr. Scholtz attorney for the petitioner.

VENTER v. VENTER.

Mr. Burton moved for a commission to take the evidence of the plaintiff in this case, as well as that of another witness, at Philip's Town. In the principal case the plaintiff is suing his wife for divorce on the ground of her adultery. In her plea the defendant had admitted all the allegations made. The plaintiff is 82 years of age, and the defendant 40 years of age.

Mr. Russell appeared for the defence to consent to the application.

An order was granted as prayed, and the Magistrate at Philip's Town was appointed Commissioner.

Ex parte PROCTOR.

Mr. Gardiner moved for an amendment of a deed of transfer, in which the petitioner's name had been wrongly given.

Order granted as prayed.

COETZER v. COETZER. { 1903. Jan. 12th.

Mr. Searle, K.C., appeared for the applicant in this matter, and asked for a suspension of a writ of arrest. The applicant had been in gaol for over a month, and he had no means to pay the debt in connection with which the writ of arrest had been granted. The debt was for maintenance of his wife, from whom he had been judicially separated.

Mr. De Waal appeared for the respondent, and asked for a postponement of the case until February 1, as he had not yet had time to reply to the petitioner's affidavit.

Mr. Searle objected to the postponement until February 1.

The Court directed that the matter be mentioned again on Tuesday or Wednesday, if the replying affidavits could then be put in, otherwise the case would have to stand over until February 1.

LANDESHUT v. KOENIG.

Mr. Upington appeared for the applicant to move that the award of arbitration be made a rule of Court.

Mr. Searle, K.C., with him Mr. Alexander, appeared for respondent.

The matter was, by consent, ordered to stand over until February 1.

Ex parte GREEN. { 1903. Jan. 12th.

This was an application for an order authorising the sale of certain property.

The petition of George Thomas Green, formerly of Oudtshoorn, but at present of Ladybrand, shewed that he was the father and natural guardian of Edward Green and Laura Green, both minors, aged 19 and 16 years respectively. The former of these minors was practically emancipated, living away from his parents and earning his own livelihood, and the latter, though still living with her mother, was earning her own livelihood. On April 27, 1895, transfer of a certain piece of property was passed to petitioner in his capacity of the father and natural guardian of, and in trust for his said minor son, E. Green, and there was also passed on July 28, 1896, a similar transfer of another piece of property to and in favour of L. Green. Shortly before the late war broke out, petitioner migrated to the Orange Free State, and he now wished to have his family there with him to reside. The aforesaid properties were not of much beneficial use to his aforesaid children, and it would be to their advantage to dispose of the same. Petitioner undertook to invest the proceeds thereof at more remunerative returns.

Petitioner, therefore, prayed for an order sanctioning the sale of the aforesaid two properties by public auction and authorising the passing of transfers to the purchaser, or purchasers.

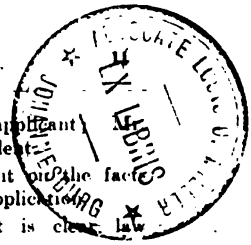
The Master in his report did not object to the sale of these properties by public auction, or in such manner as might be most to the advantage of the minors, but recommended that the proceeds of the sale be paid into the Guardians' Fund until the minors attain their majority.

On the motion of Mr. P. S. Jones, the Court granted an order as prayed.

[Applicant's Attorneys: Tredgold, McIntyre and Bisset.]

TELFER v. TABLE BAY HARBOUR BOARD.

Mr. Buchanan moved for leave to sign judgment against plaintiff for not proceeding with his action within the time allowed by rule of Court.—Granted



TOWN COUNCIL OF CAPE TOWN v. CAPE GOVERNMENT RAILWAYS. { 1903. Jan. 12th.

Arbitration — Award — Enlargement of time fixed for award —Waiver—Remuneration.

A deed of submission provided that the award should be given within a period of three months, but owing to the evidence taking up more time than was anticipated, it was agreed by the parties verbally and in the presence of the arbitrators to extend the time without however fixing any period. After that several months passed without any award being given and one of the arbitrators had to go to Europe for four months for the benefit of his health. On his return one of the parties to the submission applied for an order directing fresh proceedings and appointment of arbitrators.

Held, *that the applicant had waived his right to take advantage of the fact that the award had not been given within the time agreed upon and the application was accordingly refused.*

This was an application upon notice calling upon the Government to show cause why they should not be required to submit to a deed of submission for the purpose for assessing the compensation to be paid to the Town Council in respect of the expropriation of certain property in Rutger and Stuckeris-streets. The Town Council made the application on the ground of a delay in the award of the arbitrators beyond the time allowed by law, but it was alleged by the Government that the Council had agreed to an extension of time in which the award was to be given, and that the arbitrators were now prepared to hear argument, and give their award. A number of affidavits and a quantity of correspondence were read.

Mr. Gardiner for applicant. Mr. Searle, K.C., for respondent.

After hearing argument on the facts the Court refused the application.

De Villiers, C.J.: It is clear law that a person may renounce or waive any right given to him by law. In the present case, there was a deed of submission providing that the award shall be given within a period of three months, and unless that period had been enlarged, either by the arbitrators in the manner required by law, or by the parties themselves, the arbitrators were bound to give their award within the three months, and the applicants would not have been bound to accept any award made afterwards. But it is common cause that the time was enlarged, and the only question is whether the applicants consented to an indefinite enlargement. Well, upon this point we have the affidavit made by Mr. Fairbridge, in which he says that in the month of January, 1902, the arbitrators sat and heard evidence, and that as a considerable time had already elapsed it was agreed by the parties verbally, in the presence of the arbitrators to extend the time in which the award was to be given, no further period, however, being fixed. Well, if this is correct it is clear that the applicants have waived the right to take advantage of the fact that the award was not given within the time fixed by the deed of submission, or within the time fixed by the Act of 1898. They have consented verbally to an extension without fixing a time, and I think under these circumstances they are not entitled to come in and ask that everything done by the arbitrators shall be set aside and new proceedings initiated. I really do not see anything to gain by making the order which must be refused with costs.

Maasdorp, J., concurred.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1903. Jan. 13th.

Mr. Buchanan moved for the admission as a translator of Philip Albertus Myburgh Cloete.

Granted.

PROVISIONAL CASES.

BENDLE V. BENDLE.

Mr. Russell applied for an order for civil imprisonment against one Henry J. Bendle, who, under a separation order, had been ordered to pay his wife £5 per month for her support and that of her children.

Defendant appeared, and said he refused to contribute to the support of his wife because she was living with another man.

The case was ordered to stand over until February 2, defendant to file an affidavit setting forth his allegations in the meantime.

Postea (February 2).

Respondent alleged that he had never received the summons.

De Villiers, C.J.: But have you made an affidavit as directed?

Defendant: I made one, and I got an answer from Mr. Gately, Acting Registrar, that the Chief Justice could not see his way clear to re-open the case.

Mr. Gately: That is not so. He alleges he never received anything beyond the summons. He entered appearance personally, and all process was served at the address he gave. I received no notification of a change of address.

In reply to the Court, defendant said that he earned 10s. a day as a carpenter at Robben Island, and out of that he had not saved anything. He did not see why he should pay his wife £5 per month, as she was living with a man named Shelby. He could not say whether she lived with that man as his wife or housekeeper. He would not give her one farthing as long as she was with another man under one roof. He alleged that she occupied the same bedroom as Shelby. He had not had time to make an affidavit, although when the matter was last before the Court, the presiding Judge had advised him to do so.

Defendant was sworn, and then repeated that he had saved no money to meet the judgment.

Mrs. Bendle was present in court, and on being interrogated by the Chief Justice, denied that she lived with Shelby as his wife. She merely kept Shelby's house, and in return received 15s. per month, and a home was also provided for her children. Her husband had paid her nothing for four years, although he had always appeared "flush of money." She did not wish to see him in prison, as she could not afford 1s. per day to keep him there, and she would accept £3 per month if the defendant could not pay more.

The Court granted a decree of civil imprisonment, but suspended execution, pending payment of £2 10s. per month.

BUCHANAN V. DUGGAN.

This was an application for a decree of civil imprisonment.

Mr. Buchanan appeared for the applicant.

Defendant appeared in person and said he was prepared to pay £10 a month.

A decree was granted, suspended on payment of £10 a month, the first payment to be made on or before February 15.

GENERAL MOTIONS.

Ex parte FOUCHE AND ANOTHER.

Mr. Howel Jones moved for leave to pass transfer of certain property within the district of Robertson to C. Fouche, who was an executor in the estate, and had purchased the said property. All the heirs were majors and had consented to the transfer.

The application was granted, subject to the production of the Master's certificate as to the consent of the heirs.

COETZEE AND OTHERS V. GAVIN.

This was an application for an interdict ordering the respondent to remove an obstruction in a certain water-course, to repair damages done thereto, and to abstain from further interference therewith.

The petition of the applicant stated that the parties were owners of adjoining farms in the Oudtshoorn district. Between the properties were a dam and a water-course, to the use of which applicants alleged they had enjoyed a right since 1863. In October last part of the course was washed away, and seeing the impractibility of the immediate reconstruction of the same in the same place as before, the applicants approached Gavin in the matter. Respondent protested against any re-construction except on certain conditions. Petitioners caused the course to be re-constructed with a slight deviation from the original course, but Gavin subsequently obstructed the free flow of the water by effecting a breach, thereby causing the water to run to waste. Gavin had refused to submit to arbitration. Petitioners contended that no damage had accrued or was likely to accrue to defendant's property by reason of the deviation; if it could be shown that Gavin suffered any damage they were prepared to pay compensation. The applicants' farm was absolutely dependent for its existence upon the water running in the water-course in question. They prayed for an order calling upon the respondent to remove the obstruction and to repair the breach and restraining him from interfering with the free and unobstructed flow of the water. The petition had been submitted in Chambers in November to his lordship the Chief Justice, who made no order. His lordship then stated that the evidence before him was not sufficient to justify the granting of the order prayed for, but that the application might be renewed in Court, in which case it should be clearly proved that it was quite impossible to reconstruct the course and dam as they existed before the wash-away.

In affidavits filed on behalf of the respondent it was stated that the reconstruction of the dam and course in the manner effected by applicants caused damage to respondent's property and was a source of serious danger. Respondent alleged that extensive encroachments had been made on his property and that had the applicants adopted the suggestions and friendly advice given by him (respondent) the breakage would not have occurred. He had offered to consent to the re-construction of the course in a certain manner which was necessary in order that his property should be protected. This method of construction would be advantageous to the applicant. Respondent prayed for an interdict restraining the applicants and all others from trespassing on his property and from using the water-course in an unauthorised and illegal manner. It was stated on affidavit that it was not possible to restore the course and dam as they originally existed. It was contended by the respondent that applicants had no servitude in regard to the water-course. In 1863 a small furrow was made, the two farms being then owned by the same proprietors, but it was stated that the course and dam now in question were established in 1885.

Mr. Burton (with him Mr. J. E. R. de Villiers) for the applicants; Sir H. Juta, K.C. (with him Mr. Searle, K.C.), for the respondent.

After counsel had been heard in argument on the facts of the case, the Court granted an interdict restraining the respondent from preventing the applicants from reconstructing the furrow as it existed prior to October, 1902, and from interfering with the flow of water therein.

Buchanan, J.: The applicants in this case are co-proprietors of the farm Nooitgedacht, and the respondent is the proprietor of the farm Welgedacht, situated immediately above Nooitgedacht, on the Oliphant's River, in the district of Oudtshoorn. From 1863, at least, by arrangement between the co-proprietors of these two farms the water for the lower farm Nooitgedacht, had been taken out of the Oliphant's River by means of a dam and furrow situated on the upper farm, and led down to Nooitgedacht. This furrow and dam, as is not unusual in the district, were liable to be washed away or destroyed by the floods occurring in the river. In 1885 it appears that the old furrow which had existed from 1863 was washed away or destroyed, and by permission of the owner of the upper farm, instead of reconstructing the old furrow as it had existed up to that time, the proprietors of the lower farm were allowed to go a thousand yards higher up the stream and construct a new dam and a new furrow, led over what is now the respondent's property to the applicant's property. This new furrow lasted until 1891, when another flood again interfered with it,

and washed part of it away, and in that year, after communications between the parties, the respondent allowed a further deviation to take place on payment to him of an amount of compensation which though small, was amicably arranged between the parties. In October last another flood occurred, and the result of this flood was to wash away the existing furrow to the extent of about fifteen yards causing a breach in the furrow to that extent. At the end of that month negotiations took place between the applicants and the respondent for making a further deviation. The respondent, as owner of the upper farm, suggested and pointed out a further deviation which he was willing to give on payment of an amount of compensation and on certain terms which he specified. The applicants refused to take this deviation on the terms stated, but they themselves went on the respondent's farm, and violently, and without the consent of the upper proprietor, constructed a new furrow of the length of 51 yards, by means of which they avoided this wash-away of 15 yards. The respondent objecting to what had been done, broke away portion of the original furrow of 1885, some 260 yards above where this new furrow was made. The applicants again went on the farm, repaired the furrow, and caused the water to flow by means of the new furrow which they had constructed down to their farm. After that date respondent closed the loop furrow which had been constructed, but it does not appear that after that date he interfered at all with the old furrow of 1885. The applicants now come into Court and pray for an interdict calling upon the respondent to remove the obstruction which he has placed in what is called the loop, and also for an interdict restraining him from interfering with the free flow of the water down this furrow to the applicants' farm. In answering affidavits filed the respondent in the first place raises the question whether any servitude existed over the upper farm to allow any furrow whatever to be constructed on the property. However, from the affidavits before us we are of opinion that a sufficient *prima facie* case has been made out to show that the lower proprietors are entitled to a flow of water from and over the upper farm down to the lower farm. It may be that when the facts are gone into by action, the respondent may be able to show that what was in existence at the time of the grievance complained of was only a matter of leave and licence, and not a matter of right, but on the affidavits as they stand, there seems to be sufficient ground for holding that there was a right in the lower proprietors to lead their water from the upper farm. An *ex parte* application was made to a judge in Chambers for an interdict such as is now applied for, and his lordship then pointed out that the evidence before him was not sufficient to justify the order applied for, and he also said that there was no proof before him sufficient to show that it was impossible to construct a watercourse as it existed before the flood of October, 1902. The evidence brought before the Court now on affidavit leaves a great many questions of fact open, but on the affidavits as they stand, we cannot say that the old furrow which existed in 1885 cannot be restored to its original condition. The objections to its being so restored seem to be questions of expediency and economy, and not of necessity, and these are not sufficient grounds for saying that the applicants are entitled without the consent of the upper proprietors to go and make any deviation they think fit. They have done so; they have taken the law into their own hands, and made this deviation, and now they come into Court and say: "We have made this deviation; it is necessary and expedient; and if you have suffered any damage thereby, we will pay you for any damage which the Court or arbitrators may assess." But there is no law which justifies any private individual encroaching on the property of another and then saying, "I have taken what I wanted and I will pay you for any damages you may have sustained." Therefore, as the affidavits stand in this case, it appears to us that the applicants had no right whatever to make this loop furrow against the wishes of the respondent or without his consent. That part of the application therefore cannot be allowed. But the respondent sets up the question distinctly in his affidavit, and to some extent in the argument, that the applicants have no right whatever over the farm, and an interdict to a limited extent ought to be granted, and this will be that the respondent will

be interdicted from preventing the applicants from re-constructing the furrow as it existed prior to the flood of October 24, 1902, and from interfering with the flow of water therein; that is, the applicants can come upon this farm, reconstruct this 15 yards and take their water down as before. Leave will be reserved both to applicants and respondent to bring any such action as they may be advised. The only question which remains is the question of costs. Now, if the respondent had not in any way interfered with this furrow we should have refused the application altogether, but as he sets up the right to do as he has done in reference to the old furrow, and as the evidence before us shows no such right, we will not give him his costs. Then comes the question as to whether we can give the applicants their costs. There are several reasons against this, one is that the applicants acted *ri et armis*. Then the applicants came into Court not so much on account of the injury done to the old furrow as to obtain the right of using this new furrow. The Court cannot, on the facts before it, uphold any right to use the deviation. As the true condition of things may be elucidated in an action to be brought by either party, it will be open to either party in any action which may be instituted to recover the costs of this application, but whatever the result of such action may be we think it right to exclude the costs of the affidavits of the applicants. We have repeatedly pointed out that affidavits from Oudtshoorn are abusive, irrelevant, argumentative, lengthy, and unnecessary, and to check this practice the costs of these affidavits will not be allowed under any circumstances. The order will be: "That the respondent be interdicted from preventing the applicants from reconstructing the furrow as it existed prior to the flood of October 24, 1902, and from interfering with the flow of water therein, with leave reserved to either applicant or the respondent to bring such action as they may be advised and in such action to recover the costs of this application, excepting the costs of the affidavits filed by the applicants."

Maasdorp, J., concurred.

[Applicants' Attorneys: Michau and De Villiers; Respondent's Attorneys: Tredgold, McIntrye and Bisset.]

BUAS V. EDWARD SEARLE AND CO.

Sir Henry Juta, K.C., who with Mr. Schreiner, K.C., appeared for the plaintiffs in this matter, and applied for a commission *de bene esse* to examine certain witnesses for the plaintiff at Antwerp, Belgium.

Mr. Searle, K.C., who with Mr. Benjamin, appeared for the defendants, and said that they did not oppose the application.

The application was granted and the British Consul at Antwerp appointed commissioner.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

REX V. LAUBSCHER. 1901. Jan. 11th.

Mr. Burton applied for the release of Jacobus Johannes Laubscher upon bail. The applicant had been arrested as a prisoner of war, and taken to Ceylon. He had recently returned, and had been arrested for treason, and was now detained in gaol at Malmesbury.

Mr. Nightingale appeared on behalf of the Attorney General to consent to the application upon condition that the petitioner furnished personal bail in the sum of £500, and two sureties of £250 each; further, that as he had not yet been committed for trial, he must when required appear before the Resident Magistrate of Malmesbury for preparatory examination, and that if committed for trial he should accept service at Malmesbury. The last act of treason alleged occurred in November, 1901, so that applicant did not come under the jurisdiction of the Treason Court.

Bail was granted in terms of the consent of the Attorney-General; bail to be to the satisfaction of the Resident Magistrate of Malmesbury.

Ex parte HUGO AND ANOTHER.

Mr. B. Upington appeared on behalf of two executors in the estate of the late F. H. M. Hugo, and moved for the confirmation of the proposed sale of certain property. There was a consent paper signed by the major heirs, and the report of

the Master as to the interests of the minors concerned was favourable.

An order was granted as prayed.

Ex parte PITTS AND WIFE.

Mr. Buchanan moved for an order authorising the execution of a post-nup tial contract. The parties were married on December 12, 1901 Prior to the celebration of the marriage, it was agreed between them that they should be married without community of property, and with a provision that certain four lots of land, furniture to the value of £300, and a life policy for £100, should be settled upon the wife. The petitioner was wrongly informed by friends that a contract could be entered into at any time after the marriage, so long as it had been agreed upon before then. He had found out his mistake, and now wished to have a post-nuptial contract carrying out the ante-nuptial agreement.

Buchanan, J., pointed out that the contract proposed to be entered into should have been set out. On the petition before them the Court could only authorise a contract in terms of what had been set out.

The matter was allowed to stand over to enable the petitioner to make a more definite statement as to the agreement which he desired to enter into, Buchanan, J., pointing out that it would be just as well to submit a draft of the agreement.

Postea (February 2). The order was granted as prayed.

FINKELSTEIN v. FINKELSTEIN. { 1903. { Jan. 14th.

Marriage — Funds to prosecute action for judicial separation.

A woman who alleged that she had contracted a valid marriage in Russia now applied for an order to compel her alleged husband to furnish her with money to enable her to prosecute an action for a judicial separation from him. The respondent denied the legality of the alleged marriage, but (1) as he produced a document by which he and the applicant had agreed to come together and marry and be husband and wife" (2) and as after the parties separated the respondent demanded that the applicant should return to him and also that he should have the custody of their children and (3) as the respondent had tendered £20 to the applicant.

Held, *that he should forthwith pay to her £25 towards enabling her to prosecute her action. The Court declined to express an opinion as to the legality of the marriage.*

Mr. Benjamin moved that the respondent, Moses L. Finkelstein, be ordered to pay his wife, Anna Finkelstein, a sum of £25, to enable her to bring an action against him for judicial separation, and also for a contribution by way of alimony to enable her to maintain herself and children pending such suit, and, further, for costs of the application. In her affidavit applicant said that she was married in community of property to Moses Finkelstein in 1884 in Russia, and there were six children of the marriage, the eldest being sixteen years old and the youngest one year old. She intended to institute an action for judicial separation against her husband on the grounds of continued cruelty and drunken habits, and as he had advertised in the public papers, stopping her credit, she had no means of carrying on the action. Defendant was a general merchant and ostrich feather buyer at Oudtshoorn, and she believed he had sufficient means.

Mr. Upington appeared for the respondent, and read a replying affidavit, in which the respondent denied that he had been legally married to the applicant, and he put her to the proof of the marriage. He said that about May, 1884, they made an agreement in Russia by which they agreed to live together, and he was to care for her in the same way as a husband did for his wife, and in the event of their separating or his dying before her she was to receive 200 roubles Russian money, or about £20. This agreement was signed by two witnesses, but not by the parties themselves. Respondent now said that he was willing to pay that £20, and had tendered the amount.

He also denied the allegations of cruelty and drunkenness, and further said that he was not a man of means.

To this applicant replied by affidavit that she had been legally married to respondent by a Jewish Rabbi in Russia, according to the law of Russia, and she further said that defendant had never repudiated the marriage until notice of this application was served upon him.

Mr. Upington submitted that before a woman could come into court and ask for judicial separation there must be proof of the marriage before the Court.

Maasdorp, J., pointed out that in the agreement referred to the ceremony was called a marriage.

Buchanan, J.: This is an application on behalf of Mrs. Finkelstein, who wishes for an order upon her husband to pay over to her a certain sum of money to enable her to institute proceedings against him for judicial separation, also for alimony for herself and children. In answer to this application the respondent says that applicant is not his wife, and he produces a document which, as far as one can understand, shows that in Russia the parties did agree to come together and marry and be husband and wife. As far as this document is concerned it certainly does not support the contention of the respondent that there was no marriage. Further, after the parties separated at Oudtshoorn the attorneys for the respondent wrote to applicant's attorneys requesting the wife (applicant) to return to respondent, and also requesting the children to be returned to him. Now respondent says there was no marriage, and if so he has no claim whatever to these children, although the woman would have an action against him for the support of the children who, he alleges, are illegitimate. On the face of the affidavits as they stand, marriage or no marriage, the applicant would have a right of action. Besides, we have it that the respondent has tendered the £20 under the agreement to be quit of the applicant. The Court will, therefore, order the respondent to pay forthwish to the applicant's attorneys the sum of £25 towards enabling her to prosecute her action. As to the question of the legality of the marriage we cannot now decide. Costs of this application to be costs in the cause.

Maasdorp, J., concurred.

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[Applicant's Attorneys: Tredgold, McIntyre and Bisset; Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

FRIBERG V. FRIBERG.

This was an application upon notice calling upon Theodor Friberg to show cause why he should not be ordered to pay £30 to enable applicant to institute proceedings for judicial separation and for payment of £15 a month.

Mr. Gardiner appeared for the applicant; Mr. Buchanan for respondent.

It was stated in the petition that the parties were married on May 4, 1882, and there were five children of the marriage, of whom the eldest was 19 years and the youngest eight. Applicant intended to sue for a judicial separation on the grounds of long continued intemperance and cruelty. Respondent was an aerated water manufacturer, and jointly with one Tait, was the proprietor of the Table Mountain Aerated Water Factory, at Woodstock. He owned certain immovable property.

Respondent denied the allegations of intemperance and cruelty. The aerated water business was still young, and any interference with the funds thereof would probably result in the loss of the whole. He had instructed his solicitors to consent to a notarial separation, but this was refused. He was willing that the estate should be investigated with a view to the equitable division of the estate.

The Court ordered payment of £15, to enable applicant to institute her action, to be tried next term, and payment of a sum of £10 as alimony on or before February 1.

SOTONDOSCHE V. SOTONDOSCHE.

Mr. Gardiner appeared for the applicant; Mr. Upington for the respondent.

The application was one to make absolute a rule calling upon respondent to show cause why he should not restore to the applicant certain cattle pending an action to be brought by applicant to establish his ownership. Applicant alleged that respondent unlawfully seized and removed the cattle from the applicant's kraal during his absence.

The respondent Sotondosche, brother of the applicant, alleged that he removed certain cattle from applicant's kraal. These cattle belonged to respondent and

another, and were removed with the knowledge and consent of applicant. Applicant had been placed in charge of cattle belonging to respondent, and had unlawfully sold some of these, upon which respondent and the other party removed the remainder.

Buchanan, J.: The question to be decided was whether the respondent and his friend acted the part of spoilators. There were the affidavits of the applicant and his wife to the effect that the cattle were removed in the absence of applicant, and there was the affidavit of the respondent, who said that applicant was present and consented when the cattle were removed. Seeing that criminal proceedings were pending in respect to the disposition of some of the cattle, the Court could not now say that this was an act of spoilation. The rule could, therefore, only be made absolute so far as it prevented respondents from disposing of the cattle, pending an action to be brought forthwith. Costs to stand over.

REX V. GAGIANS AND OTHERS.

Mr. Burton moved for an order authorising the expunging of certain names in the criminal record book of the R.M. Court, Namaqualand. The applicants were convicted of an offence under martial law, and their names were entered as having been convicted in the criminal record of the R.M. Court of O'okiep.

Mr. Nightingale, for the Government, consenting, the application was granted.

DALTON V. DAY.

Mr. Searle, K.C., moved for an order on respondent to pay costs. The original application was for ejectment, but since the proceedings commenced, respondent had given up possession.

An order was made for costs.

VON HOLDT V. REYNOLDS.

This was an application by Reynolds, defendant in the above action, for leave to sign judgment against plaintiff, Von Holdt, for not proceeding with his action within the prescribed time.

Mr. Buchanan appeared for the applicant, Reynolds; Mr. Benjamin appeared for the respondent, Von Holdt.

The affidavit made on behalf of applicant stated that summons was issued on July 12, 1902, and plaintiff had failed to proceed with his action within the time laid down in the Rules of Court. It had also been pointed out in correspondence that the wrong person was being sued by plaintiff.

The respondent in his affidavit stated that in the summons issued in July last he claimed £180, being the value of certain six tons of steel sold by him to the plaintiff. During the month of November, however, applicant accepted a proposal to take half the steel and pay for the same. Afterwards notice of this application was given, but then it was arranged that it should be withdrawn, and each party pay his own costs. This was not done, and respondent was now compelled to ask the Court to refuse the application.

In a replying affidavit, Walter Charles Reynolds denied that he accepted the proposal which plaintiff made in November last. He absolutely denied that six tons of steel were ever purchased, although it had been agreed that from a half to one ton of flat steel springs should be purchased at 27s. 6d. per 100 lb. The respondent had agreed that if the application did not come into Court he would pay all the costs, but applicant found that the matter was already in Court.

Counsel having been heard on the facts,

Buchanan, J.: In July last the plaintiff took out a summons against the defendant, and immediately thereafter, on service of the summons, defendant's attorneys wrote, stating that they had entered appearance, and informing plaintiff that he had sued the wrong person. No further action was taken by the plaintiff, and in January he was informed that in consequence of his not proceeding any further, he would be barred, and he was asked to pay the costs incurred, it being stated that if he did not an application would be made to the Court to sign judgment against him. No reply was received to this letter, and thereafter the defendant applied for leave to sign judgment against the plaintiff. Respondent now comes into Court and asks that this order be not made on the ground that he had personally seen the applicant, and they had agreed that there should be no further proceedings, and that each party should pay his own costs. This the applicant positively denies. Considering that there were attorneys on both sides, and that there was no such

communication between them, we cannot as the case now stands support the allegations of the respondent that the applicant had agreed that each should pay his own costs. The respondent was clearly in default, and there is no ground why the application should not be granted with costs. An order will therefore be made as prayed.

OLIVIER V. GERICKE AND OTHERS. 1903. Jan. 14th.

This was an application for an order on the respondents to give up possession of a certain farm, and restraining them from interfering with the said property.

The affidavit of Gert Cornelis Olivier, the applicant, was as follows:—

1. That deponent craves leave to refer the honourable Court to his affidavit of December 6, 1902.

2. And deponent says, that since the making of the aforesaid affidavit, the deponent has been credibly informed by some of his tenants, and verily believes that the respondent Wanneburg, who was accompanied by the respondent Gericke, took possession of oats which had been cut, and set aside for deponent's use, notwithstanding the protests of deponent's tenants; stored the same in certain premises and locked the doors thereof.

The defence was that the said ground had been bequeathed to the respondents by their deceased parents, to take possession thereof after the death of the survivor and that under the said will the said property was burdened with a perpetual *fidei-commissum, ne exiret extra familiam.*

On the motion of Sir H. Juta, K.C. (with him Mr. Searle, K.C.), the application was granted.

Respondents were in default.

[Applicant's Attorneys: Tredgold, McIntyre and Bisset.]

Ex parte GIBSON.

This was an application to have a certain rule *nisi*, granted on December 23, 1902, by the Hon. Mr. Justice Buchanan in Chambers, made absolute.

The petition of Harry Gibson, secretary of the South African Association, as one of the executors testamentary in the estate of the late Johan Conrad Silberbauer, showed:—

1. That the petitioner, in his aforesaid capacity, was appointed by the late J. C. Silberbauer, together with C. C. Silberbauer and C. F. Silberbauer, as executors testamentary in his estate.

2. That the deceased was the registered owner by deed of transfer of certain land at Bloemendal, Mowbray, in the Cape division, purchased by him from the executors of the late E. J. Syfret. This land consisted of lots 3, 4, and remainder of lots 6, 9, and 12.

3. On September 28, 1849, the remainder of lots 6, 9 and 12 were transferred to one J. H. van Reenen, and by a subsequent transfer became vested in one T. W. Hudson.

4. On May 3, 1860, the said Hudson transferred the said lots 3, 4 and remainder of 6, 9 and 12 to A. J. Zeederberg; but prior to the transfer Surveyor Cameron, in 1860, provisionally deducted from the diagram attached to the transfer made in favour of J. H. van Reenen an extent of 17 square roods for a road across lot 6 to afford access to the Liesbeek River.

5. That such deduction was never used for a road, nor was any road ever made, nor was the deduction noted on the official diagram filed in the Deeds Office with Van Reenen's transfer. Nevertheless, transfer was passed with the reduced extent, and has been so passed in subsequent deeds, including that in favour of the testator.

6. That the correct extent of lots 3 and 4 and remainder of 6, 9 and 12 is 1 morgen 434 square roods and 36 square feet, or 17 square roods more than was actually transferred.

7. That there is no record that the 17 square roods reserved for a road has been transferred by the said Hudson to any one.

Wherefore petitioner prays for an order upon the Registrar of Deeds under the Derelict Lands Act, No. 28 of 1861, authorising him to transfer the said 17 square roods to the estate of the deceased.

On the motion of Mr. Upington, the Court granted an order as prayed.

[Applicant's Attorneys: Silberbauer, Wahl and Fuller.]

COWLEY V. COWLEY.

Mr. Bisset moved for removal of trial to Oudtshoorn.

The matter was ordered to stand over until the return day of the citation—the 6th February.

Postea (February 6). The application was granted.

Ex parte FOURIE. { 1903. Jan. 14th.

This was an application for an order authorising the passing of certain transfers.

The petition of Ockert Marthinus Fourie, of Swanepoel's Kraal, in the division of Uitenhage, showed that the said petitioner had been appointed tutor dative over the minors Phillipus Jacobus Fourie, Theodora D. Fourie, Lucas J. Fourie, and Cecilia J. Fourie. That the first of the said minors had attained the age of 21 years, and the second had attained her majority in virtue of marriage. That the remaining two minor children were part owners, in their individual capacities, of the farms Kremlin, Swanepoel's Kraal and Slag Boom, situate in the division of Uitenhage. That there are eleven other co-proprietors in these properties. That the said properties are thickly covered with fire and other wood, and that the cutting and sale of firewood and other wood was one of the sources of livelihood carried on by all the owners of the said properties. Owing, however, to the farms being held in undivided shares, disputes in regard to trespass on wood-chopping and grazing areas, which had been mutually agreed upon constantly arose between owners, and dissatisfaction and disagreement prevailed generally, and in order to put an end to this state of things it had been decided between all the co-proprietors to subdivide the said farms. Thereupon the said farms were surveyed and subdivided, each proprietor receiving in the subdivision a defined share equal in extent to the undivided share held by him or her. The value of the defined shares thus awarded to the said minor children was quite equal to—if not greater than—the value of the undivided shares held by them. Should the passing of the partition transfers of the said properties, in accordance with the subdivision made by the joint owners and duly carried into effect by Surveyor Rostall, be sanctioned by the Court, petitioner will be able to work and farm the portion of the ground allotted to the said minor children to much greater advantage than he otherwise could.

Wherefore the petitioner prayed for an order authorising the passing of the said partition transfers, and further authorising petitioner to assist the two minors to whom he is tutor in the execution and completion of all or any powers or declarations, or other documents as shall or may be necessary or requisite, and generally to act on their behalf in the completion of the partition and sub-division of the said properties aforesaid.

The Master's report was favourable, and on the motion of Mr. Buchanan, the Court granted the order as prayed.

[Applicant's Attorneys: Silberbauer, Wahl and Fuller.]

Ex parte DAMERELL.

This was an application for an order confirming the sale of certain property at Port Elizabeth to the petitioner, Wm. Ewart Damerell, the executor dative of the estate of the late Alexander Mack Masterton, of which estate the property in question formed a part. The said property was sold by public auction on July 29, 1902, and knocked down to the petitioner at a full and fair price, as was shown by the affidavit of the auctioneer and one of the major heirs of the said estate. Certain minors were, however, interested and hence the present application.

The Master recommended that the application be granted.

On the motion of Dr. Greer, an order was granted as prayed.

[Applicant's Attorneys: Scanlen and Syfret.]

VAN AARDT V. BEKKER AND MAYNIER.

Application was made by the defendant Bekker for removal of this suit to the Circuit Court, at Aliwal North.

Mr. Upington appeared for the applicant.

Mr. Searle, K.C. (with him Mr. Burton), appeared for the respondent (plaintiff in the action).

Mr. Benjamin appeared on behalf of the second defendant to consent to the application.

It was stated on affidavit for the applicant that the parties and witnesses, of whom there were about fourteen, all resided at Aliwal North, with the exception of one.

After hearing counsel.

Buchanan, J., said the application was made under the 34th rule of Court. His lordship read the rule, and said that in this case the plaintiff, the defendants, and all the witnesses resided in the district of Aliwal North, some 600 or 700 miles from Cape Town, and the defendant now applied to have the case removed to the Circuit Court of Aliwal North, where the case could be more conveniently and more economically tried. The only answer to this is that there has been no Circuit Court in Aliwal North since war was proclaimed. That really was no answer, because the war is now over, and there would be a Circuit Court there. It was said the case was one of great importance, and that there were important questions of law. He had looked over the papers, and the question seemed to him to be one of fact. There would no doubt be a conflict of evidence, but if such a case could not go to circuit, the Circuit Court might as well be abolished for the purpose of civil work. No reason had been shown why the case should not be removed, and the application would be granted, costs to be costs in the cause.

Ex parte D'OLIVEIRA.

Mr. Buchanan moved for an order authorising the Board of Executors to pay out certain moneys.

The matter was ordered to stand over, so that formal notice might be given to the Secretary of the Board of Executors.

LEVIN v. COCHRANE AND CHERRY.

Mr. Benjamin moved that the Court make final the provisional order granted by the Chief Justice restraining the respondents from parting with the proceeds of the estate of their firm, saving such portion as is required to satisfy a certain mortgage bond, pending an action to be instituted by applicant to recover a sum of £1,250. It appeared that the respondents being in need of financial assistance applied to the applicant who guaranteed them to the bank, receiving in return an option to purchase certain property for £6,000, with the further understanding that if the property were sold for a higher sum than that he should share the profit with them. The property had, before the expiry of the option, been sold for £8,500, and it was the half of the sum in excess of £6,000 that applicant intended to bring an action to recover.

Mr. Searle, K.C., appeared for the respondents.

After the affidavit had been read and counsel had been heard in argument, the Court granted an order making the rule absolute to the extent of £1,250, pending an action to be brought forthwith, costs to be costs in the cause.

Buchanan, J.: The respondents in this case, being in financial difficulties, applied to the applicant, Levin, for assistance, and a written document is produced which shows the agreement come to between the parties. The document says that Levin, in order to assist the firm, had given a guarantee to the African Banking Corporation for any advances made to them up to the extent of £1,000. As a fact, Levin had given a written guarantee to the bank in the terms stated. In consideration of this guarantee, the firm gave Levin the exclusive right of pre-emption over their property in Roeland-street for the sum of £6,000. This right of pre-emption lasted till the 3rd of April this year. The agreement also provided that if Levin did not buy the property himself, and if the firm could get an offer for not less than £7,000, Levin was to consent to a sale and was to share with the firm any surplus over £6,000. The property went up in value, and Mr. Mouat, the inspector of the firm, has now sold the property within the time during which the option lasts for the sum of £8,500. Levin, under the agreement, claims that one half of the difference between £6,000 and £8,500 belongs to him. It is stated in the affidavits that in consideration of the guarantee given by Levin to the Bank, the Bank gave to the firm financial assistance to the extent of over £900 - the guarantee being for £1,000. The firm say now that Levin undertook to continue his guarantee for a period of twelve months. Levin says that it is not so. He alleges that it was intended that the assistance should be temporary, and that the respondents had told him they were getting money by the middle of April from the Mossel Bay Harbour Board. When in April the firm did not liquidate their liability to the Bank, ap-

plicant put pressure on them through the Bank, which resulted in the overdraft being cleared off in May. As the documents stand, there was the right given to Levin to stop his guarantee at any time on giving notice of his intention to the Bank. The guarantee given by Levin to the Bank was referred to in the agreement between applicant and respondents. When we look at the guarantee to the Bank, we find it a guarantee terminable at any time Levin may give notice to the Bank. There is nothing in the written document to assist the Court in saying for how long this guarantee was to last. As the document stands, Levin was quite within his right in terminating the guarantee. The firm now wish on the ground of alleged breach of contract to prevent the money now in the hands of Mouat being paid over to Levin, but as the documents stand the half surplus belongs to Levin. A rule *nisi* having been granted against Mouat parting with the proceeds of the property, we think that to the extent of £1,250 it should be made absolute, pending an action to be brought forthwith; costs to be costs in the cause. His Lordship added that the Court would suggest that instead of wasting money on the law which would come out of the pockets of creditors, the parties should come to some arrangement.

Ex parte EXECUTORS OF THE LATE DANIEL JOHANNES VAN WYK.

Mr. P. S. Jones applied for confirmation of the sale of certain property to one of the executors. Certain minors were interested, and the Master's report was favourable.

Granted.

REX V. STANLEY. { 1903 Jan. 14th.

Expulsion from licensed premises — Disorderly conduct — Act 28 of 1883, Sec. 78.

Under the term "disorderly conduct" employed in Sec. 78 of Act 28 of 1883, is included the use of language which would tend to create a breach of the peace in the bar of a hotel. The hotel proprietor is justified in ejecting any person using such language, even if he is sober.

Sir Henry Juta, K.C., appeared for the appellant; Mr. Howel Jones for the Crown.

The appeal was one against the conviction of appellant, who is the landlord of the Commercial Hotel at Paarl, for an assault upon one De Villiers, in that he seized hold of him and pushed him out of the bar of the hotel.

Sir Henry Juta said that the whole case turned upon section 78 of the Liquor Licensing Act of 1883, which provided that any licensed person might refuse to admit or might turn out of the premises in respect of which the licence was granted, any person who is drunk, or who is violent, quarrelsome, or disorderly.

The record of evidence was read, from which it appeared that there was a discussion in the bar in reference to the defence force. The appellant alleged that De Villiers made use of language which tended to create a breach of the peace, but the Magistrate held that the conduct of De Villiers was not such as to justify the defendant in ejecting him.

Sir H. Juta, K.C. (for the appellant): The question is whether the language used by the appellant was likely to lead to a disturbance or not. The language used by De Villiers certainly was. A number of the District Mounted Police were about the place, and some very uncomplimentary things were said of them and of others by De Villiers. Boshoff (who was with De Villiers) went out quietly when requested to do so, but De Villiers had to be forcibly ejected. A licensed person may eject anybody who is likely to cause a disturbance; and the language used by De Villiers was very likely to do so, more particularly as he was with Boshoff, who had been in charge of a rebel commando. A quarrel does not necessarily mean coming to blows, and if a publican were to wait till blows were struck before ejecting people, he would most likely lose his licence.

Mr. H. Jones (for the Crown): I quite agree with the view that the Court should protect publicans who try to maintain order on their premises. It has been said by counsel for the appellant that

De Villiers came into the bar with the leader of a rebel commando; but that is not the offence with which he is charged. Boshoff seems to have been somewhat of a braggart, but he did not try to cause a breach of the peace. He simply tried to get up an Afrikander drink, and his intentions seem to have been rather pacific than otherwise.

Sir H. Juta in reply.

Buchanan, J.: In this case the appellant, who is a hotel-keeper, was charged with assaulting one De Villiers by seizing hold of him and attempting to put him out of his bar. He was convicted by the Magistrate, and fined 10s. He now appeals against this conviction on the ground that he was doing what he had a right to do under the 78th section of the Liquor Licence Act. By that section any licensed person may refuse to admit or may turn out of his premises anyone who is drunk, or who is violent, quarrelsome, or disorderly, whether such person be drunk or not. The hotel keeper here says that the complainant was disorderly in his bar; the Magistrate has found that he was not so disorderly as to justify the act of the appellant in turning him out. What took place seems shortly to have been this: The complainant and one Boshoff came into the bar, where there were a number of members of the late Defence Force, that Boshoff and another man entered into a conversation which certainly would, as far as the evidence goes, have led to a row and, indeed, Mr. Jones, for the Crown, seems inclined to admit that if Boshoff had declined to go out when asked, there might have been justification for the landlord turning him out. But the plaintiff only seems to have made one casual remark, which certainly does not seem to me to have been likely to lead to a disturbance. Boshoff showed his good sense when requested to leave by going out, but the complainant refused to leave the bar. Boshoff probably thought he had rendered himself liable to be ejected. This is one of the cases on the border, and if the Magistrate had found that the complainant had rendered himself liable to be ejected I don't think the Court would have interfered with his decision. But the Magistrate had all the parties before him, he heard all accounts of what took place, and it is quite possible he may be right in saying that the plaintiff did not do anything to justify his being turned out. I quite agree with what Sir Henry Juta has said that disorderly conduct would include language which would tend to create a breach of the peace, and if a person goes into a bar and uses such language, that would be disorderly conduct, and would justify the proprietor in turning him out. Boschoff seems to have been guilty of such conduct, and when remonstrated with he left the bar, but the plaintiff does not seem to have been guilty of this. The only thing against him appears to be that he came in with Boshoff, and refused to leave when the latter left. The appeal must be dismissed, with costs.

Mr. Justice Maasdorp concurred.

[Appellant's Attorneys: Faure and Zietsman.]

LANDESHUT v. KOENIG. { 1901, Feb. 1st.

Arbitrator — Award — Evidence — Irregularity — Mistake of arbitrator.

It is no valid objection to the award of an arbitrator that the arbitrator heard the evidence of a witness of one party to the submission in the absence of the other party if the evidence was so heard with the previous consent of both parties. Nor is it a valid objection to the award that the arbitrator has made a mistake in his award unless the mistake is so gross and manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator.

Mr. Upington moved to have a certain award of an arbitrator (Mr. Maynard Nash) made an order of Court.

Mr. Searle, K.C. (with whom was Mr. Alexander), appeared for the respondent, and opposed the application on several grounds. It was alleged that the arbitration was wrong in form, certain material evidence having been taken when respondent was absent, and

without notice having been given to him, and it was also contended that the award was wrong in substance, the arbitrator not having taken into consideration or given weight to certain agreements. The matter arose out of the financing of a certain company of juvenile theatrical performers.

After hearing counsel on the facts,

De Villiers, C.J.: The objections to the award are that the arbitrator heard the evidence of a witness of one party to the submission in the absence of the other party, and that in the estimation of the damages awarded to the applicant he proceeded upon an erroneous basis. In regard to the first of these objections, I am satisfied that it was with the respondent's previous consent that the evidence of Mrs. Conway's claim was taken in the absence of the respondent, and that it is not competent for him now to raise this objection to the award being made a Rule of Court. In regard to the second objection, the affidavits certainly throw considerable doubt on the correctness of the award, but that is not sufficient to impugn the award. It is not a valid objection to an award that the arbitrator has made a mistake in his award, unless the mistake is so gross and manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator. The views of the text writers of our law on this point are as conflicting as the English cases, but the tendency of this Court from its establishment to the present time has been, if possible to uphold the awards of arbitrators where they have acted honestly, impartially, and within the scope of the reference. The mistake in the present case, if a mistake at all, was upon a very immaterial point, and was certainly not a manifest one, for it does not appear on the face of the award, and it relates to facts about which there is still, after all that has been said, considerable obscurity. The award must be made a Rule of Court, with costs.

KOENIG V. LANDESHUT.

Mr. Schreiner applied on behalf of Julius Koenig for an order for security to the amount of £1,260 pending the settlement of an action against the respondent in respect to fees for the alleged hire and use of certain playrights. He stated that there were several matters in dispute between the parties, and the respondent was now on her way to Australia.

The respondent's attorneys answered that she had only temporarily left the Colony, and would shortly return to settle here. The present visit to Australia was an enforced business visit. There was a considerable sum of money in the hands of Julius Koenig belonging to the respondent.

The applicant's replying affidavit stated that he admitted that he had a sum of £4,248 16s. 10d., said to belong to the respondent, but if the award were made final there would be no assets left in the Colony belongng to the respondent.

The Chief Justice suggested that the money be placed in the hands of the Registrar of the Court.

Mr. Schreiner: I have no objection at all to that course. Of course, there will be the question of costs, but that may remain to abide the result of the action.

Mr. Upington opposed the application, and pointed out that the respondent had declared her intention of returning to this country.

De Villiers, C.J.: The Court cannot allow the applicant to retain this money in his own hands, but there is sufficient reason for ordering that the money be paid to the Registrar. The respondent has left the Colony, there is no proof that she has any domicile in this colony; as far as one can judge she was a temporary visitor, and it is only right if the applicant has a *bona fide* claim against the respondent it should be secured, more especially as under the order of the Court the applicant is ordered to pay over a sum of £4.200 to the respondent. If he has a bona-fide claim against her it is only right that a portion of that amount should be in some way or other secured to him in order to meet any claims which he may have against the respondent. The Court will, therefore, order that the sum £1,400 be paid over by the applicant, Koenig, to the Registrar to abide the further order of the Court. As to costs, I think they should be costs in the cause.

Maasdorp, J., concurred.

[Applicant's Attorneys: D. Tennant: Respondent's Attorneys: van Zyl and Buissinné.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1903. Feb. 12th.

Louis Oxley Pyemont Pyemont and Hendrik Stephanus van Zyl were admitted as advocates of the Supreme Court.

Edward Francis Day was admitted as an attorney-at-law and Robert Baird Warren as an attorney-at-law and notary public.

PROVISIONAL ROLL.

KEANE AND TURNBULL V. KRAMER.

Mr. Buchanan moved for provisional sentence upon an unsatisfied judgment of the High Court of Justice, King's Bench Division, in Ireland, for £58 1s., and taxed costs £35 9s. 8d. A certified copy of the judgment was put in.

Granted.

FRASER V. TWINE.

Mr. Russell moved for provisional sentence for £100 due on a promissory note, with interest and costs.

Granted.

ROUX V. PETERSEN.

Mr. Russell moved for provisional sentence for £100 due on a mortgage bond with interest and costs. The bond had become due owing to the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted and the property declared executable.

TENNANT V. ISAACS.

Mr. Upington appeared for the plaintiff in this application for provisional sentence.

Mr. Wilkinson appeared for the defendant, and said that there were some other applications for provisional sentence against defendant, but a provisional order for the sequestration of defendant's estate had been granted, and it would be better for these applications to stand over until Thursday, the return day of the provisional order. Counsel also stated that owing to the granting of the provisional order defendant could not deal with certain two properties, and it was alleged that if he could deal with one of these properties he could satisfy the debts for which he was now being sued.

De Villiers, C.J., pointed out that that would be a ground for refusing the application when it was sought to make the provisional order of sequestration final. If defendant could then show the Court that if he were able to sell the property he would have more than would suffice to pay his debts, then he was not insolvent, and the Court would not make the order final.

All the applications for provisional sentence were ordered to stand over until Thursday.

SELIGMAN AND CO. V. OLIVIER.

Mr. De Waal moved for the final sequestration of defendant's estate as insolvent.

Granted.

HEATLIE V. CAISSE.

Mr. Benjamin asked that this matter be allowed to stand over until Thursday.

Postponement allowed.

BOARD OF EXECUTORS V. JOOSTE.

Mr. J. E. R. de Villiers moved for provisional sentence for £200, due on two mortgage bonds, which had become due owing to the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Provisional sentence granted, and the property declared executable.

ESTATE OF DE VILLIERS V. GROENEWALD.

Mr. Alexander moved for provisional sentence for £160, due upon a mortgage bond, which had become due by reason of the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Order granted, and the property declared executable.

ESTATE OF DE VILLIERS V. PERRY.

Mr. Alexander moved for provisional sentence for three sums of £83 2s. 6d., £558 18s. 6d., and £300 17s. respectively, due upon three promissory notes. The notes had been duly presented, but the certificate had not yet arrived here.

Provisional sentence granted, subject to the production of the certificate to the Registrar.

DE VILLIERS V. PERRY.

Mr. Alexander moved for provisional sentence for £121 14s., due on a promissory note.

Granted, subject to the production to the Registrar of the certificate of presentation.

MANIKUS V. PERRY.

Mr. M. Bisset moved for provisional sentence for £1.650, due on a mortgage bond which had become due owing to the non-payment of interest. It was also asked that the property specially hypothecated be declared executable.

Granted.

HODGSON AND MARTIENSSEN V. ROBERTSON.

Mr. Alexander moved for provisional sentence for £200, due on a promissory note.

Granted.

SCOTT V. PETERSON AND ANOTHER.

Mr. P. S. Jones moved for the final sequestration of the partnership estate of the defendants as insolvent.

Granted.

MICHAU V. SMITH.

Mr. De Waal asked that this case be postponed *sine die*, as there were prospects of a settlement being effected.

Postponement allowed.

ILLIQUID ROLL.

ROWE V. SHENKER. | 1903. Feb. 2nd.

Mr. M. Bisset moved for judgment, under Rule 329d, for £21 12s., less £12, paid on account.

Granted.

CHRISTIE V. BENNETT.

Mr. Upington moved for judgment, under Rule 319, in default of plea, for £336, less £100, paid on account.

Granted.

SELLAR BROTHERS V. CAPE TOWN CLUB.

Mr. Benjamin moved for judgment, under Rule 329d, for £325 18s. 11d., for goods sold and delivered. He also asked for an order declaring certain funds, the property of the club, in the hands of Mr. T. J. O'Reilly, executable in satisfaction of the plaintiffs' claim. Counsel pointed out that on a previous occasion an application was made to the Court for leave to wind up the club under the Companies Act. That application was refused. Mr. O'Reilly had been appointed liquidator, and as such had certain funds belonging to the club in his possession, but inasmuch as he was not an official liquidator, but simply a third party having funds in his possession, it was necessary to apply to the Court for an order declaring the funds executable.

In reply to the Court, counsel said he did not think Mr. O'Reilly had had any notice of the application.

Provisional sentence granted, but as to the second prayer the Court ordered that any funds in the hands of Mr. O'Reilly belonging to the defendants in their capacity as representatives of the club be declared executable in satisfaction of the plaintiffs' claim.

GIBBON V. ROWAN.

Mr. Russell moved for judgment, under Rule 329d, for £45, being the rent of certain premises.

Granted.

VARLEY V. LAMBERT.

Mr. Buchanan moved for judgment, under Rule 319, in default of plea, for £1.235, claimed in the plaintiff's declaration, being the purchase price of certain property, of which the plaintiff again tendered transfer.

Granted subject to the production to the Registrar of proof of service.

LANE AND PHILLIPS V. LEWIS.

Mr. Greer moved for judgment, under Rule 329d, for £42 3s. 6d., for goods sold and delivered, less £20, paid on account.

Granted.

HEATLIE V VAN DIEMAN.

Mr. Buchanan moved, under Rule 329d. for judgment for £32 4s. 2d., for services rendered and money advanced.

Granted.

S.A. SUPPLY CO. V. BLOMSON.

Mr. De Waal moved, under Rule 329d, for costs in a suit in which the plaintiff claimed £2 10s. for goods sold and delivered. The capital having been paid only the costs were now claimed.

Granted.

CHETTY V. CHETTY.

Mr. Russell moved, under Rule 329d, for judgment for £50, money lent.

Granted.

FOSTER SHORT AND CO. V. FITZGERALD

Mr. Benjamin moved, under Rule 329d, for judgment for £129 4s. 2d., goods sold and delivered.

Granted.

COLONIAL GOVERNMENT V. MARCUS AND CO.

Mr. P. S. Jones moved, under Rule 329d, for judgment for £400, being balance of purchase price of a certain agricultural lot, with certain expenses and interest; further, for an order declaring that if payment be not made within one month, the sale of the said lot of land shall be null and void, and payments already made forfeited.

Granted.

NANNUCCI LIMITED V. WARD.

Mr. Russell moved, under Rule 329d, for judgment for £50, for hire of a certain shop.

Granted.

CARMICHAEL V. CHETTY.

Mr. M. Bisset moved, under Rule 329d, in an application for judgment for £46 14s. 9d. The capital sum having been paid, only the costs were now asked for.

Granted.

HART V. CAPES.

Mr. M. Bisset moved, under Rule 329d, for judgment for £40, being the purchase price of certain ground.

Granted.

HEYDENRYCH V. THOMAS.

Mr. Van Zyl moved, under Rule 329 l, for judgment for £25.

Granted.

REHABILITATIONS. { 1903. Feb. 2nd.

Mr. M. Bisset moved for the rehabilitation of the insolvent Willem Johannes Fourie.

Granted.

Mr. M. Bisset moved for the rehabilitation of the insolvent John Christian Henry Grassow. The trustee had reported unfavourably as to the manner in which applicant had brought up certain outstandings in his schedules.

The application was refused, but leave given to apply again in three months.

Mr. C. de Villiers moved for the rehabilitation of the insolvent Johan Reynoldt Gerhardus Klerck.

Order granted.

Mr. De Waal moved for the rehabilitation of the insolvent Joseph Nicolaas Ekkerd.

Granted.

Mr. Gardiner moved, under section 117 of the Insolvent Ordinance, for the rehabilitation of William John Clear.

Granted.

Mr. Buchanan moved, under section 117 of the Insolvent Ordinance for the rehabilitation of William Prince.

Granted.

GENERAL MOTIONS.

Ex parte GIBSON. { 1893. Feb. 2nd.

Mr. Buchanan moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Rule made absolute as prayed.

MARSBERG V. MARSBERG.

Mr. Alexander asked that this matter be allowed to stand over, the necessary affidavit from plaintiff not having arrived from Kimberley.

Postponement allowed.

GUSH V. GUSH.

Mr. Gardiner moved for a decree of divorce, defendant having failed to comply with the order of the Court granted November 3, 1902, to restore to plaintiff her conjugal rights.

Order granted as prayed.

COETZER V. COETZER.

Mr. Searle, K.C., moved for an order suspending a writ of attachment against the applicant for contempt of Court, in not satisfying a judgment of the Court.

Mr. De Waal said he appeared for the respondent, but was not instructed to oppose or consent to the application. He stated that he had been informed that the respondent had not the money necessary to proceed further in the matter.

Order granted, but no order made as to costs.

MCBEAN V. SOUTHERN LIFE ASSOCIATION.

Mr. Russell asked that this application for leave to sign judgment against the plaintiff be allowed to stand over.

Postponement allowed.

Re THE CAPE OF GOOD HOPE BUILDING SOCIETY.

Mr. Schreiner, K.C., moved for the confirmation of the final report of the liquidators of the Cape of Good Hope Permanent Land and Building Society.

Report confirmed, and an order made that the intention of the liquidators to dissolve the society be published in the same way as the other orders.

Ex parte STEVENS.

Mr. Benjamin moved for an order authorising the registration in petitioner's name of certain property.

Ordered to stand over, so that an affidavit might be filed as to the value of the property.

STEVEN V. STEVEN.

Mr. Russell moved for leave to the applicant to sue his wife by edictal citation for divorce. Applicant had come out to this country in 1896, and he had been informed that in 1900 his wife, who remained behind in Scotland, had been delivered of a child. In a letter to him, defendant had admitted that fact.

Leave was given to sue by edictal citation, rule made returnable on May 1; leave also given to serve intendit with citation; personal service to be effected.

HERBERT V. HERBERT.

Mr. C. de Villiers moved for leave to the applicant to sue the respondent by edictal citation for restitution of conjugal rights, failing which, for divorce.

Granted, personal service to be effected; rule made returnable on May 1, and leave given to serve intendit with citation.

Ex parte SEGALL.

Mr. J. E. R. de Villiers moved for the appointment of a *curator ad litem* for applicant's wife in an action about to be instituted to have her declared of unsound mind and incapable of managing her affairs.

Granted, Mr. Advocate Van Zyl being appointed *curator ad litem*, summons to be served on the alleged lunatic as well as on the *curator ad litem*.

Ex parte WINTERBACH. { 1903. Feb. 2nd.

This was an application for the amendment of an Order of Court granted on April 15, 1901, under the Derelict Lands Act of 1881, whereby the Registrar of Deeds was instructed to register a certain erf at Ceres in the name of Johan Carel Winterbach (the petitioner). A rule *nisi* was granted on the aforesaid date, and made absolute on May 23, 1901. Petitioner, however, owing to incorrect information, stated that the said piece of land was still registered in the name of Jan Hendrik Munnik, from whom petitioner's father had purchased it; but the petitioner has since ascertained that at the time of the said purchase the said land was registered in the joint names of the said Jan H. Munnik and Hendrik Lodewyk de Lange Vos, and was erroneously included with the remaining extent of a certain place Riet Valley, which was transferred by the assignees of the estate of the said late Jan H. Munnik and the trustees of the said late Hendrik L. de L. Vos to one

Adolph Arnholtz, on March 30, 1880, and thereafter having been registered in the names of different persons, at present stands registered in the name of Caroline Armicia Boyes. Wherefore petitioner prayed that the aforesaid order granted to him might be amended accordingly.

On the motion of Mr. De Waal, the Court granted an order as prayed.

[Applicant's Attorneys: Van der Byl and Van der Horst.]

THOMAS V. THOMAS.

Mr. Alexander moved for leave to the applicant to sue the respondent by edictal citation for restitution of conjugal rights, failing which for divorce.

Granted, citation to be returnable on May 1; personal service to be effected, if possible, failing which one publication in a Kimberley newspaper and one in a Bloemfontein newspaper, as well as in the "Government Gazette." Leave was also given to serve the intendit with the citation.

Ex parte VAN RENSBURG.

Dr. Greer moved for an order authorising the Registrar of Deeds to grant certified copies of certain mortgage bonds which had been lost during military operations in the recent war.

A rule *nisi* was granted, calling upon all persons concerned to show cause why the order should not be granted; rule returnable on February 12, and one publication to be made in the "Government Gazette" and one in a Dutch newspaper.

PETITION OF MARGARETHA JOHANNA RETIEF.

Mr. De Waal moved for leave to the petitioner to transfer certain immovable property.

Granted.

GRAHAM BROS. V. STRASBURGER. { 1903. Feb. 2nd.

This was an application for leave to substitute one Arthur Pavitt, of 26, Rue du Mont Thabor, Paris, for that of Arthur Septimus Browne, of 370, Rue St. Honore, Paris, as the Commissioner authorised to take the evidence in France of certain witnesses connected with the above suit. The applicant also called upon the respondent to show cause why the hearing of this case should not be postponed from February 26, 1903, until such later date as should allow of the return of the said commission from France. From the affidavits filed, it appeared that the estate of Graham Bros. had been sequestrated since proceedings in this action had been commenced. It also appeared that Arthur S. Browne was no longer in practice in Paris, but that A. Pavitt was now acting for him.

Mr. Schreiner, K.C. (for defendant): This is an application for the substitution of one Commissioner for another. I submit that we are entitled to oppose this motion. (See Sec. 24 of the Insolvent Ordinance.) The action has been stayed, and the case cannot go to trial just now.

Mr. Searle, K.C. (for plaintiff): We come into Court on the merits. Defendant applies to have evidence taken on commission. Apparently last Friday or Saturday an order was granted, but it was never expected that there would have been such excessive delay in bringing on the case.

Mr. Schreiner in reply was not heard.

The Court intimated that judgment would be postponed until after the hearing of the application to make the provisional order of sequestration final.

VAN BLERCK V. VAN BLERCK.

Mr. Benjamin moved for the personal attachment of the respondent, one Van Blerck, a carriage painter, of Wellington, a young man who is about to be sued by his wife on the ground of his adultery with one Wilhelmina Hoffman, with whom, it is alleged, he is now living. Last September the defendant was ordered to pay his wife £20 to enable her to proceed with her action, but he had not yet paid anything.

Respondent appeared in person, and said his only defence was that he could not pay so much. All he could afford was £3 per month. His wages were anything from £2 to £3 per week.

De Villiers, C.J., pointed out the defendant's neglect to put by anything, and his offer now to save up came somewhat tardily. If he could pay and would not he must be punished for contempt.

Defendant denied that he was living with the woman Hoffman.

The Court granted an order of £3 10s. per month until defendant shall have paid £20 and costs.

CONSTABLE V. CONSTABLE.

Mr. Benjamin moved for substituted service of citation, it having been found impossible to effect personal service, as ordered.

Application granted, two publications to be made in a Johannesburg newspaper and one publication in the "Government Gazette," and the return day of the citation extended to May 1.

FORBES V. TIMBER SUPPLY CO.

Mr. Schreiner mentioned the case of Forbes and the Timber Supply Co., which was an application for leave to appeal to the Privy Council from a judgment of Court.

Mr. Buchanan said he was instructed to consent to the application if the leave were granted on the usual conditions, but he was bound to say that he did not know anything as to the previous history of the case.

De Villiers, C.J., said that the conditions were not the usual ones, and that the case would stand over until Thursday next.

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., and the Hon. Mr. Justice MAASDORP.]

WASSERMAN V. WASSERMAN. { 1903, Feb. 3rd.

This was an action for restitution of conjugal rights, failing which, for divorce.

In this case the summons, intendit, and other documents were served by substituted service in Paris. At one time it was thought that personal service could be effected, but that had been found impossible. Plaintiff claimed an order for the restitution of her conjugal rights, failing which, for a decree of divorce and custody of the minor children of the marriage. She did not claim maintenance or costs.

Mr. Buchanan for the plaintiff; Defendant in default.

Rachael Wasserman (born Fletcher) said she was married to Michael Wasserman at Johannesburg on January 10, 1895. She lived with him there until 1897, when they came to Cape Town, where her husband obtained work. In 1899 defendant left witness and her children, and proceeded to Europe. He said he was going for two months. She wrote to him repeatedly, but only received from him one letter from Paris, giving his new address. She wrote often to that address, but received no reply. He left her with £2 only. There were three children of the marriage, aged seven, six, and five years respectively.

By the Chief Justice: Witness worked at tailoring, and intended to support her children in that way. She had heard that defendant was living with another woman in Paris, whom he had since married.

The Court granted a decree of restitution of conjugal rights, defendant to return to or receive the plaintiff on or before May 15; failing which, to show cause by May 31 why a decree of divorce should not be granted, and why plaintiff should not have the custody of the children of the marriage; order to be served in the same way as the original citation.

SAMPSON V. SAMPSON.

This was an action for restitution of conjugal rights, failing which, for divorce, forfeiture of the benefits of the marriage, and costs, brought by Mrs. Sampson against her husband, Solomon F. Sampson. Substituted service had been effected, in accordance with an order of the Court.

Mr. Alexander appeared for the plaintiff; the defendant was in default.

Charles William Henry Smith, clerk in the Colonial Secretary's Office in charge of the marriage registers, pro-

duced the original certificate of the marriage of plaintiff and defendant.

Wilhelmina Christina Sampson said she was married to defendant at Vryburg on April 17, 1893. After the marriage they resided for a little in Kimberley, and then came to Cape Town, where they lived together for six years. On September 15, 1900, defendant left plaintiff, and went to Pietermaritzburg, Natal, and five months later he sent her £7. That was the last she heard from him. There were no children of the marriage.

By the Chief Justice: She believed defendant was now in Johannesburg, but did not know his address.

The Court granted an order calling upon defendant to return to or receive plaintiff on or before May 15, failing which, to show cause by May 31 why a decree of divorce should not be granted; personal service to be effected, if possible, failing which, substituted service, as directed in regard to the citation.

YATES v. ESTATE YATES. { 1901. Feb. 3rd.

Fiduciary relation — Contract — Independent advice—Executor's commission.

On the death of his brother, the plaintiff, who was an Attorney-at-law, agreed with the defendant, who was his brother's widow and executrix, that he would administer the estate and that, in consideration of such administration, she should allow him the executor's commission of 5 per cent. on the gross assets of the estate.

Held, *that the contract was not voidable by reason of the plaintiff not having seen that the defendant had independent legal advice before entering into the contract.*

This was an action to recover the sums of £439 6s., being commission in respect of services rendered in administering the estate of the late John James Yates, with interest on the same, and £70 9s. 11d., disbursements made.

The declaration set forth that the plaintiff resided at King William's Town and the defendant at Kei-road. On June 6, 1895, John James Yates died, leaving defendant, his widow, his sole heiress, and she was duly appointed executrix of the estate. On July 25, 1895, at Mount Frere, it was agreed between the plaintiff and the defendant that in consideration of the former administering the estate the latter would allow him the executor's commission of five per cent. on the gross assets, this sum to be paid to the plaintiff by defendant's executors upon defendant's death, or by the defendant upon her remarriage, if such should ever take place, and until that time to bear interest at the rate of six per cent. per annum. The plaintiff, in pursuance of that agreement, administered the estate and made disbursements in so doing on behalf of the defendant to the extent of £70 9s. 11d. This estate was realised by July 1, 1896, and realised £8,785 3s. 6d. for the gross assets, and the amount coming to plaintiff as his commission of five per cent. was £439 6s. About June, 1896, defendant remarried, and the amounts then became due and payable. Plaintiff therefore sued for £579 11s. 11d., being the amount of the commission, interest, and disbursements.

Defendant in her plea said that after the death of her husband the plaintiff, without stipulating for any remuneration, and proferring to act towards her as a brother, promised to undertake to advise her and represent her in and about the liquidation of her husband's estate, and acting as such from time to time laid before her documents for signature, which she in all good faith signed. As to the document purporting to be an agreement between her and plaintiff, she said she was wholly ignorant of it until after her re-marriage. That defendant's signature to this document was obtained by plaintiff acting then as her adviser by the exercise of undue influence and by wrongfully, unlawfully, and fraudulently taking advantage of her confidence in him as her adviser, and its contents were at no time by him explained to or understood by her, and it was contended that, therefore, the agreement was null and void in law. That the plaintiff did act as her adviser and representative in connection with the liquidation of

her late husband's estate, and that she submitted to his guidance and control in all matters. She was aware that the plaintiff must have made certain disbursements on behalf of the estate, but did not admit the amount alleged to have been so disbursed, and she specially denied that the plaintiff did administer the estate and prepare for her signature any proper and legal account of such administration duly supported by necessary and proper vouchers, upon which account alone so supported it could be determined what sums had been properly disbursed on account of the estate and what allowance by way of commission or remuneration the Master of the Court would make in accordance with law and practice. She said that even if the document did embody a valid agreement, the plaintiff was not entitled to have and maintain an action against her therein until he should have complied with the conditions thereof, and should have prepared an account supported by the proper vouchers, and until the Master of the Court should have allowed a sum by way of executor's commission for the administration of the estate, and for the purpose of permitting the plaintiff, should he desire it, to prepare such an account she was willing that he should have at all times reasonable access to all documents now in her custody order, or disposition. She admitted that she remarried in June, 1899, and that she refused to pay the sum claimed, or any sum. Wherefore she prayed that the plaintiff's claim might be dismissed.

For a claim in reconvention the defendant (now plaintiff) said that the plaintiff (now defendant) was in possession of documents connected with the titles or deeds of transfer of landed property situated at Mount Frere, or elsewhere in the native territories, which she was entitled to as heir of her husband, and wrongfully refused to deliver up these to her possession. Wherefore she prayed for an order compelling the plaintiff (now defendant) forthwith to deliver up to her all the said documents or deeds, together with the costs of suit.

In his replication plaintiff said that a balance sheet and account were prepared of the estate of the late John James Yates, upon which the sale of the business took place, and this balance-sheet was signed by the defendant. All books and accounts were kept by one Miller, the bookkeeper to the estate, and were and are under the control and custody of the defendant.

For a plea to the claim in reconvention the plaintiff admitted that he was in possession of certain documents connected with the titles or deeds of certain landed property to which the defendant would be entitled, and he said that he had always been ready and willing, and hereby again tendered to deliver up the same upon payment to him of the sums due to him by the defendant.

Sir H. Juta, K.C. (with him Mr. Benjamin), for the plaintiff. Mr. Schreiner, K.C. (with him Mr. Buchanan), for the defendant.

Joseph John Yates, the plaintiff, said that for seventeen years he had carried on business as an attorney at King William's Town. His brother, defendant's husband, died on June 16, 1895, leaving three businesses in his estate. He left a will, which had been drawn in witness's office. It had been understood that witness would be the executor, but when the will was discovered, it was found that the wife was the executor. Witness took steps to look after the businesses, there being no one else to take control. Witness detailed the steps he took. In the course of these he went for a couple of weeks to Mount Frere, where the principal business was established, and made himself thoroughly conversant with the whole business. When he found the extent of the work involved, he represented to the widow that it could not be expected that he would undertake without remuneration the administration of the estate. At the same time he saw that the business could not be drained of too much money, and after they had discussed the whole thing, the agreement now in question was duly signed and witnessed. He could not remember whether Mrs. Tetlow, the witness to the agreement, was present when defendant actually signed it, or whether she merely heard the signature acknowledged. Mrs. Tetlow was not present when the nature of the document was explained to defendant by witness. Witness found his brother had left certain instructions as to the manner in which his estate was to be wound up. Witness carried out those instructions as far as possible, but if he had followed out those instructions in their entirety, the estate would have

been bankrupt. One Miller was the bookkeeper at the principal business at Mount Frere, through which place all the accounts from the other two businesses passed. Witness's work in connection with the estate involved considerable correspondence with Miller and others. Nearly all the indents were sent through witness. Then a large number of debts of small amounts belonging to the estate had to be collected Witness tried in every way possible to realise the estate, but nobody would have anything to do with the business. He offered it for sale to defendant's brother, but he would not buy it. Ultimately witness effected an arrangement with Dyer and Dyer, who were practically the only creditors of the business. On July 21, 1895, the indebtedness on the capital account was £5,022 10s., and by April 18, 1896, that had been reduced to £3,700. On the current account, the indebtedness was £1,007, and by June 30, 1896, that had been reduced to £586. On July 1, 1896, by arrangement with the chief creditors, Dyer and Dyer, the business was taken over by witness's brother. He might mention that the business had been offered to others at less money than his brother paid for it. An agreement was entered into in regard to the purchase of the business by witness's brother. This was the first time witness had ever heard that the estate had been realised ruinously, or that witness had not done his best for it. Defendant secured out of the estate all the landed property, in addition to a house which had never been brought into the estate, as it had been ceded to defendant by ante-nuptial contract. Defendant had got about £2,200 out of the estate. The gross assets were over £6,000, and the difference between that amount and the £2,200 represented the debts in the estate. Witness never had charge of the books of the business, which were in charge of Miller at Mount Frere. Witness produced his books to show how his disbursements of £70 odd had been incurred. The principal items were telegrams, and witness's and defendant's postcart fares to Mount Frere. For many of the items, witness had not vouchers. It was erroneous to state that the property was not sold to the best advantage. The widow got £100 per year out of the property by the sale of the business to witness's brother.

Cross-examined by Mr. Schreiner: Defendant stopped with witness's mother after her husband's death. Witness never cared much for her. After her husband's death, he told her he would do all in his power for her. He did not go to Mount Frere on his own business, although he went home by Natal. At the time there were farms at Mount Fletcher for sale, and witness considered he had lost over £2.000 by not being there to buy them. As to the agreement, witness did not think he brought it with him to Mount Frere. He believed he wrote it out at the table there. He read the agreement over to defendant. At that time witness had read the instructions left by his deceased brother, who had desired Mr. Cross to act as liquidator, but the latter refused to do so. Those instructions also directed that Mr. Murray should act as solicitor. It did not occur to witness to advise defendant to see an independent person in regard to signing the agreement. He claimed 5 per cent. on the Mount Frere property, but he did not know they had the title for it. He had refused to hand over the title to the defendant. Being a solicitor, he had a lien on the titles for his claim. He had not had the name of deceased in the documents changed to the name of the person to whom the property had been sold. He did not give the defendant a copy of the agreement. She wrote to witness when she was going to be married. He did not state his claim before the marriage, because he was not taken into defendant's confidence, and, in fact, was not even invited to the wedding. It was untrue that witness went to defendant one day with the agreement to sell the business to his brother, and said that she must sign it. She said she must inquire into it, but he would not say that she was reluctant to sell. It was not true that witness said that, unless she signed the agreement, he would wash his hands of the whole matter.

De Villiers, C.J., pointed out that the cross-examination of witness as to the sale to his brother raised the question of maladministration of the estate, which could never have been anticipated from the plea.

Mr. Schreiner pointed out that in his examination-in-chief, at any rate, witness had gone into that question in considerable detail.

De Villiers, C.J.: That was to show the amount of work done.

Re-examined: At the time he claimed 5 per cent. on the whole he did not know that there were any immovables in the estate.

Miss Mary Ann Yates, a sister of the plaintiff, said she lived with him at King William's Town. Witness knew defendant, and often spoke with her about the affairs of her late husband's estate. Defendant told witness that she had signed a document to the effect that she would pay plaintiff something for his trouble. She told witness that on two occasions. That was shortly after she returned from Mount Frere.

Cross-examined: Witness could not give the date, but one of the conversations was before defendant started housekeeping. The other was after that time. Witness first heard of the document from defendant.

Sir H. Juta closed his case.

For the defence Mr. Schreiner called

Mrs. Kate Wheeldon, the defendant in the action, who said that she was married to her present husband in community of property, but with her first husband, John James Yates, she had an antenuptial contract. At the time of her first husband's death, on June 6, 1895, witness was on her way to Natal, having received news that he was ill. About a month later witness went to Mount Frere. In the interim she stayed at the house of Mr. Yates's mother. During that time plaintiff never talked anything about business matters with witness. He said she was to look upon him as a brother. Witness was on good terms with plaintiff, and he never showed that he disliked her. She thought they were very good friends. When he spoke about accompanying her to Mount Frere, she said it was very kind of him to go up and do anything for her. There was nothing said about what would be done by him. He told witness then that he was going up to buy farms. He gave witness no idea that he was going to make any charge for what he did for her. At Mount Frere witness and plaintiff stayed in the same house. Mrs. Tetlow, a very old friend, was also there. Plaintiff was there for two or three weeks. She did not remember signing the document in question. She remembered signing several documents that were put into her hands by Mr. Yates. She had perfect confidence in Mr. Yates at the time. She did not inquire into anything that sh signed. She had no recollection whatever of the document, a copy of which was sent to her in July, 1899. She knew that she signed a document to which Mrs. Tetlow was a witness.

Mr. Schreiner: That document is before the Court. Do you remember the occasion on which Mrs. Tetlow witnessed the document?—I remember Mrs. Tetlow did witness a document.

Is that your signature on the document?—Yes.

You see Mrs. Tetlow signs as a witness?—Yes.

On the occasion on which Mrs. Tetlow appeared as a witness to the document did Mr. Yates explain to you when you were alone what a business matter should be and how he should be paid in the way set out in this document?—No.

Did he ever say to you that he was to be paid?—Never.

You want to be very careful about that, you know, Mrs. Wheeldon. Has Mr, Yates ever said to you during that time you were to pay him for his services?—Never.

He says that on that date he explained to you fully the terms on which he would do the work, that he would not make any charge until you should either die or remarry, and that he should then receive 5 per cent. on the gross assets?—He did nothing of the sort.

Of that you are positive?—I am positive. I asked him afterwards if I had to pay him for anything he had done. He replied, "Nothing whatever." He was only too glad to be able to do what he had done for me; it had been little or no trouble, because the business had been left in such perfect order.

Witness further stated that she was living at Kei-road when she met her second husband, and that shortly before she was married she wrote to Mr. Yates informing him of her engagement. He sent her a very nice letter in reply. He made no mention of any claim that he might have against the estate, and the first intimation that she received was a copy of the document that she got in July 1899. It was a great surprise

to her. She only saw the first sheet at first, and the amount that appeared there was £40 or so. She said to her husband at the time that she did not know that she owed Mr. Yates anything at all, but if he claimed this sum for any services he had rendered she supposed she would have to pay it. Her husband then told her to look further on, and on doing so she found that the account amounted to something like £600. He never consulted her with regard to the expenses which he had put down for telegrams, horse hire, and so forth. As to the item of £10 for a visit to Natal, he simply told her that he was going to speak to the doctor about the operation that her late husband went through to satisfy himself that everything had been done that could have been done. She was glad that Mr. Yates went to Natal, but she did not ask him to go. She subsequently removed from Mount Frere to King William's Town, where she was asked down to Mr. Yates's office on a little matter of business. Willie Yates was there, and an agreement was then produced under which Willie Yates was to take over the business. He was to pay a rent of £100, this covering the shop and two cottages. She told him that she thought that she should have something extra for the cottages, even if it were only £20 a year, but he said he could not think of paying any more. Mr. W. P. Yates was also present, and he said something to the same effect as the other Mr. Yates. Mr. Yates, the plaintiff, took that document away. She hesitated to sign the document because she was not satisfied with the terms, and Mr. Yates then seemed to be in great concern, and he said that if she did not sign he would wash his hands of the whole business. Mr. Yates was not speaking the truth when he said that nothing of the kind took place. There was no one at that time whom she could consult except her brother-in-law, and he did not care about having anything to do with Mr. Yates. She knew Mr. Murray, the attorney, but she had not employed him as a legal adviser. All that he had done on her behalf was to make her will. She did not go back to Mount Frere till about two months after her first husband's death. Nobody had asked her for the key of her husband's drawer for the list of instructions that he had left. She knew that the drawer must have been broken into. She left her business matters entirely in the hands of Mr. Yates, in fact, she added, "they did just as they liked." Miss Yates's statement that witness had told her that Mr. Yates was to be paid by her for his services was absolutely untrue.

Cross-examined by Sir H. Juta: She did not remember exactly when she was first married. She was married about three years to her first husband before he died. She was about thirty years of age at the time of his death. When she was in England she lived with a lady for a while, but she did not do any secretarial work for her. She was prepared to pay the amount that she saw on the first sheet of the account, but she did not think for a moment that he would charge her £600. She had always said that she would be prepared to pay him a reasonable sum, but she did not think that £600 was a reasonable sum.

Sir H. Juta: You know that he transacted a good deal of work in connection with the business after your husband's death, that there were three branches, and that he looked after them all. You know that the executors of this country get paid a reasonable amount for their trouble?—Yes.

I suppose that you are perfectly willing that he should be paid a reasonable sum as an executor?—I don't know about that. Of course, being a brother-in-law, he told me he was doing this as a brother. He was not an executor, you see.

But he was doing all the work of an executor?—Yes

And also an administrator?—Yes.

Supposing in the Master's Office there was a tariff on which they pay executors, you would be willing that he should be paid according to that?—I don't know about that; he was not an executor. She added that she did not remember signing the document, but she admitted that the signature was hers. At the time she signed this document she was in the habit of signing documents that she knew nothing about. She did not ask what it was about.

Sir H. Juta: But supposing it was to sign away £5.000 of your own?—But I did not take the precaution to examine the document, as I had perfect confidence in him as a brother.

De Villiers, C.J.: It is a very short document, a very simple document; did

that there was to be such a postponement of the payment, it was arranged that this six per cent. should be paid. I think, however, that it is right that this six per cent. interest should run only from the time that the amount of the remuneration was ascertained and communicated, and I am not inclined, therefore, to allow any of this interest except from the date of the summons. Before considering the question as to the amount of commission I must consider the question of the disbursements. The claim is for £70 odd, but in my opinion the Court should allow only for such disbursements as the plaintiff has tendered vouchers for, which I find amount to £24 12s. 6d. Then as to the commission, I am of opinion that there should be no commission charged upon the immovables. It was not a case in which the Master would have allowed the defendant any commission as executor under the circumstances, even if there had been other heirs. As to the movables, however, I am of opinion that the plaintiff should receive his commission at the rate of 5 per cent. upon £6,528. The Master's explanation was not perfectly clear to me. He admits that 5 per cent. would have been allowed upon the capital account and current account reduced, but he seemed to say, with some hesitation, that as to this amount of £3,700, which represented the debts which were owing at the time when plaintiff's brother took over the business, the amount should only be 2½ per cent. I confess that I cannot see any reason for distinction between this £3,700 and the remaining portion of this claim. In my opinion, therefore, there should be a commission charged at the rate of 5 per cent. upon £6,528, which makes £326 8s., add to that £24 12s. 6d. disbursements and the sum total is £351 0s. 6d., and for this sum judgment should be given for the plaintiff with interest from the date of summons. There is only one other point, and that is in regard to the claim in reconvention. Sir Henry Juta has candidly admitted that the plaintiff cannot dispute the right of the defendant to the possession of these documents, and if it had appeared that the retention of these documents had anything to do with the present lawsuit or added in any way to the costs, the fact that judgment is given for the defendant on her claim in reconvention would affect the case, but under the circumstances of this case it could not in any way affect the costs.

Mr. Schreiner having been heard on the question of costs,

De Villiers, C.J.: My view is that the main question the parties came into Court to decide was whether or not this was a valid contract. There is a charge, a very serious charge, made in the plea to the effect that the defendant by wrongfully, unlawfully and fraudulently taking advantage of defendant's confidence in him as her adviser, got this document, and that its contents were not explained to her by him or understood by her. On this distinct charge the Court has found in favour of the plaintiff, and therefore the plaintiff must have his costs. Judgment will therefore be given for the plaintiff as indicated with costs, and judgment for the defendant on the claim in reconvention.

[Plaintiff's Attorneys, Godlonton and Low; Defendant's Attorneys, Innes and Hutton.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

MOOLMAN v. MOOLMAN AND ANOTHER. } 1903. Feb. 4th.

This was an action for divorce brought by Petrus Johannes Moolman against his wife, the first-named defendant, on the ground of her adultery with one Willem Adriaan Moolman, plaintiff's brother, the second-named defendant.

There had been a claim against Willem Adriaan Moolman for damages, but this claim was not now proceeded with. Plaintiff, in his declaration, stated that he was married to the first-named defendant in 1882, and there were seven children of the marriage, six of whom were still minors. He alleged that in August, 1901, his wife, while living apart from him, committed adultery with the second-named defendant, and on May 25, 1902, gave birth to a child, of which plaintiff was not the father. Plaintiff therefore claimed a decree of divorce against his

wife, custody of the minor children, and forfeiture by the first-named defendant of the benefits of the marriage.

The plea did not admit the allegation of adultery, and put the plaintiff to proof thereof.

Mr. Searle, K.C., for plaintiff. Mr. Benjamin for the first defendant.

Mr. Benjamin said he came into Court merely on the questions of costs and custody of the children.

Mr. Searle called,

Petrus Johannes Moolman, the plaintiff, who said that he lived at the farm Graspan, in the Fraserburg district. The first-named defendant was his wife, and there were seven children of the marriage. The eldest was married, but the remaining six were minors, their ages being 14, 13, 11, 8, 6, and 3 years respectively. On May 8, 1901, witness was removed from his farm by the military authorities. He was taken first to Calvinia, then to Clanwilliam, and then to Malmesbury. He was not allowed to return to his farm until August 2, 1902. He had not seen his wife during the interval. Witness had a brother, Willem Adriaan Moolman, who lived about an hour and a half from witness's farm. Witness's wife and children were left on the farm when witness was removed by the military authorities. While he was at Malmesbury witness heard something about his wife, and when he came towards his farm a child was brought to him. When he came on his farm he saw his wife, and she admitted that the child was hers, and that Willem Adriaan Moolman was the father. Witness said to her, "Then I don't recognise you as my wife any longer." Witness and his wife after that lived in the same house for some time, but did not cohabit. Witness claimed the custody of all the children of the marriage, but was now willing that his wife should have two of the children, viz., Martha Maria, aged eight years, and Johanna Catherina, aged three years. Witness was married in community of property. At the time of their marriage his wife had £80, a horse, a chest of drawers, and some other articles. Witness was willing to give his wife for the support of herself and the two children mentioned, a school erf at Bramvlei, 400 sheep and goats, a cart and two horses and harness, a wagon and span of eight donkeys and harness, and her bedroom furniture. The value of the property he was willing to give his wife would be between £900 and £1,000.

Cross examined: Witness was not willing to give his wife the custody of the boy 14 years of age. The boy should still be at school, and besides, the boy was not willing to go to the mother.

By De Villiers, C.J.: Before witness was removed by the military he and his wife had not lived very well together. There had been trouble in regard to men, not witness's brother, but others.

Martha Helena Louw said that she was a daughter of the last witness, and was married in January last. She remembered her father being taken away from his farm by the military. That was on May 8, 1901, and he returned on August 2, 1902. Witness remained on the farm all the time he was away. On May 25, 1902, during her father's absence her mother gave birth to a child. Her father's brother was often at the farm during her father's absence, and her mother was at his farm for one or two days.

The Court granted a decree of divorce, plaintiff to have the custody of all the minor children, except Martha Maria and Johanna Catharina, of whom the defendant shall have the custody with liberty of access to the children on the part of either party at reasonable times and places, plaintiff to give to defendant for the maintenance of herself and the two children mentioned, the school erf at Bramvlei, 400 sheep and goats, a cart and pair of horses and harness, a wagon and span of eight donkeys and harness, and the bedroom suite; plaintiff to pay the costs of the action.

ALIE v. CARR, BROS. AND ASH. { 1903. Feb. 4th.

This was an appeal from a decision of the Acting Resident Magistrate for Cape Town in an action in which the plaintiffs sued the defendant for £10 9s. 7d., being balance of an account for goods sold and delivered as follows: June 11, £2 5s. 6d.; July 2, £7 9s. 5d.; August 2, £2 14s. 8d.; total, £12 9s. 7d.; by cash, November 21, £2; balance due, £10 9s. 7d. The principal evidence for the plaintiffs was that of Patrick George Thornton, who stated that he was traveller to the plaintiffs, and received the orders for June and July, some from de-

fendant and some from men in his shop. Defendant told witness that he was selling his business. Witness did not remember the date. Defendant asked him to transfer his account to another man, which witness refused to do, and said that if defendant wished he would give the goods in his (defendant's) name. Defendant said "Yes," and witness commenced to supply the goods. Defendant himself paid witness £2 on account. He had never disputed the account, which had been rendered to him regularly. Some of the goods were delivered to the corner of Grey and Combrink-streets by defendant's orders, and some to defendant's shop, at 62, Hanover-street. For the defence Sheik Alie stated that he kept a shop at 62, Hanover-street, but he did not buy any goods from plaintiff in June and July. He sold his shop thirteen months ago to Izak Esau. He did not owe plaintiff a penny at that time, and he did not pay £2 on account to plaintiff in November. He did not tell the last witness to supply the other man for his account, nor did he say he would stand security for the same. The signature to the delivery book was not defendant's, but that of Izak Esau, who bought the shop. After witness sold the shop he had no transactions with the last witness. Izak Esau had left for Johannesburg four months ago. Witness did not live at 62, Hanover-street, now. Further evidence was called to show that the licence for 62, Hanover-street, for 1901, was taken out in the name of Sheik Alie, and for 1902 by Said Alie. It was stated, however, that in their register they had the same man down in 1901 as 1902.

The Magistrate gave judgment for the plaintiffs for £7 14s. 11d., and set forth the reasons for his judgment as follows: The books of the plaintiffs were produced, and the entries are in the name of the defendant for June and July, the item of August having been withdrawn by the plaintiff's attorney. Mr. Thornton, the traveller for plaintiffs, swears that he received orders from defendant and also from some of the men at defendant's shop, that defendant told him he was selling his business, and he wished to transfer the account to another man, which he refused to do, but said he would supply the other man with the goods, but to be debited to the defendant, to which the defendant agreed, and Mr. Thornton swears positively that defendant paid him £2 on account, with which he has been credited in the account at the back of the summons. The defendant denies all the allegations, and says that he never received the goods, that he had sold his business to one Izak Esau, and that the signatures in the delivery book are those of Izak Esau, which are signed in Indian, and that Izak is now in Johannesburg. I believed Mr. Thornton, who gave his evidence in a most straightforward manner, that the defendant did pay him £2 on account of the debt, and that the goods were ordered by defendant and some of his men in his shop, and that the goods were delivered as described, and I did not believe the defendant at all. It is my experience that men of the defendant's class, whenever a delivery note is signed by someone else than the person who ordered and bought the goods, the debt is generally denied, and everything else which is stated by the plaintiffs, and the individual who signed the delivery note has generally gone to Johannesburg or cannot be found. I am quite satisfied also that the licences taken out were in the name of the defendant, although the spelling may be different. It was not certainly taken out in the name of Izak Esau, to whom the defendant alleged he had sold his business, and under these circumstances, my judgment is for the plaintiffs for £7 14s. 11d., with costs.

Against this judgment the defendant now appealed.

Mr. Searle, K.C., appeared for the appellant; Mr. Benjamin appeared for the respondent.

After hearing Mr. Searle, and without calling on Mr. Benjamin, the Court dismissed the appeal, with costs.

De Villiers, C.J.: It is impossible for the Court to disturb the judgment of the Magistrate. There was clear evidence before him on behalf of the plaintiffs that orders for the goods were given by the defendant and by some persons in his shop, and Thornton goes further and states that afterwards the defendant himself paid £2 on account. Now it is said that Thornton may not have been able to recognise the defendant, but upon this point also it is clear he had seen the defendant several times. It was not as if he had only seen the defendant casually, for he had seen him several

times, communicated with him, and received money from him. As to the delivery of goods at other places than the shop at 62, Hanover-street, there is Thornton's direct evidence that the goods were delivered at these places by the express instructions of defendant, and as the Magistrate believed Thornton, the Court cannot disturb his decision. The appeal must therefore be refused, with costs.

Maasdorp, J., concurred.

[Applicant's Attorneys: D. Tennant, Junr.; Respondent's Attorneys, C. E. Price Hughes.]

BROWN v. McDONALD. { 1903. Feb. 4th.

This was an appeal from a judgment of the Acting Assistant Resident Magistrate at Vryburg in a case in which the plaintiff Brown sued one McDonald for the delivery of a certain cow, failing which, for its value, £20. From the record, it appeared that the plaintiff lost a cow on October 1, 1902, and afterwards a cow was discovered on the farm of one Smith, which plaintiff said was the one he had lost. Smith said he held the cow for one Featherstonehaugh, a conductor in the Repatriation Camp at Vryburg. Plaintiff interviewed defendant, as the head of the Repatriation Department thereat, and received from him a note to a Conductor Williams, saying that the cow was to be restored to him if it was not a bad case. This note was given to Williams, but the cow was not handed over to the plaintiff. The defendant was now sued for the return of the cow in his personal capacity, and admitted in the course of the case that the cow was still in his possession. No explanation was given to defendant as to why the cow was not returned to him. Several witnesses for the plaintiff swore positively as to the cow being branded with plaintiff's, his father's, and brother's marks. These three persons and a servant in their employ also identified the cow as the one which had been lost on October 1, 1902. For the defence, it was stated positively by several witnesses that the cow in question had been handed over to the Repatriation Department by the Army Service Corps on September 29, 1902, two days before the plaintiff lost his cow.

The Magistrate gave judgment for the defendant, and in his reasons for doing so, stated that he found that the cow in question had been handed over to the Repatriation Department by the Army Service Corps on September 29, 1902, and further, that no cause of action had been disclosed against defendant in his official capacity. On the merits of the case, he was satisfied that the cow was not in defendant's private possession, and therefore gave judgment in defendant's favour, with costs.

Against this decision plaintiff now appealed.

Mr. Upington appeared for the appellant; Mr. Searle, K.C., appeared for the respondent.

After hearing Mr. Upington, and without calling on Mr. Searle, the Court gave judgment for respondent, and dismissed the appeal, with costs.

De Villiers, C.J.: The Magistrate in his reasons for his judgment says: "After hearing all the evidence, I found that the cow in question was taken over at Vryburg from the Officer Commanding the 37th Company of the Army Service Corps, on 29th September, 1902, by the Repatriation Department, on account of the Transvaal Administration, and properly accounted for, and is now in the possession of the Transvaal Administration." The cow which the plaintiff lost was lost on the 1st of October, and if the statement of the witnesses for the defence is correct the cow could not be the same one that was lost by the plaintiff. Well, upon this point the Magistrate had the evidence of two witnesses, viz., Davies and Williams, and both of them swear to the identity of this cow as the cow which was taken over from the Army Service Corps on the 29th September. There is no doubt that the evidence of the plaintiff's own witnesses is in conflict with this testimony, but I think we should take the Magistrate's decision as final upon this point, he having heard the witnesses. It is unnecessary, therefore, to consider the further question as to whether, assuming the identity of the cow to have been proved, there would have been an action against the defendant in his individual capacity in respect to a cow claimed by the Repatriation Department. This raises an important question of law which it is not necessary not to consider. The decision proceeds upon the facts, and it is not

clear that the Magistrate was wrong in holding that the cow, which was in the possession of the defendant, was the cow which came into his possession on the 29th of September, 1902, two days before the plaintiff lost his cow, and for these reasons the appeal must be dismissed with costs.

Maasdorp, J., concurred.

[Appellant's Attorneys: Reid and Nephew.]

REX v. HILLIARD. { 1903. Feb. 4th.

Obstructing public thoroughfare —Sec. 5 of Act 27 of 1882— Prescription—Costs.

The appellant had been convicted by an Acting Resident Magistrate of having obstructed a public footpath in front of his shop by placing sundry goods thereon. Defendant pleaded that though the public had free access to this footpath he had acquired a prescriptive right to so use the said footpath and that he had so used it during some 22 years, the whole tenancy of the said shop.

Held, *that the said user for 22 years gave the appellant no such prescriptive right and that, while the Court would give no opinion as to the proprietary rights of the owners of the said premises, over the said footpath, the appellant had been rightly convicted and that the appeal must be dismissed. As, however, the Court held the appeal not to be of a frivolous character they refused to make any order as to costs.*

This was an appeal from a decision of the Acting Resident Magistrate of Cape Town in a case in which A. Hilliard was summoned for having contravened section 37 of the Cape Town Municipal Regulations by having on September 1, 1902, wrongfully and unlawfully placed or permitted to be placed on the public footway outside his premises in Church-square, Cape Town, 12 packing-cases, 13 large rolls of oil-cloth, and one hand-cart without permission in writing from the Corporation. Defendant's counsel at first objected, and excepted to the jurisdiction of the Court as a title to land was in dispute, but on the Court drawing attention to a decision of the Supreme Court, withdrew his objection. The evidence for the prosecution was to the effect that the diagrams showed the land in question to have been public property as far back as 1789. For the defence, George Smith stated that he had known the property in question for the last 50 years, and remembered a small wall and railing enclosing the property now in dispute. Inside this enclosure was a garden. The railing was removed more than 40 years ago. He knew that the defendant had occupied the premises for more than over 20 years, and the ground had not been enclosed during his occupancy. A. A. Jurgens gave evidence as to his having known the property for 60 years, and when he first knew it it was enclosed, and trees were growing inside the enclosure. Two or three of these trees still remained. Dr. Fuller's garden was in line with the property. The defendant, A. Hilliard, deposed to having occupied the premises for the past 22 or 23 years, and during that time the stoep had always been the same as it was now. He had only removed one small tree. There was a lawsuit about this property in Mr. Crosbie's time. Since then Mr. Van Zyl, the owner of the property, had planted the trees, and had not been interfered with, and witness had put up a verandah without interference by the Town Council. He had used the stoep for plasing packing-cases, etc., on. These did not prevent the public from using the stoep.

The Magistrate's reasons were as follows:

In this case defendant, Mr. Hilliard, was summoned for contravening Regulation No 37 of the Cape Town Municipality in that he did on the 1st September, 1902, wrongfully and unlawfully place, or permit to be placed on the public footway outside his premises in Church-square 12 packing-cases, 13 large rolls of oil-cloth, and one hand-cart, without the permission in writing from the Corporation. Defendant's counsel (Mr. Ad-

vocate Gardiner) admitted the fact of the goods being on the footway as alleged and proved, but set up a prescriptive right as a complete defence. It is clear from the evidence that as early as 1789 the property in question was public property according to documentary evidence, and had not been transferred or alienated since. Up to about 30 years ago this piece of ground, extending from defendant's shop wall to the curbstone on the Church-square side was enclosed from a time not ascertained. The enclosure was then removed, the shop lowered and levelled to the corner of Spin-street, and a pavement constructed and maintained by the owner or lessee, forming a continuous open space from Spin-street to 46 feet beyond defendant's premises to a projecting wall, and thereafter used by the public as a public footway ever since without any protest or restraint by the owner or occupier. It appears that during the last 22 or 23 years, from defendant's occupation, he had used the sidewalk at least once a week in the course of business in the manner complained of, and thereby interrupted the free passage of the public on such occasions, but it is evident that during the preceding 8 or 9 years the stoep had never been in any way obstructed to public use, consequently no prescriptive right was maintained during that period. The fact is established beyond doubt that the property in question is public property and used as a public footway for at least the last 30 years, according to the evidence of a defence witness. The defendant admitted that the public had the concurrent use of the property as a footway during his tenancy, that he never placed the cases there to prevent the public from going there, and never turned people off the stoep or did anything to test the validity of his right to use it. It appears that the defendant never actually asserted any prescriptive right; but what he did was merely done in the ordinary course of business. There is no evidence to show when and under what circumstances this piece of ground was enclosed, and whether or not the enclosure was removed because it was improperly constructed. We have it on record that as soon as this space was thrown open, it was utilised by the public as a side-walk, and is still being used as such. In my opinion defendant has failed to establish a prescriptive right, and even had he succeeded, it is doubtful whether it could override the Council's right to control such footways and open space under their regulations. In the case of *Lawley* v. *The Town Council* (No. 9 Juta, page 8), where the applicant sought to obtain an interdict restraining the Council from removing the signboard in front of their premises in Longmarket-street upon the ground that the same had been in existence for upwards of thirty years, the Chief Justice, in refusing the application, expressed the opinion that the property in the pavements and sidewalks was vested in the Council, and that in any event they had control over them, and that such control carried with it the right of control over all projections and over such footways or sidewalks. In the case (*Town Council* v. *Maxwell*) for contravention of the regulation under which defendant is charged, the Supreme Court, in confirming the conviction, decided that if the public had a right to use land as a street, then it came under the municipal regulation. In the case of the *Queen* v. *Adams* (10 Sheil, 756), relied on by counsel, defendant was convicted under the Police Offences Act for driving a wagon in what was alleged by defendant to be a private footway in Sir Lowry-street, Cape Town. The Chief Justice, in allowing the appeal, is reported to have said in effect that the defendant, having acquired a prescriptive right could not be found guilty under the Act, but added that it was quite possible there could have been some municipal regulation under which the appellant might have been convicted. In view of the above decisions, in so far as the principles are applicable to this case, the extensive powers vested in the Council for the public welfare in respect of footways and sidewalks for over fifty years, and realising the far-reaching and prejudicial effect a judgment in favour of defendant may have upon the public interest, I find the defendant guilty of the offence charged.

Mr. Gardiner for appellant. Mr. Schreiner, K.C., for the Crown.

Mr. Gardiner said that the evidence should be really strong in order to establish actual ownership of the property in question, and he submitted that it was not necessary for him to go so far for the

purpose of this Act as to show actual ownership. But they had for over thirty years used this property in the way charged, and a sort of servitude might be obtained even over a sidewalk. His case was that acts of ownership had been exercised over that property for over fifty years. The property was enclosed until 1872, then the railings were taken down, and trees had since been planted, a verandah had been erected, and the pavement had been kept in repair by the appellants. There was no adverse use against them on the part of the Council. The registered owner of the particular property was the Town Council, but the appellants had acquired a prescriptive title by exercising the rights of owners as tenants.

[[De Villiers, C.J.: Supposing this regulation was not *ultra vires*, was there not a contravention?]

Mr. Gardiner said he would not say that the public had no right of access. He afterwards contended that this particular property was not a side walk, and it was not a stoep which the regulations had power to deal with. As it was a criminal charge, there was sufficient evidence of title to justify the defendant being given the benefit of the doubt.

Mr. Schreiner briefly addressed the Court in support of the conviction.

De Villiers, C.J.: At this stage it is not advisable to express any opinion that might prejudice any case which might be afterwards brought as to the ownership of this property, or as to any right that the applicant might have to put these packages on the pavement. For the purpose of such an action, I should think that the owners of the property, Messrs. Van Zyl, should be the parties. Nothing that the Court can now say will affect any case that may be afterwards brought, and for the present we have only to deal with the case as it came before the Magistrate. The applicant was charged with a contravention of the 37th regulation of the Municipality, prohibiting the placing of goods on any "public street, square, lane, or upon any stoep, pavement, or sidewalk." I suppose we might take it that the "stoep, pavement, or sidewalk," here referred to is such stoep, pavement, or sidewalk as the public has access to. My opinion is that, upon the evidence, the public had a right of access to the stoep in question. It is said that the property had been enclosed up to 30 years ago, but there is no evidence as to when this enclosure began; there is no evidence at all events that this enclosure existed for 30 years before it was removed, and that in that way the owners of the adjoining property had acquired a right by prescription to the property itself. That is not alleged. But then it is alleged that there was such an enclosure up to 30 years ago. Then it was moved, and for a time the public had free access to this stoep, until Mr. Hilliard acquired a lease of the premises, and from the time he acquired a lease of the premises, that is 22 years ago, he was in the habit of placing packages on the stoep when he chose to do so. But in my opinion, that is not sufficient to prove a prescriptive right, either by way of servitude or by way of ownership. The public still had access to the stoep, and although there is no one who did complain of these packages being placed there, still the mere fact that the packages were placed there for a period of over 22 years did not give the applicant any servitude or any right of ownership. The Magistrate, therefore, in my opinion, was right, upon the evidence before him, in convicting the appellant, and it will be now for the applicant, in communication with the owners of the property, if he is advised that he can establish a right, to have this whole matter threshed out, and nothing that is said in the present case will affect the decision of any future case. Upon the evidence before the Magistrate and now before the Court, I think the only course is to confirm the conviction.

Maasdorp, J., concurred.

Mr. Schreiner asked for costs.

Mr. Gardiner argued that the appeal had in no way been a frivolous one, and that no order as to costs should be made.

The Chief Justice said there had been cases in which the Court had allowed costs, but they had been cases in which appeals had been rather of a frivolous nature. He thought, however, that it was not possible to say that the appeal in the present case was of a frivolous nature, and the ordinary course would be followed of making no order as to costs.

[Appellant's Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Sir JOHN BUCHANAN.

REVIEW.

REX V. WISEMAN AND ANOTHER. { 1903. Feb. 5th.

Spliting of charge.

Buchanan, J., said that a case had come before him, as Judge of the week, in which Joseph Wiseman and Dorah Wiseman were charged under what was called the Immorality Act. In the one case they were charged together with having kept, managed, or assisted in the management, and knowingly received a share of the money taken in a brothel. On the evidence they were properly convicted and sentenced. Immediately thereafter the man Joseph Wiseman was charged as a separate offence with knowingly living wholly or partly on the earnings of prostitution. It was clear it was the same charge, and the Magistrate ought not to have split the charge into two in this way. One conviction must be quashed. The woman was sentenced to three months' imprisonment with hard labour, and that would be confirmed. The man was sentenced to three months imprisonment with hard labour on the first charge, and on the second charge to eighteen months' imprisonment with hard labour, to take effect at the expiration of the former sentence, and to receive fifteen lashes. The sentence on the more serious charge would be allowed, and the sentence of three months' imprisonment quashed.

ADMISSION.

Mr. Upington moved for the admission of Benjamin Arthur Tindall as an advocate.

Order granted and the oaths administered.

PROVISIONAL ROLL.

VAN REENEN V. ISAACS.

Mr. Buchanan moved for the final adjudication of defendant's estate as insolvent.

Mr. Wilkinson appeared for the defendant.

Mr. Buchanan said that this matter stood over from Tuesday, so as to enable an answering affidavit to be filed to defendant's affidavit. That affidavit had been made and filed, and as the defendant made continual reference to his agent an affidavit had been obtained from that agent. In this matter a provisional order of sequestration was granted on January 16 last upon a summons, which set forth that the defendant was indebted to the plaintiff in the sums of £100 and £150 on two promissory notes, with interest due, for which judgment was obtained on April 12, 1902, and on which, on September 5, 1902, a writ of execution was taken out, to which a return of *nulla bona* had been made.

Mr. Wilkinson read the affidavit of the defendant, in which the latter said that during the last three years he had bought a number of lots of ground, to the value of £15,450 or thereabouts, and on one of the properties he had expended £1,100. That property had been sold for £3,500, which, to the best of his belief, left him a profit of £900. The price of the property had been paid to his agent. Other properties sold gave a profit of £475, which money, to the best of defendant's knowledge, had been paid to his agent, he (defendant) never having received any part thereof. For the property which he held he had been offered £14,450, but he valued it at £16,000. The bonds on the property amounted to £10,900, leaving him a credit balance of £3,550, taking the value at the offers that had actually been made to him. To the best of his knowledge and belief the bonds of £10,900 were his only debts, except a few small debts, not exceeding £200. He had applied to his agent and tried to get the documents connected with his property from him, so that he might sell part of it and pay his debts, but his agent had always refused to let him have them. He also alleged that his agent had received and collected on his behalf a large sum in rents and also a sum of £1,000, and he had not yet received that. There was also a large

sum of money belonging to him in his agent's hands arising from the leases and from the sale of the properties mentioned. He had instituted an action against his agent for a proper account, and had received from him a statement purporting to show him to be indebted to his agent. Defendant alleged that his agent had omitted from this account large sums of money owing him. As to Van Reenen's claim, he said that instead of owing plaintiff the latter owed him a small sum, and he said that Van Reenen had admitted that.

A replying affidavit made by the plaintiff was read, in which the latter denied defendant's allegations as to his owing him money. He also said that at various times since the judgment had been taken out the defendant had begged him (plaintiff) to allow the matter to stand over and had never set up any claim. When plaintiff wanted him to admit his liability in a document drawn up by an attorney, defendant had said that his word was enough and had refused to sign such a document. The statement that plaintiff had admitted his liability was, he said, an absolute falsehood.

In an affidavit A. W. Steer said that he had acted as defendant's agent up to October last, and considerable moneys had passed through his hands on account of the defendant, for which accounts had been rendered from time to time. The statement in defendant's affidavits as to his not receiving those moneys or any part thereof was an absolute falsehood. In deponent's opinion the value placed by defendant on his properties was excessive. With regard to defendant's allegations that his only debts besides the bonds did not exceed £200, in deponent's own knowledge defendant was heavily indebted in excess of that amount. Deponent had handed to plaintiffs attorneys in November last all the documents in his possession connected with the property, except one on which he had a lien. He had duly accounted for all rents received by him on defendant's account from his several tenants, and the whole amount had been paid by him to defendant in cash during his agency. Deponent denied having received the £1,000 mentioned by defendant. When the summons was issued calling upon him to furnish a full and true account, deponent had put at the inspection of the defendant's attorneys all the vouchers held by him, and had tendered delivery of the said vouchers, but no further action had been taken by the defendant in connection therewith. Defendant was indebted to deponent in the sum of £1,050 2s., of which sum £250 was secured by a mortgage bond.

Mr. Wilkinson said he opposed the application to have the order made final on the ground that the defendant had established, at least in his own opinion, his solvency by the particulars given in his affidavit. Counsel took it that if the solvency of a debtor was clearly established the Court would not take the extreme measure of making the order final, when the result would be the absolute ruin of a man who, if the statements in his affidavit were correct, had been for two or three years carrying on a successful business with regard to the buying and selling of land.

De Villiers, C.J.: If you say that an adjournment of a fortnight might lead to a satisfactory settlement of this, then that would be the best course, because it does seem a pity to sequestrate an estate when a man may have a large balance to his credit.

Mr. Wilkinson suggested that the adjournment be for a month, as a fortnight might be too short a time for the purpose of advertising the sale. He also pointed out a great difficulty that had arisen through the arrest of defendant on Wednesday night upon a Magistrate's Court judgment for a debt of some £60. This was to be paid in monthly instalments of £10 each, and a few days ago the first instalment of £10 had been tendered to the attorneys of the plaintiff in the case in question, but refused, and yesterday it had been again tendered and refused, whereupon defendant was immediately arrested.

Buchanan, J., said that the chances were that the creditor who arrested him ran a very great risk.

Mr. Wilkinson said that it appeared that unless otherwise provided in cases of Magistrate's Court judgments the instalments should be paid into court, and not either to the creditor himself or the creditor's attorney. He mentioned this matter of the arrest to show the difficulties that might arise if the adjournment were made for a fortnight only.

A postponement for a fortnight was allowed, and several other cases in which Isaacs was the defendant, and in which

provisional sentences were asked, were also postponed for a fortnight, as well as a case in which Isaacs was the plaintiff.

HEATLIE V. CAISSE.

Mr. Benjamin asked that this matter be allowed to stand over for a fortnight.

Postponement allowed.

BROAD V. JOCHELSOHN.

Mr. M. Bisset moved that the provisional order for the sequestration of defendant's estate as insolvent be discharged.

Provisional order discharged.

RIDDELL V. CLEWS.

Mr. De Waal moved that the provisional order for the sequestration of defendant's estate as insolvent be superseded.

Provisional order superseded.

GARLICK AND OTHERS V. LEVINE.

Mr. Buchanan moved for the final adjudication of defendant's estate as insolvent.

Order granted as prayed.

STOLTENHOFF V. BRINK.

Mr. J. E. R. de Villiers moved that the defendant's estate be sequestrated as insolvent. The provisional order was granted by the Chief Justice in Chambers on January 27 last.

Order granted.

ASPINALL V. HOWARD.

Mr. Buchanan moved for provisional sentence on a promissory note for £21 15s., value received.

Provisional sentence granted.

HEINEMANN V. RIPSTON.

Mr. C. de Villiers moved for provisional sentence on a mortgage bond for £450, with interest at the rate of 7 per cent. from May 28, 1902, and also that the property specially hypothecated be declared executable. The bond had become due by reason of the non-payment of interest. Counsel also asked for judgment under Rule 329d for £28 1s., less £13 10s. received on account, due for money lent and advanced.

Provisional sentence and judgment granted as prayed, and the property specially hypothecated declared executable.

ILLIQUID ROLL.

KELLER AND OTHERS V. RAPEMEYER. { 1903. Feb. 5th.

Mr. Gardiner moved, under Rule 329d, on a claim that the defendant forthwith transfer to each of the respective plaintiffs their respective shares in a farm. Costs *de bonis propriis* were also asked for.

Judgment granted as prayed.

MITSCHE V. MITCHELL.

Mr. C. de Villiers moved, under Rule 329d, for judgment for £48 10s., for board and lodging.

Judgment granted as prayed.

SAPIERI V. MALGAS.

Mr. Buchanan moved, under Rule 319, on a declaration for judgment in default of plea, for the transfer of certain property bought by plaintiff from the defendant, the plaintiff tendering the purchase price.

Judgment granted as prayed.

BOLUS BROS. V. JACOBSOHN.

Mr. Benjamin appeared for the plaintiff in this matter, and said that he understood that a communication had been made to the Registrar by the defendant to the effect that he was too poor to enter an appearance. In addition, counsel was not quite sure whether this was a matter in which he could ask for judgment under Rule 329d, and therefore it might be better that it should stand over. Judgment was asked for £820 14s. 9d., being the amount of loss and damage sustained

by the plaintiffs on the resale of two Coronation Syndicate shares, which the plaintiffs bought at the defendant's request, and which purchase was wrongfully and unlawfully repudiated by the defendant.

De Villiers, C.J.: I think you ought to lead evidence. It is a case which must go to trial.

The matter was allowed to stand over.

REHABILITATIONS.

Mr. Russell moved for the rehabilitation of Paul Drescher. The estate was compulsorily sequestrated on March 13, 1901, by the Eastern Districts Court. All the claims of creditors, amounting to £660, had been paid in full, leaving a balance in favour of the insolvent. In one paragraph of his report the trustee referred to certain payments as having been an undue preference.

De Villiers, C.J.: There cannot be an undue preference if the creditors are paid in full.

An order was granted as prayed.

Mr. Buchanan moved for the rehabilitation of Nicolaas Albertus Koelenberg, whose estate was surrendered on March 26, 1898, when the schedules showed liabilities, £256, and assets, £142. Debts amounting to £70 4s. 7d. only were proved, and the assets realised £92 10s., so that the creditors claiming against the estate were paid in full.

An order was granted as prayed.

GENERAL MOTIONS.

BLAKE v. BLOMSON. { 1903, Feb. 5th.

This was an application to have a rule *nisi* made absolute.

The applicant's petition set forth that he was a contractor carrying on business in the village of Piquetberg, and he entered into a contract with the respondent, Herman Blomson, to make certain alterations and additions to his premises for the sum of £700, payments on account of which were to be made from time to time. There was some delay in the work owing, applicant alleged, to the fault of the respondent, and when the work was finished there was some dispute as to the amount to be paid for certain extra work which had been performed. Applicant alleged that there were £300 due to him, and he offered to hand over the keys of a certain bar and billiard room on the premises provided the respondent gave security for that amount, so that they could go to arbitration to fix the exact sum due. Respondent did not accept this offer, and it was alleged that he wrongfully and unlawfully upon receipt of the letter broke into the bar and billiard room and took possession thereof, thereby depriving applicant of the possession to which he was entitled as his lien until the money due was paid. It was, therefore, sought to have respondent restrained from continuing in such unlawful possession, and ordering him to quit and forthwith deliver up possession pending an action to be instituted.

The respondent, Herman Blomson, in his affidavit denied that there was any delay on his part, and he also said that the claim of applicant for £300 was excessive in respect of the extra work done. He admitted his liability for a certain amount, and stated his willingness to go to arbitration as to the amount as provided in the contract. He put in a deed of submission to arbitration, which had been signed by him on January 26 last. He also said that he had entered into possession of the bar and billiard room with the full consent of the applicant. He was quite prepared to abide by anything awarded by the arbitrators.

Sir H. Juta, K.C., for the applicant. Mr. Benjamin for the respondent.

After hearing counsel in argument on the facts,

De Villiers, C.J.: At this stage it is difficult to decide the question of fact as to whether there was any agreement between the parties with regard to the taking possession of the premises. The probabilities, however, appear to me to be that the respondent did take forcible possession, and the fact that the applicant still possesses the keys seems to show that he had no intention of parting with the possession of the premises. The Court will, therefore, make the rule absolute, but direct the possession of the premises to be restored to the respondent upon his giving security to the satisfaction of the Magistrate of the district for the sum of £300. It is possible, however, that there was

this arrangement, and that there was no forcible possession, and therefore on the question of costs the respondent should be given a chance to recover these if that should be the case. The question of costs will therefore stand over.

ARDERNE V. THE TREASURER GENERAL.

Stamps Act—Noting of protest by master of ship—Sea Protest.

On the 8th of September, 1902, the master of a ship which had just arrived in Table Bay, signed a document in the presence of a notary public notifying his intention to execute a sea protest. On the 25th of November a formal Notarial protest was executed by and in presence of the Notary.

Held, *that the Sea Protest was executed on the 25th of November and that as the document bore an adhesive stamp for 10s. and was tendered for execution on that day, it was not subject to treble stamp duty.*

This was an application upon notice given to the respondent, calling upon him to show cause why he should not be ordered to cancel the stamp of ten shillings affixed to a sea protest of the British barque Glencairn, and why he should not pay the costs of the application.

The affidavit of the applicant, H. R. Arderne, stated that on November 25, 1902, the master and several members of the crew of the British barque Glencairn called at his office and executed a sea protest, to which a stamp of 10s. was, in the terms of Act, No. 13 of 1870, schedule No. 5, affixed, and the same was tendered on November 25 to Gordon Cloete, Superintendent of Stamps, Licences, and Excise branch of the Treasury for cancellation. The said Gordon Cloete declined to cancel the said stamp, alleging that the sea protest was insufficiently stamped, stating that in doing so he was acting upon the instructions of the respondent.

The replying affidavit of Gordon Cloete was read, in which he said that he refused to cancel the sea protest on the ground that the first note of protest was executed on September 8, 1902, and that the extended protest should have been stamped with a stamp of the value of £2 10s., in accordance with the provisions of Section 14 of Act No. 3 of 1864. He went on to say that it was the custom in fixing the date of execution of a sea protest for the purposes of the said section to take the date of the first entry, note, entry or declaration as the date of execution of the protest, the extended protest, and the note of entry forming one instrument for stamping purposes.

H. R. Arderne, in a further affidavit, said that Mr. Cloete was entirely in error in stating that it was the custom in fixing the date of execution of the sea protest for the purposes of Section 14 of Act No. 3 of 1864 to take the date of the note of protest as the date of the execution of the sea protest. This statement would be amply borne out by a reference to the protocols of the notaries, C. A. Fairbridge, Edward Hull, J. R. Reid, J. S. Merrington, and others filed of record in the office of the Registrar of the Court. Deponent had been in practice in Cape Town as a notary for over 20 years, during which period very many sea protests had been prepared and executed before him. These sea protests had in the majority of cases been executed beyond the period required by the above section for the affixing of the stamp assuming that the date of the note of protest was taken as the proper date from which to reckon such period, but in no case had a fine been asked or sought to be imposed. Deponent submitted that all the officers appointed by the Government to cancel stamps on notarial deeds had taken the date of the execution of the sea protest as the proper date from which to reckon the period for the purpose of the said section. Mr. Cloete was the first gentleman appointed to cancel stamps who had taken up the present attitude in regard to the stamping of sea protests. The sea protest was not a continuation of the note of protest. They were separate and distinct documents.

The affidavits of several attorneys in Cape Town and Port Elizabeth were read, supporting the contentions of the applicant as to the custom in regard to the stamping of sea protests.

H

. J. A. Reid deposed that he was an attorney-at-law and notary public, practising in Cape Town, and was the senior partner of the firm of J. H. Reid and Nephew. A considerable number of sea protests had been executed before him, and it had been the custom for some years past, in stamping the extended protest, to take the date of the first note of protest as the date of the execution of the extended protest, and the deeds executed before him had been stamped accordingly.

Sir H. Juta, K.C., for the applicant. Mr. Evans for the respondent.

After hearing counsel,

De Villiers, C.J.: It is common cause in the present case that the document in question is a sea protest, and that as such it would require a 10s. stamp if tendered within 21 days after its execution, that it would require a £1 stamp, if tendered after 21 days and before 42 days expire, and that it would be liable to a stamp of £1 10s., that is treble the original stamp, if tendered after 42 days and before 62 days had expired. Now the question to be decided in this case is, was this document tendered within 21 days? The date of the instrument is November 25, 1902, and it was tendered for cancellation on November 25, 1902. If, therefore, it was executed on the date on which it purported to be executed the stamp of 10s. was sufficient. But it is said on behalf of the Crown that, although this instrument purports to be executed on November 25, the date of execution must be taken to be September 8, because on that date the master of the ship had notified to the notary his intention of making a protest. Well, on a reference to that document itself, which has been produced before the Court, it is seen that that document is not in any sense a notarial protest. It is simply a document executed by the master, not certified to in any way by the notary, and the master simply gives notice of his intention to protest. In my opinion, that is not in any sense of the word a sea protest. The term sea protest implies that there has been a protest of some kind, a protest by or before a notary, and here no protest whatever has been made until November 25, when this document was executed. It is said that if there has been a wrong practice up to the present time, that is not a reason why that wrong practice should continue. I quite agree with that argument, but the fact that for nearly 40 years notaries have been in the habit of treating noting of protest as not being a formal protest would go very far to show what the real effect of noting of protest is. In my opinion, the noting of the protest by the master does not constitute the formal sea protest which requires a stamp, that it is not a notarial document in any way, that it is not necessary that it should be a notarial document, and that it is not a protest by a notary which would justify the Court in holding that stamp duty is payable in respect of the document in question. The application, therefore in my opinion, must be granted with costs.

Buchanan, J., concurred.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton; Respondent's Attorneys: Reid and Nephew.]

MCBEAN V. SOUTHERN LIFE ASSOCIATION.

Mr. Russell, on behalf of the defendant, moved for leave to sign judgment against the plaintiffs for not proceeding with their action, and also asked for costs of the present application.

Order granted as prayed.

FORBES AND OTHERS V. TIMBER SUPPLY CO.

This was an application for leave to appeal to the Privy Council.

Mr. Schreiner (with him Mr. Searle) said that the only question that arose practically was in what way the Court would direct that the judgment would in the meanwhile be dealt with. Judgment had been given in the Court below for £7,000. The defendants were now asking for leave to appeal so as to keep open their rights, though it did not necessarily follow that the appeal would be prosecuted.

Sir H. Juta, for the respondents, said his instructions were to consent on the usual conditions, but it seemed to him that this was only a side issue to obtain an expression of opinion from the Court as to what would be the amount which out of the £7,000 would have to be distributed.

The Court granted leave to appeal, and suspended execution on the payment of

£7,000 on the liquidators, giving security to the satisfaction of a judge of the High Court of Southern Rhodesia to abide the judgment of the Privy Council and the costs of the appeal.

LEIBBRANDT V. THE TOWN COUNCIL OF CAPE TOWN. { 1903. Feb. 5th. „ 6th.

Trespass—Interdict—Town Council—Act 26 of 1893, Sec. 138—Compensation.

The Town Council of C. had entered upon applicant's property for the purpose of constructing certain drains. They were willing to pay compensation for any damage done, when the work should have been completed, but not before. Applicant now sought to have a rule nisi *which had been granted, interdicting the Council from trespassing on applicant's land made absolute.*

Held, *that as the Council was justified in its action by Sec. 138 of Act 26 of 1893 and as it was a responsible body well able to pay such damages as might be awarded to applicant, the rule must be discharged.*

This was an application to have a certain rule *nisi* restraining the respondent Council from trespassing on the applicant's property made absolute.

The applicant's affidavit showed that she was the owner of certain premises in Jameson-street, and that the Council were constructing a large brick drain along the said street. The Council had given her notice that they proposed to construct a drain across her premises in order to carry away the storm water, but they had already certain land near by where they could construct the drain. The Council's employes had already trespassed on her premises in order to commence the excavations.

Sir H. Juta, K.C., for applicant. Mr. Schreiner, K.C., for respondent.

Mr. Schreiner said that the Council's position was that section 133 of the Act of 1893 empowered them to construct sewers and so forth as should be necessary from time to time so as to effectually drain the municipality, that due notice was given to the applicant of their intentions, and that no objection was raised until some time afterwards. The Council contended that the works proposed were not calculated to impair, but rather improve, the value of the applicant's property, and that they would be prepared to pay such compensation for any injury or damage done as the applicant was entitled to. Besides, this drain would go underground and would replace a ditch on the surface.

Sir H. Juta said that there were two points that he wished to bring before the Court. He maintained that this section gave the Council no power to expropriate land. According to his learned friend's arguments, if he had a piece of property in Cap Town, and the Town Council wanted to run a sewer through it, they could take up as much of his land as they chose, only paying for the damage, not expropriation.

[Buchanan, J.: That would generally come under costs. It is only another way of doing the same thing.]

Sir H. Juta said the Council had got clauses dealing with expropriation, but this was not an expropriation clause, and therefore it did not deal with any new sewerage works and entitle them to go and cut up any person's land. What about all the months when the plaintiff would not be able to use the land owing to the works proceeding?

[Buchanan, J.: That would come under the compensation.]

Sir H. Juta said that was not how the Council read the clause. They regarded it as a clause simply for the payment of damages. They said that the applicant's property would be improved by the sewer and they would have everything nicely filled up again, and that she could use it for building purposes and where, then, was the damage done? Their position was not that they were going to pay, or that they were bound to pay one penny for all the time that the applicant was kept out of possession. They had no right to go and take private property to make a sewer across it. If they wanted to do that they wanted an expropriation power, just as the Government or any private railway would to lay two rails across a person's land.

[Buchanan, J.: If she suffers damage by the work being done she is entitled to compensation.]

Sir H. Juta: That is not their view. The Council must also have right of access to the sewer for maintenance. Then how, I ask, is the applicant to build on the land. Are we going to have arbitration proceedings every time the Council wants to inspect the drain? I submit that this particular clause was never intended to apply to cases where new sewers were being laid through private property.

[Buchanan, J., said he would take time to consider his judgment.

Postea (February 6th).

Buchanan, J., in giving judgment, said: This is an application to make absolute a rule *nisi* which was granted interdicting the Town Council of Cape Town from trespassing on the property of the applicant, Mrs. Leibrandt. The Town Council now justify what they intend to do under the 153rd section of their Municipal Act, which provides that where the Council find it necessary to cause sewers, drains, and pipes to be made or laid for the purposes of the Municipality, they may, if needful, carry such sewers, drains, pipes, etc., through and across private lands or beneath or against private buildings, and make compensation for any damage done, which compensation shall, if not mutually agreed upon, be settled by arbitration. In this case the applicant says that no agreement has been come to between her and the Corporation as to the compensation to be paid. The Corporation contend that under this section they are entitled to carry out their works, and afterwards, when the works are completed, and when the damage done can be correctly ascertained, they will pay compensation. There are two principles generally adopted by the Legislature when entrusting powers to public bodies affecting private property. They generally lay down that the interest of the private individual must give way to the public interest, but they safeguard this by the rule that where private interests have suffered, due compensation is to be made for any injury caused. These principles have been regarded in the case of the Cape Town Municipal Act. In this case the persons who are going to do the injury are a responsible body, and can well pay for any injury which may be done at any time, either before or after the injury is done; and thus there is no risk run by the applicant of not getting compensation. It is true that the section in question does not in express terms give the Corporation authority to enter before the question of compensation is settled, as is given to the Government in the Railway Acts, but after careful consideration, I think that by implication this section gives a similar power. It says that compensation is to be made for any damage done. Now until the work is completed, it is not easy, even if not impossible, to ascertain exactly what damage may be done by the proposed work. As I said before, the applicant is quite secured in having a responsible body against which she can recover, while the amount to be paid cannot be satisfactorily settled until after the work is done. No doubt, the Corporation wish to restrict the damage to such damage as may ultimately result to the property after the whole work is done; but I think Sir Henry Juta is right in contending that the applicant is entitled to any damage which she may suffer through the work being done, whether suffered while the work was being done or ultimately. Only that the amount of such damage can be better ascertained when the work is completed. Therefore, I think that the Corporation was entitled to enter upon the property and do the work, and then, when the work is completed, to either agree with the applicant as to the amount to be paid, or, if the parties cannot agree, to refer the matter to arbitration, and let the arbitrators settle the damage suffered by the applicant by the invasion of her private rights. Under these circumstances, I think the rule *nisi* granted in the case must be discharged, with costs.

[Applicant's Attorneys: Reid and Nephew; Respondents' Attorneys: Fairbridge, Arderne and Lawton.]

SAACKS BROS. V. RONDEBOSCH MUNICIPALITY. { 1903. Feb. 5th.

Municipal regulations—Sanitation.

Applicants called upon the Municipal Council of R. to show cause why they should not be ordered to pass and approve of plans for certain 22

cottages which the applicants wished to build on a certain piece of land measuring 180 by 200 feet which was their property. The Municipal Council objected to the erection of so many cottages on a small piece of land on the ground that they would be necessarily insanitary, unless one access was given for necessary sanitary purposes to the back of these cottages. The applicants were willing to provide a 6 foot passage but nothing more.

Held, *that the Council had not acted unreasonably in refusing to approve of the plans, and that the Court therefore would not interfere with the exercise of the powers vested in them by the legislature.*

Sir H. Juta, K.C., moved on behalf of the applicants, who are builders, for an order directing the Rondebosch Municipality to pass certain plans which they had sumitted to the Council. Mr. Schreiner, K.C., appeared for the respondents

The applicant's affidavit set forth that they submitted to the Council for their approval plans of nine cottages and a shop in Duinefontein-road, and twelve cottages facing a road running parallel therewith, and that for sometime they heard nothing further from the Council about the plans. Subsequently, after certain negotiations, they received a letter from the Council stating that they required a road 20 feet wide running on the north and south of the property, or one in the centre, instead of the lane 6 feet wide shown on the plan, and a 20 feet road running east and west, and connected with the other 20 feet road, so as to give access for the sanitary carts to call and discharge their duties. The Council also intimated that, unless the said roads were constructed, they would not undertake to carry out any sanitary services. The applicants said that the plans showed proper access to the property by a 6 feet cemented passage way in the centre of the block, and that such access was in excess of the requirements of Cape Town and other municipalities. Considerable open space was provided for each cottage in excess of the requirements of the Cape Town regulations, which were very stringent on this point. In the event of the adoption of a proper drainage system, which was in contemplation, the roads which were proposed by the Council would be of no use whatever.

The affidavit filed on behalf of the Council set forth that the plans were rejected for sanitary reasons, and the plans had been taken away, to be re-submitted with amendments. The roads required by the Council would give the necessary facilities for dealing with the refuse from the property. The plans submitted by the applicants showed that the houses which they proposed to erect were designed in such a way as to give an extremely narrow width to each house. It was also pointed out by the Council that there had been an outbreak of typhoid fever in the vicinity of the property.

Sir H. Juta said the Council, by not expressing their approval or disapproval within the time laid down by their own regulations, were estopped from raising any objection to the plans. The regulations were perfectly clear that within fourteen days of receiving notice, plans, sections, and schedules, they must either approve or disapprove of the plans, and if they did not disapprove within fourteen days, they should be deemed by these regulations to have sanctioned such plans, sections, and schedules. He had been through the regulations from A to Z, and there was not a word to show that the Council could insist on a road being constructed so that the sanitary cart could go to the back door, or the back yard, or wherever the refuse may be.

Two points have to be considered in this case. (1) Whether the Council have not by not objecting within 14 days estopped themselves from objecting now. The Council have no regulation providing that I must make a road to enable them to bring their carts to my back door, and that is my second point.

Mr. Schreiner, K.C.: In reference to this case, see sections 47 and 96 of Act 20 of 1890. *Clark* v. *Town Council of Cape Town* (4 Sheil,

42). *Heynes* v. *Rondebosch Municipality* (11 Shiel 792). In that case the same defence was set up as in the present case. People have no right to put up a number of cottages without any sanitary conveniences. We do not say that you must make roads, but we do say that if you put up small cottages, you must give access to the sanitary authorities. It is quite possible that there may be worse places than these cottages, but I submit that this Court will support the Council in its action. It is absurd to say that because 14 days had elapsed before the Council objected that they could not thereafter object. A municipal body must be allowed a certain amount of discretion, and unless *mala fides* can be shown in the exercise of this discretion, the Court will not interfere.

Sir H. Juta (in reply): The Municipality does not object to these places. The houses are not said to be insanitary; but the Municipality want a road of 22 feet wide that the sanitary men may not spill stuff. The case of *Clarke* v. *Town Council of Cape Town* is not in point. In that case the house was insanitary. Here the only objection is as to access to the houses. There is no *bona fide* objection as to the building itself. Any typhoid fever which may exist in the neighbourhood can be traced to the washhouse of the Municipality. As to the second point urged on behalf of the defendants, if the Town Council has once approved of these buildings, it cannot afterwards withdraw its approval.

Buchanan, J.: This is an application calling upon the Rondebosch Municipal Council to show cause why they should not be ordered to pass and approve of plans for 22 cottages, which the applicants wish to build upon a piece of land, some 180 feet by 200 feet, situated between Duinefontein-road and another road in the Rondebosch Municipality. The Government of this country have vested local bodies with the control and regulation of their different Municipalities, and have given them certain powers. The Rondebosch Municipality under the Act have the power to regulate building and sanitary matters within the Municipality. The Act also allows them to make regulations for carrying out these purposes, and regulations have been duly passed. Under these regulations application was made to the Council to sanction the erection of certain cottages. The applicants allege now that as their plans submitted to the Council were not disapproved of within the fourteen days mentioned in the regulation, the consent of the Council must be taken as implied. If that be so, and the consent of the Council has thus been given, there is no necessity for the application calling upon the Council to show cause why they should not give their consent. But I take it on the affidavits that this question does not now arise, as it is not clear that the fourteen days mentioned have expired. It is stated positively on the one side that after the plans were first lodged they were taken back for amendment and then returned, and that fourteen days had not expired between then and the notice of disapproval of the plans. Now a Council or public body must not act unreasonably in the exercise of the powers entrusted to them for public purposes, nor may they act on improper motives in refusing to give their consent in cases like this. The question we have to consider is whether or not the Council was unreasonable in refusing its assent to the plans, or has been actuated by improper motives. A case has been decided in this court in which the Municipality were held entitled to prevent the cutting up of land within the Municipality for building purposes in such a way as to interfere with the due sanitation of the buildings which might be erected upon small lots of land. In this case the applicants do not wish to cut up the land into small lots for building purposes. The Municipal Council of Rondebosch, in the exercise of the powers vested in them for securing the welfare and well-being of the inhabitants, say that the building of a number of small cottages on a small piece of land would necessarily be insanitary unless due access were given for necessary purposes to the back of these cottages. Some of these cottages, it has been pointed out, would only have a 14-foot frontage altogether, and it will be necessary to get to the back of these for the purpose of sanitary removals. The Council say, "We will not object to your crowding the property to this extent if you will give us a proper road to

enable our carts to get to the back," but the applicants object to this and say, "We will only give a 6-foot passage." I only go into these details to show whether there was such unreasonableness on the part of the Council as to justify the Court in granting the order, and I cannot say that the Council has acted unreasonably in refusing to approve of the plans. No improper, sordid, or any other irregular motives are imputed. As there is no want of *bona fides*, the Court cannot under these circumstances interfere with the Council in the exercise of the powers vested in them by the legislative authority to protect the interests of the inhabitants. The application will therefore be refused.

[Applicants' Attorneys: Tredgold, McIntyre and Bisset; Respondents' Attorneys: Reid and Nephew.]

DE KOCK V. BAILEY.

Mr. Russell appeared for the applicant De Kock in this matter, and asked leave to withdraw the election petition filed by the applicant against the return of Mr. Abe Bailey as member of the Legislative Assembly for the district of Barkly West. Applicant now confessed that he was not in a position to deny the qualifications of the respondent for election as a member. He therefore desired to withdraw his election petition, and said he was willing to pay all costs incurred.

Mr. Schrener, K.C., who with Sir Henry Juta, K.C., and Mr. Benjamin, appeared for the respondent, consented to the application.

Buchanan, J.: Of course there is no collusion.

Mr. Schreiner said there was not, and he pointed out that while the Court had power to direct that a rule nisi be issued calling upon all concerned to show cause why the application should not be granted that was not necessary here. It was simply a question of qualification upon which the petition had been filed and no improper conduct was alleged against the respondent.

The application was granted, applicant to pay all costs incurred.

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., and the Hon. Sir JOHN BUCHANAN.]

TROMP V. BROWN. { 1903. Feb. 6th.

This was an appeal from a judgment of the Resident Magistrate of Fraserburg in a case in which the present respondent, Brown, sued Tromp for the return of certain eleven Africander sheep, or their value, £11. In 1901 Brown was employed by Tromp as his overseer on his farm, and there was also a shepherd there by the name of Jefta Witbooi. In September, 1901, Tromp was sentenced to a period of imprisonment by a military court at Fraserburg, and was sent away, leaving Brown and one Solomon van Schalkwyk to superintend his farm business. During his absence the shepherd, Witbooi, left his service, and before doing so he demanded his stock, which were running with those of his master. Neither Tromp nor Witbooi had any specific ear mark or any other mark distinguishing their animals, and in the presence of Brown, Van Schalkwyk and Mrs. Tromp, Witbooi picked out his sheep and goats from the kraal, and they were satisfied that the animals were his property. Thereafter Brown made an exchange with Witbooi, giving him a cart for ten sheep and one goat. Witbooi took the cart and left, while Brown left the sheep and goat with those of his master. On the return of Tromp he was informed of the transaction of Brown and Witbooi, and he then told Brown that seven of the sheep and the goat were his property, and stolen from him by Witbooi, and he demanded them back. At the same time he had Witbooi arrested and charged with the crime of theft. Brown, believing his master left the sheep with those of Tromp, who had afterwards taken the other three sheep as well. In the meantime Witbooi awaited his trial, which, owing to martial law, could not come on at the first circuit. When the trial took place before the Circuit Court at Beaufort West, Witbooi was found not guilty, and Tromp was ordered to restore his property. Witbooi went to Tromp's farm to obtain his stock, but Tromp purchased them from him. Even then Tromp did

not know Witbooi's stock from his own, as they had no distinguishing marks. Thereafter Brown demanded his sheep from Tromp, but the latter refused to give them up. Seeing that the sheep had been in Tromp's possession all the time, and that Witbooi had been found not guilty of stealing the very sheep which Tromp detained, the Magistrate gave judgment in favour of the plaintiff Brown for the delivery of the sheep, or their value, £11. Against this judgment the defendant Tromp now appealed.

Mr. Burton appeared for the appellant; Mr. Searle, K.C., appeared for the respondent.

After hearing counsel on the facts, the Court dismissed the appeal, with costs.

De Villiers, C. J.: It is not denied in this case that the plaintiff has given full value for the sheep. On the return of the plaintiff from his banishment he claimed the sheep as his own. The question of the ownership of these sheep was directly tried by the Circuit Court, because Jefta Witbooi, who had handed these sheep to the plaintiff, was tried for the theft of these very sheep, and he was acquitted. After that this action was brought. In my opinion the Magistrate was justified in holding upon the evidence that the sheep belonged to Jefta Witbooi. There was evidence before the Magistrate that the fendant's own overseer, Schalkwyk, counted out these sheep, and was present when Jefta took them and raised no objection. Mrs. Tromp was also present, and raised no objection, and these were the persons who had been left in charge by the defendant when he left the farm. In addition to that we have the fact that the jury has found that Jefta did not steal the sheep. Under these circumstances I think the Magistrate was justified in holding that there was evidence that the sheep did belong to Jefta, and that Jefta was justified in selling them to the plaintiff. The appeal must therefore be dismissed with costs.

Buchanan, J., said that he had only one remark to make, and it had reference to the legal effect of the acquittal of Witbooi. He did not think that the trial of Witbooi for the theft of these sheep necessarily disposed of the case between Tromp and Brown. If Tromp had been able in the civil case clearly to establish his ownership the mere fact of the acquittal would not have prevented him getting the sheep. But the fact that the jury, after hearing the evidence, said that Witbooi was innocent of theft was very strong evidence to go before the Magistrate as to the ownership. His lordship concurred in the dismissal of the appeal.

[Appellant's Attorneys: Van der Byl and Van der Horst; Respondent's: Tredgold, M'Intyre, and Bissett.]

KAPLAN v. HANEKOM. { 1903 Feb. 6th.

Soldier — Obedience — Order of Superior Officer.

The defendant being a soldier received an order from his superior officer to collect the mules which the Boers during the recent war had left behind and to take them to G. Among the mules so left behind was a mule which the Boers had taken from the plaintiff and which the defendant now collected with others, and took to Garies. The plaintiff did not get back his mule and sued the defendant for his wrongful act in taking the mule.

Held, *that the order given to the defendant was not a manifestly illegal one and that as he was bound to obey the order he was not liable for damages.*

This was an appeal from a judgment of the Acting Resident Magistrate of Namaqualand in a case in which the present appellant (Kaplan) summoned Hanekom for the sum of £30, being the value of a certain mule, the property of the plaintiff, alleged to have been unlawfully removed by defendant. Before the case was proceeded with in the Court below the Magistrate pointed out to the plaintiff's attorney that the amount sued for was in excess of the jurisdiction of the Court, and ultimately an amendment of the summons, reducing the claim to £20, was allowed, the defendant making no objection. The facts of the case were

that a mule, the property of the plaintiff, was left on the farm of J. C. and D. J. Coetzee at Doornkraal, and this mule was taken by the defendant from the farm about the middle of August, 1902. The defendant, when removing the mule, was a corporal enrolled in the Namaqualand Border Scouts, a force enrolled under the Imperial Army Act, and was subject to the orders of Captain Hodge, the Commandant of Garies, who also had jurisdiction by virtue of martial law over that part of the district, in which the farm Doornkraal is situated. The mule in question was taken by the enemy from the farm Doornkraal, but ran away from the Boers and found its way back to the farm at the end of July or beginning of August. The defendant Hanekom received orders from Captain Hodge to collect all derelict stock which had been left by the enemy and bring them in to Garies, and it was in carrying out this order that he removed the mule from the farm Doornkraal. The Magistrate, after hearing the evidence, gave judgment for the defendant, with costs of suit.

The Magistrate gave his reasons for his judgment as follows: The defendant was bound to carry out the orders of his superior officer, subject to certain limitations which, with one exception, need not be entered into, as they do not exist in this case. The plaintiff contended that as war had ceased the military authorities had no right to take his mule on the date they did. The question as to whether he had lost his ownership by the seizure of the mule by the enemy need not, in my opinion, be decided in this case. As far as the defendant was concerned the order issued by Captain Hodge seemed to him to have been a reasonable one, and one which, if he had neglected to carry it out, would have subjected him to severe penalties. With this honest belief, with no malice against the defendant whatsoever, and in good faith, the defendant, who is a respectable European farm assistant, when he learnt that the mule had been in the use of the enemy, took it and delivered it at the military camp at Garies. In my opinion, therefore, there is no liability attached to a soldier in carrying out the orders of his superior officer under the circumstances disclosed in this case, and judgment was accordingly entered for the defendant, with costs of suit.

Mr. Burton appeared for the appellant; the respondent was in default.

De Villiers, C.J.: The defendant was in the position of a private soldier, bound to obey orders given to him by his superior officer. If his military superior gave an order which was manifestly illegal the private soldier would be justified, and in some cases bound, to refuse the order. Now, can it be said in the present case that the order given by the superior officer was manifestly illegal? It is true that the war was over, but it had not been over very long, and the superior officer told the defendant to collect the horses, mules, wagons, and carts that the Boers had had in their possession and had left behind. This mule was one of the cattle which had been in the possession of the Boers, and in one sense the Boers had left it behind because they had gone away, leaving the mule there. It is true that the mule had of its own accord left the Boers, but the Boers had also left it behind, because they left the place without going back for the mule, and therefore this mule, in my opinion, fell within the terms of the order given to the defendant. He obeyed that order, and all he did was to take this mule to Garies. The object of his commanding officer may have been to collect all the stock so as to take it to one place to be claimed and identified by the true owners, in which case the order, so far from being manifestly illegal, would have been manifestly legal. It would have been a different matter if the mule were still in the defendant's possession, for the question would then have arisen whether the plaintiff was entitled to vindicate his property found in the possession of the defendant. The Magistrate was, in my opinion, right in holding that the defendant was not liable for obeying the order of his superior officer, and the appeal must be dismissed with costs.

Buchanan, J., concurred, and added that the appeal was dismissed totally irrespective of any question arising out of the Indemnity Act.

[Appellant's Attorneys, Michau and De Villiers; Respondents in default.]

Ex parte TURNBULL.

Mr. Alexander moved in the matter of the petition of John Parker Turn-

bull for an order authorising the Registrar of Deeds to amend an antenuptial contract. It was stated that the Registrar refused to register a bond for £1,700 on the ground that the petitioner's name was inscribed in the antenuptial contract as John Turnbull, and that an order was now sought authorising the Registrar to alter his name on the contract and register the deed.

Order granted as prayed.

Ex parte MILLS AND ANOTHER.

This was an application by Mr. Close for an order authorising the transfer of certain property.

Order granted as prayed.

Ex parte HEMBERT.

Dr. Greer moved on behalf of petitioner for an order authorising the Master to pay to George Peter Heffer, a minor, the sum of £225 out of the estate of his father, who died intestate, in order that the said minor might qualify as a photographic artist.

Order granted as prayed.

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr Justice MAASDORP.]

DE WIT BROS. V. HARTSLIEF. { 1903. Feb. 9th.

Mr. Gardiner moved for judgment in terms of consent paper for taxed costs up to date of judgment, and a reference of the accounts between the parties to the 6th January, 1903, and further moneys in dispute to Mr. Cameron, bookkeeper, Tarkastad, as arbitrator.

Judgment was given in terms of the consent paper.

ROSENBERG V. HENDRICKS AND ANOTHER.

This was an action for work done, Mr. Benjamin being for the plaintiff and Mr. Russell for the defendant.

Mr. Benjamin moved for judgment for the sum of £275, with costs, in terms of consent paper subject to the consent paper being amended so as to conform to the rules of Court.

Judgment was given in terms of the consent.

GOTTSCHALK BROS. V. FAURE.

Landlord and tenant—Ejectment Damages.

This was an action for ejectment and damages brought by the Gottschalk Bros., shopkeepers, Stellenbosch, against P. H. Faure, also of Stellenbosch.

From the pleadings it appeared that the plaintiff was the lessee of certain premises in Stellenbosch belonging to defendant, and the defendant was the sub-lessee of two rooms in the said premises on a monthly tenancy. On the 30th September last plaintiff gave defendant a month's notice to deliver up possession of the two rooms, but defendant had failed to do so, and the action was for an ejectment order and £30 damages for wrongfully and unlawfully continuing in possession of the rooms. The defendant agreed to let the premises to the plaintiff and his partner, Mr. Lapin, in March, 1899, at a rental of £5 10s. per month for the first two years and £5 15s. per month for the remainder of the term. The plaintiff and Mr. Lapin afterwards dissolved partnership, and the business was continued by the plaintiff. The question between the parties was whether the two rooms were sub-let to the defendant by the month until the plaintiff should require them or whether the rooms were formally given up by the plaintiff and his partner in consideration of the rent of the rest of the premises being reduced by 30s. per month.

Mr. Benjamin (with him Mr. Bisset) for the plaintiffs. Mr. Close (with him Mr. Russell) for the defendant.

Herman Gottschalk, the plaintiff, said he went to Stellenbosch in 1898 for the purpose of starting business there, and that he afterwards arranged to lease premises from the defendant for a term of five years.

Mr. Benjamin said that he must draw the attention of the Court to the fact that the copy of the lease produced was not stamped.

Mr. Close said that the original agreement was also unstamped.

Buchanan, J.: What is the amount of the stamp due?

Mr. Benjamin: £2.

The plaintiff, continuing, said that under the lease the tenancy was to commence on the 1st March and three or four months afterwards the defendant came to see him, and said he had got a bottle store licence for the premises, and asked him to let him have two rooms until he could secure a transfer of the licence to the next premises. Witness replied that he would be able to let him have two rooms for the present, and he should require monthly payment of rent, and the tenancy must be by the month. In spring, 1902, witness saw the defendant about giving him notice, and informed him that he should want the premises before the fruit season opened for fruit-packing purposes. The defendant replied he would first see Mr. Bosman in regard to the transfer of the licence, Mr. Bosman was the present licence-holder. Witness's attorney gave the defendant notice to deliver up possession of the two rooms on the 31st October, explaining that he regretted to have to take this step, which was necessary owing to the extension of his premises. At the end of November plaintiff tendered a cheque to Mr. Faure for the full rent, £5 15s.; but a letter was received in response from the defendant saying that the amount was altogether wrong, and that it should be £4 5s. Defendant had not left the premises. While the defendant's tenancy was continuing, it had been the custom for the rent of the rooms to be paid by the defendant, or 30s. to be deducted from the rent paid by the plaintiff to the defendant.

Cross-examined by Mr. Close: He had been in partnership with Mr. Lapin. Witness was the manager of the business. Lapin was not present when he made the arrangement as to sub-letting the rooms to Mr. Faure. Mr. Faure asked him for a lease, but he refused to agree to anything beyond a monthly tenancy. For two or three months after commencing the business witness and his partner occupied the two rooms in question for sleeping purposes.

D. F. Bosman, partner in the firm of Bosman, Powis and Co., said that in June 1900 he entered into a lease with the defendant for the two rooms for a term of five years, with the option of renewal for a further term of five years. The defendant called upon him in December last, and did not act quite straight on that occasion. He said that he had had a good offer for his premises from a man in the Free State, but the man did not want to have a bottle store there, and Mr. Faure asked witness if he would be prepared to take two rooms in the next premises. Witness said that he did not care to move in, but he would move in provisionally. He was prepared to remove to another place afterwards, and then he would give the defendant £300. Of course that was subject to the defendant raising no objection to the witness's taking the bottle store to another place. The licence would then be on witness's property instead of on the defendant's. Defendant then said, "Look here, give me a note to that effect." Witness entered into a provisional arrangement accordingly, but later in the day the defendant came to him and said he had told an untruth, and that he had not acted straight; that he was in trouble with the man to whom he had let the property. Witness said he would be coming to Stellenbosch shortly, and he would try to arrange a settlement between the defendant and Mr. Gottschalk. Witness told him that he had let the place to two parties, and that he would give him £300 if he would consent to allow him (Mr. Bosman) to have the licence taken elsewhere, thus giving him back the two rooms. The defendant admitted that he had made a fool of himself, and that he had let the two rooms to two parties. He also admitted that he had hired the place on a monthly tenancy, and explained that he had thought he would never have any difficulty with the plaintiff; but they had some dispute about some chaff.

Cross-examined: He did not think that the licence that the defendant had was worth more than £300. He would have given the defendant £300 if he had consented to the removal of the licence to other premises.

Mr. Benjamin closed his case.

The defendant, Pieter Hendrik Faure, said he was the owner of the premises. He got a bottle-store licence granted by the Licensing Court on the first Wednesday in March, 1899, and he went and saw Lapin and Gottschalk, who were in the place, and told them that his application for a licence had been successful. He told them that he should like to have the two rooms, and asked if they would be willing to let him have them. The two men had a conversation in German or Hebrew, and then Lapin said that they

would be able to let him have the two rooms, and that they would want £2 a month for them. He said that £2 was more than he cared to pay, and then they agreed upon 30s. Before he left he said to the two men: "Then we understand each other well; these two rooms are mine in future, and have nothing to do with the contract." Pointing to the wall, he added, "This wall is our future boundary wall." Lapin said, "They are yours entirely; we have nothing more to do with them." The plaintiff was present at the time this conversation took place. With regard to the cheques which had been produced by the other side in cases where the amount was £5 10s., he returned 30s. per month. In September last he had a dispute with the plaintiff about some chaff, for which the plaintiff had to pay, and next day he received a notice to quit the two rooms on the following day. Mr. Bosman came to see witness in August, and offered £300 to him for his licence. Witness told him that he could not sell at that price as he was drawing £69 a year from the place. Subsequently he received a summons from the Court for £30 damages, and as he did not want to go into Court he determined to see Mr. Bosman about the licence. He told Mr. Bosman that he had had an offer for the premises, and asked him if he would be prepared to go into the next premises. He emphatically denied that he ever told Mr. Bosman that he had made a fool of himself, and had let the rooms to two people, or that he said that he had hired the two rooms from the plaintiff on a monthly tenancy. He was afraid that Mr. Bosman would offer him nothing for the licence, and that was the reason why he resorted to the untruth in order to get the note from him. He took care, however, before he returned to Stellenbosch to go again to Mr. Bosman and tell him the real position of affairs.

Cross-examined by Mr. Benjamin: He told the untruth to Mr. Bosman in order to get an offer from him.

Mr. Benjamin: Are you telling an untruth now, Mr. Faure, in order to get anything from Mr. Gottschalk?

Witness: No.

Cross-examined: Witness did not accept Mr. Bosman's offer of £300 because he thought it was too low. He asked Mr. Bosman £500 for the licence. He applied for a licence for the two rooms, although he knew that he had already let them to the plaintiff and his partner.

Theodore Lapin, a partner of the plaintiff, said that he was one of the parties to the lease. Mr. Faure told witness he had applied for a licence, and that if he got it he would have to get the two rooms back. Nothing was said about it in the lease. Before the lease was entered into nothing was said about getting the rooms back. It was said then that the matter could be arranged. About a month or five weeks afterwards plaintiff came to them and said that he had got the licence, and wanted the rooms back again. At that time plaintiff could not talk much English, and witness conducted the negotiations. They spoke in German. Witness arranged to let Faure have the two rooms back again as long as the lease continued, as they were useless to them. They were to let him have them back for £2, but afterwards agreed to make it 30s. Witness's partnership with plaintiff was dissolved in August, 1899. Since then witness had been in Port Elizabeth, and had not seen Mr. Faure until he came to Cape Town last week.

Cross-examined: Witness had no particular dispute with plaintiff. He simply said he did not want to be in partnership with him any longer. After the dissolution witness was quite good friends with plaintiff. There was a case against witness in Johannesburg, but witness declined to state particulars of that case.

Re-examined: Plaintiff knew nothing of this case at the time he entered into partnership with the defendant. If the gentleman (Mr. Benjamin) wished to know all about that case witness would tell all about it, as there was nothing against him (witness). The cheques were drawn up for £5 10s. because they did not wish to interfere with the written arrangement.

This closed the evidence.

The argument was chiefly on the facts, but Mr Benjamin cited the case of *McNair and Cordiner* v. *Fachs* (12 C.T.K., 1020).

No authorities were cited on the other side.

Buchanan, J.: The defendant in this case was the owner of certain property at Stellenbosch, which he let to the defendant and his partner, one Lappin. The lease, which is in writing, was for

five years, commencing from the 1st of March, 1899. Prior to the execution of this lease defendant had applied to the Licensing Board for a bottle store licence, but as he himself stated, he did not expect it would be granted, so that no mention was made of it at the time of the lease. After all he got the licence, whereupon he approached the plaintiff, then in possession, and asked him to surrender two of the rooms. The plaintiff did surrender two of the rooms, and the defendant went into occupation of them. The question in dispute between the parties is the terms upon which these two rooms were surrendered. The plaintiff alleged that the defendant took the two rooms from him as a monthly tenant at a rent of 30s. per month, so that possession could be recovered on a month's notice being given. The defendant, however, said that what was agreed upon was that the two rooms should be given back and that the original contract should be altered to that effect, with a deduction of 30s. per month from the rent, as provided in the original contract. The other partner, Lappin, who has since retired from the partnership, has been called as a witness, as well as the parties to the suit, but none of the three persons gave exactly the same account of what took place on the occasion of giving up the rooms. Indeed, Lappin went further than even the plaintiff or the defendant, and stated: "We gave back the two rooms as long as our lease lasted." Now neither the plaintiff nor the defendant said that was part of the conversation. We have thus the written document of lease and this verbal conversation. Now, the Court has repeatedly laid down that where a document in writing is sought to be varied or substracted from by a verbal agreement, the verbal agreement relied upon must be strictly proved. The written agreement has not been altered by any writing, and as far as the other documents in this case are concerned, they are altogether in favour of the plaintiff. After the alleged verbal agreement was entered into, month after month up to August, the rent was paid by cheque for the full amount of the rent secured by the lease, viz., £5 10s. The defendant himself admitted that, and said that the reason the rent was not reduced to £4 was that the plaintiff had said: "We want to stick to our original document; we want to keep our lease as it is, and you can repay the 30s." Mr. Bosman's evidence also shows that the defendant himself had been under the impression that the rooms were let back to him on a monthly tenancy. He deposes that the defendant not only admitted this to him, but said he had got into a difficulty by letting the premises twice over. From all the facts of the case I am of opinion that defendant had taken repossession of the premises simply as a monthly tenant. Notice to quit had been given him on October 30, but the defendant still retained possession. An order will, therefore, be granted for ejectment, defendant to give up possession on the 28th of this month. As to damages, no special damage are alleged, though £30 are claimed. The Court will award damages equivalent to the rent for the time the defendants have been in possession, viz., 30s. per month for four months, that is £6, together with costs. One other question arises, and that is with regard to the written document of lease which has been put in as evidence between the parties. Under the Stamps and Licences Act any such document put in unstamped as evidence could not be received unless the Court imposed a penalty. The stamp in this case should have been £2, and a fine of £2 would now be imposed. That £2 fine, however, would not stamp the lease, and a further £2 would be required for that purpose, as well as the statutory fine for the delay in stamping, so that the revenue would be substantially enhanced by the lease not having been stamped at the time it was made. That fine of £2 would have to be paid by the plaintiff.

Maasdorp, J., concurred, and said he wished to express an opinion with regard to the conflict of evidence given in this case. He had no doubt that this was in great part due to the fact that the parties in agreeing, as they thought, on what the terms were to be as to defendant's occupation of the two rooms had not the same intention in their minds. If that were so, then no agreement had been come to, and in that case defendant would be in the same position as he now would be under the order of the Court.

[Plaintiff's Attorneys: Faure and Zietsman; Defendant's Attorneys: Findlay and Tait.]

VAN DER WESTHUIZEN V. ESTATE VAN DER WESTHUIZEN. { 1903. Feb. 9th.

Joint Will — Children—Bequest to a class—Vesting.

W. and his wife, by a certain joint will, bequeathed a certain portion of their landed property to the children of their son G. C. W. At the time of the testator's death, G. C. W. had five children, now represented by the plaintiffs: since that time six other children had been born to him. The plaintiffs contended that only such children of G. C. W. as were in esse *at the time of the testator's death were entitled to share in the inheritance. The defendant contended that the children of G. C. W. born after the death of the testator were also entitled to share; and that, inasmuch as G. C. W. was still alive, and might have further issue, that no distribution of the estate could be made until his death.*

Held, *that as by the terms of the will the property immediately vested in the then children of G. C. W. and that as these terms were inconsistent with the postponement of the distribution of the estate; judgment must be entered for the plaintiffs in terms of their contention.*

This was a special case set down for argument, the plaintiffs being Martheus van der Westhuysen, Alida Maria Raubenheimer (born Van der Westhuysen), Johannes Mattheus van der Westhuysen, and the defendant Johannes Stephanus van der Westhuysen, in his capacity as surviving executor testamentary of the estate of the late Johannes Mattheus van der Westhuysen, and George William Steytler, in his capacity as curator *ad litem* of all the minor children of Gert Cornelius van der Westhuysen.

The special case was set forth as follows:

1. On the 22nd August, 1882, Johannes Mattheus van der Westhuysen and his wife, Anna Margaretha Elizabeth van der Westhuysen (born Olivier), spouses, married with community of goods, made and executed their joint last will.

2. The testator died on the 26th January, 1883, and his surviving spouse who adiated and accepted the benefits of the said will died on the 12th June 1898.

3. Gert Cornelis van der Westhuysen, a son of the testators, is still alive.

4. On the death of the testator the said Gert Cornelis van der Westhuysen had five children, of whom one has since died, one is still a minor, two are the first two plaintiffs, who are majors, and one Anna Margaretha van der Westhuysen is married to one Rademeyer, with whose assistance she has duly and lawfully disposed of her rights under the said will to the third plaintiff.

5. Since the death of the testator six other children of Gert Cornelis van der Westhuysen have been born and are alive.

6. In 1896 the executors of the testator, being his surviving spouse and the defendant, in accordance with the will transferred the landed property specially bequeathed to the children of the said Gert Cornelis van der Westhuysen to themselves in trust, subject to the conditions of the will (save and except the condition as to the annual payment of £65 to be brought up for the survivor by the shares of the grandchildren, that is, the children of the said Gert Cornelis van der Westhuysen, which condition she waived) and the said property is now held by the defendant as surviving executor of the testator in trust as aforesaid.

7. The amount of £590 for which, in terms of paragraph 8 (b) of the will, the said shares were made liable has been duly paid.

8. The plaintiffs contend that according to the true intent and meaning of the said will, each of them as being or representing one of the five children of Gert Cornelis van der Westhuysen, who were born at the date of the testator's death, are entitled to an equal one-fifth share of the said bequeathed properties, and that it is the duty of the defendant to transfer to each of them one-fifth of the said properties accordingly.

9. The defendant contends that the children of Gert Cornelis van der Westhuyzen, born after the death of the testator, are entitled to share equally with the children of the said Gert Cornelis van der Westhuysen, born before the death of the testator, in the said bequeathed properties.

10. Wherefore the parties pray for the judgment of this Honourable Court upon their respective contentions, and that the costs of this suit may be directed to be paid accordingly.

Mr. Schreiner, K.C., appeared for the plaintiffs; Sir Henry Juta, K.C., appeared for the defendants.

Mr. Schreiner cited *Breuler* v. *Kotze's Executors* (2, Menz., 444) and *In re Henning* (7 Juta, 53). These cases are very much in point. In this case Cornelis has no life interest in the estate, nor has the mother of the testator. The will provides for the shares of the grandchildren, but clearly the children were to come in, as the date of distribution was to be six months after the death of the testator. But it must be remembered that a will speaks from the death of the testator, and that therefore children subsequently born could have no claims to share in the inheritance.

Sir H. Juta, K.C.: I cannot follow the argument of plaintiff's counsel, when he says that a will speaks from the death of the testator. That is a rule of English law, but our law is exactly the opposite. *Wentzel* v. *Brink's Executors* (9 Juta, 328). See particularly where Voet is cited. Then we are dealing with a mutual will. The will of the survivor cannot speak till his (or her) death. It is true that by massing and adiation the survivor may be debarred from making a new will; but there have been many cases in which the survivor has dealt with the property *inter viros*, and in all these cases the Court has held that the survivor could alienate *inter viros* one-half of the property. In a mutual will there are really two wills, but surely the law will not suppose that such a will speaks from the death of the first dying. Again, if we look to Act 21 of 1875, it is clear that no money could be transferred until after the death of the survivor: so it is quite immaterial that in the meantime the whole property was to remain in trust.

Mr. Schreiner (in reply) contended that the passages cited from Voet were rather in favour of his contention than against it.

Cur. Adv. Vult.

Postea. (February 10).

Buchanan, J.: The late Mr. Van der Westhuysen and his spouse made a joint will, in which they bequeathed a specific portion of their landed property to the children of their son, Gert Cornelis. The testator died in 1883, and his surviving spouse died in 1898 without altering the will. At the time of the testator's death the son, Gert Cornelis, had five children, now represented by the plaintiffs; but since that time six other children have been born. Gert Cornelis is still alive, and it is said that he may yet have further issue. The plaintiffs contend that they alone, being the children alive at the date of testator's death, are entitled to the bequest. The defendants contend that the bequest was made to a class, namely, to the grandchildren of the testator, and that the members of the class cannot be ascertained until after the death of Gert Cornelis. No doubt under circumstances inference may be drawn from the nature of the relationship between the testator and the objects of his bounty, but the Court has universally ruled that the intention of the testator must govern the contsruction of the will, and that that intention must be gathered from the will itself. In this case the first point in favour of the plaintiffs is the fact that there is no intermediate estate created between the testators and the beneficiaries. There is no postponement of the vesting. There is also no future time fixed for the distribution of the bequest. From the terms of the will it would appear that it was the intention of the parties that immediately upon the death of the testator the property should become that of the children of Gert Cornelis. The only children that could benefit from the property at the time were those in being. There is nothing in the will to indicate that any any other beneficiaries than those in existence at the time were to come in. But there are, on the other hand, clauses of the will which are inconsistent with the postponement of the distribution of the estate. For instance, in the 8th clause of the will for this property,

which was bequeathed to the children of Gert Cornelis, the sum of £590 is to be paid, "and the payment shall be made in the way following, viz.: One-half within one year of the death of the first dying and the remainder within one year of the death of the survivor." Who is to make this payment, but the beneficiaries under the will? If we have to wait until the death of Gert Cornelis before ascertaining who these beneficiaries are, how can the payment be made one-half within one year after the death of the survivor? Then in the 11th clause the property is bequeathed subject to the condition that it shall yield to the survivor a sum of £65 per annum. For the half of the purchase price remaining unpaid the survivor is to get £65, probably as an equivalent of the interest on the amount. It is true that transfer of the properties could not be demanded until the death of the survivor, and that the property was to be transferred to executors in trust. The explanation given as to the clause is a reasonable one. The will shows that the testators did not wish their son Cornelis in any way to benefit or to interfere with the property, and it is said that they wished the executors to take transfer rather than that it should go to their son as the natural guardian of his children. Here, then, we have a bequest in favour of people in being, a bequest which is to vest at once, and for which a sum of money is to be paid over at once; there is no postponement of the distribution, and there is no intermediate estate. We have also the fact that the survivor did transfer the property, and that the purchase price was actually paid some time since, the survivor waiving her right to the annual payment. I think under all these circumstances we were forced to the conclusion that the intention of the parties was that the grandchildren *in esse* at the time of the death of the testator should have the property transferred to them, and that there should not be a postponement of vesting or of distribution until after the death of Gert Cornelis. We, therefore, think that the contention of the plaintiffs in this case is the true intent and meaning of the will, and judgment will be entered in favour of the plaintiffs in terms of that contention. Costs will come out of the estate.

[Plaintiffs' Attorneys, Fairbridge, Arderne and Lawton; Defendant's Attorneys,

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

CLIFFORD V. CLIFFORD. { 1903. Feb. 10th.

In the divorce suit of Clifford v. Clifford, set down for hearing on the 25th February, Mr. Benjamin applied for the appointment of a commissioner to take the evidence of Dr. Elliott, of Sea Point, who, it was stated, was about to leave for England by to-morrow's mail, and whose testimony was material to the plaintiff's case.

Order granted as asked, Mr. Advocate Van Zyl being appointed commissioner.

CONNELLY V. CONNELLY.

This was an action for divorce by the petitioner, Margaret Louisa Connelly, against her husband on the ground of his adultery. Mr. Benjamin appeared for the plaintiff, and there was no appearance for the respondent.

The petitioner said she was married to the respondent at S. Mary's Church, Bristol, on the 27th November, 1895. He was an architect and civil engineer by profession. After their marriage they lived for some years in several parts of England, and also on the Gold Coast, but they were not on happy terms. Respondent was of very intemperate habits, and at times he treated her cruelly. In July, 1901, he came out to South Africa with the intention of settling here, but she did not accompany him. Whilst in England she heard charges of infidelity against him, and she wished to take proceedings in the English Courts, but was advised that she would have to commence proceedings in Cape Colony. There were two boys of the marriage—one aged 8 and the other two and a half years. Both the children were at home with her parents, and she asked for maintenance from her

husband. The defendant had a reversionary interest in his mother's estate, but, apart from that, he had nothing except his earnings. He was formerly in the employ of the Public Works Department in Cape Town at a salary of £35 per month, but at present he was working as managing assistant to an architect named Mr. Walker, at Port Elizabeth. In May 1901 she obtained an order from the Bristol Magistrates against her husband for 15s. a week for the support of her children. Witness came out to this country in August of last year. In reply to the Court, witness said that she had come to this country with the idea of staying here permanently. She last saw her husband three days before he left England, but she had had no communication with him since May 30, 1901. He had only paid one instalment under the Magistrate's order.

Mrs. Annie Mary Schonberg said that her husband obtained a divorce against her last November on the ground of her adultery with a man named Connelly. Witness identified the photo produced by Mrs. Connelly as that of the man who was joined with her as co-defendant. Witness and Connelly were living at an hotel at Woodstock as Mr. and Mrs. Bruce.

A decree was granted as prayed, the petitioner to have custody of the children and the respondent to pay £5 a month towards their maintenance until the younger child should attain the age of 16 years.

MKOKO V. MKOKO AND CROW.

This was an action by John Mkoko, a Tembu, for divorce from his wife on the ground of her adultery with a man named Jim Crow. Mr. Benjamin appeared for the petitioner, and the suit was undefended.

The plaintiff's declaration showed that he was married to the defendant according to native customs at Prieska in 1897, and he afterwards came to Simon's Town, where he got employment. In 1900 he was married at the Baptist Church at Plumstead.

[Buchanan, J.: What made you marry in the Church if you were already married?]

Witness: I got converted. Witness went on to say that after the marriage at the church his wife deserted him in three months.

[Buchanan, J.: You got on much better while you were married under native law than under Christian law?]

Witness: Yes. Witness said that he went in search of his wife with a man named Matross, and they ultimately found her at Grobo, near Sir Lowry's Pass, living in a hut with Jim Crow.

Replying to Buchanan, J., witness said that they did not live any more in peace after they had been married at the church. He did not know why his wife left him. She also professed Christianity.

Corroborative evidence having been given by another native named Matross.

A decree of divorce was granted, petitioner to have the custody of the child.

BOZZETT V. BOZZETT.

This was an action instituted by Joseph Bozzett, of Stellenbosch, for restitution of conjugal rights, and, failing compliance, for divorce.

The declaration set forth that plaintiff was married to the defendant, Agnes Caroline Bozzett (born Watts), on the 14th May, 1899, at Shadwell, in the county of London, and they lived together until November of the same year. Witness was at that time a police constable, and he was transferred to High Barnet, leaving his wife at Shadwell. He sent money to her for her support. About two or three months afterwards he went to Shadwell to see her, but he failed to find her. He had no idea where she had gone, and although he saw her father, he could obtain no information as to her whereabouts. He had quarrelled with her because she was a dipsomaniac. He came to South Africa in 1896, but he did not get to see his wife again before he left, although he endeavoured to trace her. He had paid two visits to England since he had come to this country, but his efforts to trace his wife had been unsuccessful on both occasions. Her parents formerly kept a public-house called the Baker's Arms at Stratford, but on going there he found that they had left.

Mr. Benjamin for Plaintiff; Defendant in default.

Plaintiff stated in evidence that he had had a notice inserted in the "People" asking for information as to the address of his wife, and the result was that she appeared at his solicitors and asked them what they

wanted with her. Witness's private opinion was that she thought she was to receive some money. She gave her address as 23, Joshua-street, St. Leonard's-road, Poplar.

Buchanan, J.: Are you willing to take her back provided that she is willing to come back?

Witness: Yes, provided that I don't prejudice my case if she should have misconducted herself in the interval.

Buchanan, J.: You must give her an opportunity of returning. If you can prove misconduct, you can get a divorce.

Witness said he had to sell his business at Somerset West on account of its not paying, as he found it absolutely necessary to have a wife.

An order was granted calling upon the respondent to return to her husband on or before the 1st May next.

Postea. (May 14th. The rule was made absolute.)

ARENDSE V. ARENDSE.

This was an action by Karl Jacobus Fredrik Arendse, for a decree of divorce from his wife on the ground of her adultery with John Rooder and another.

It appeared from the evidence of the petitioner that he was married to the respondent, Sela Francina Arendse, at the Dutch Reformed Church, Wynberg, on April 17, 1893, and that after they had been married about a year and a quarter she left him and went to live in Cape Town with a man named John Rooder. Witness and his wife had not since lived together.

Mr. Gardiner for Plaintiff; Defendant in person.

Defendant did not deny the accusation, but she added that she had no money to pay for her defence.

A decree was granted as prayed.

DE WIT V. LUYT. { 1903. Feb. 10th.

Unlawful possession—*Bona fides.*

Where the defendant had admittedly been found in unlawful possession of certain ostriches, which by his orders had been plucked "green" and branded with his principal's brand.

Held (on appeal), *that the fact that the defendant had,* per in-curiam, *not observed that these birds were not the property of his principals and that he had therefore acted* bona fide, *was not a good defence in a civil action.*

This was an appeal by De Wit, who was the plaintiff in the court below, against the decision of the Resident Magistrate at Riversdale in respect to a claim brought by the said plaintiff against the present respondent for £8 10s. for the unlawful detention and plucking green of certain ostriches, and £1 10s., the value of certain feathers. The evidence for the plaintiff was that the ostriches were found in the camp, of which the defendant acted as manager or overseer after they had been missed by the plaintiff for some days, and that one of the birds had been plucked green and two had been branded. The defendant's evidence was that he had not seen the birds, and that the reason why they were found to have been branded was that he had given instruction that some young birds were to be branded, and that old birds, whose marks were indistinct, were to be re-branded. The Magistrate's reasons for his judgment were that he gave absolution from the instance on the ground that the defendant did not knowingly detain the ostriches in the camp of his employers; the Court was of opinion that the defendant had no knowledge that the birds were there. No specific damages were proved to have been sustained. The branding of the ostriches was admitted by the defendant, but it was done because the birds in question were mixed with others of the farm that were branded.

Mr. Upington for appellant; Mr. Gardiner for respondent.

Counsel having been heard in argument on the facts of the case,

Buchanan, J., said that the Magistrate in this case seemed to have acted upon an erroneous idea. The ostriches in this case were found with defendant, and while with defendant one of the birds was plucked, and it is not denied that they were re-branded by defendant or his servants with the brands of Reitz and Versfeld, to whom the other ostriches in his custody belonged. The Magis-

trate had found no *mala fides* proved, and that seemed to be the ground upon which he gave absolution from the instance. If *mala fides* had been proved the defendant might have been liable to a criminal action, as well as the civil one. The fact that there was no *mala fides* did not exclude him from civil liability. However, as the Magistrate had not found specifically upon the facts necessary for a decision of the case, the case would be remitted back to the Magistrate to find specifically upon the facts, more especially as to the plucking of the bird and the offer to give up the feathers deposed to by the one and denied by the other of the parties. It would not be necessary to hear counsel again, as judgment would be given when that report was received.

[Appellant's Attorneys. Tredgold, McIntyre and Bisset; Respondent's Attorneys. Silberbauer, Wahl, and Fuller.]

REX v. CLARKE. { 1903. Feb. 10th.

Evidence—Stock theft *Bona Derelicta.*

The accused had been convicted by a certain Assistant Resident Magistrate of the theft of a horse from the military authorities. It appeared from the evidence that the horse had been left in charge of a certain farmer by one of the Border Scouts. Eventually the horse got into the pound, being then in very bad condition. The accused released it, fed it up and at the request of one A. sold it to him for £6, at the same time saying it was not his own horse and therefore he could not well sell it. The evidence showed that one of the military officers had given permission to the accused to take the horse and use it if it "picked up."

Held, *on appeal, that as the horse was practically derelict, and as the accused had acted quite openly in the matter, the conviction must be quashed.*

This was an appeal from a judgment of the Acting Resident Magistrate of Namaqualand in a summary trial under Act 35 of 1893, held on December 22, 1902, in which one George Clarke was charged with the theft of stock. It was alleged that during the month of October last prisoner stole from the farm Kraaifontein a horse belonging to the Imperial Government. The prisoner pleaded not guilty, but after evidence had been led the Magistrate found him guilty, and imposed a sentence of five months' imprisonment, with hard labour. Against this decision the prisoner appealed, the appeal being upon the ground that the evidence did not support the conviction. The evidence showed that the horse in question was one that had been commandeered, and used by the military authorities. Afterwards the horse, while in the custody of one of the Border Scouts, became sick, and was left on the farm, from which it was taken by prisoner. Prisoner alleged that he had been told by one Captain McDonald that he could take the horse and use it. He then gave the horse to one Auchenbach, but on the military authorities calling upon him to produce the horse he obtained it back by giving another horse to Auchenbach, and then gave the horse to the military.

Mr. J. E. R. de Villiers appeared for the appellant; Mr. Howel Jones appeared on behalf of the Crown.

After hearing counsel, the Court allowed the appeal, and quashed the conviction.

Buchanan, J.: In this case the prisoner was charged with stealing a horse belonging to the Imperial Government, found guilty, and sentenced to five months' imprisonment with hard labour. It appeared that at one time the horse belonged to one Mostert, but was commandeered by the military, and Mostert having been paid the horse became the property of the Government. Afterwards, in November, the horse, which was described as being sick and debilitated, was along with a number of other horses in the custody of one of the Border Scouts. This Border Scout had to take these horses to a certain place, but it appeared that two of them were so bad and in such a weak condition that he had

to leave them behind. As he said, he could not leave them in charge of anybody, and he just left them at a farm belonging to one Buys. Afterwards the deputy commandant told Buys that if the horse picked up he could use it, and the matter could be settled afterwards. The horse did not pick up from what the prisoner himself said, and he was supported by two witnesses. Later on Captain McDonald, one of the military officers, told prisoner that he could take the horse and use it if it picked up. The horse got into the pound, and prisoner released it and fed it up, and handed it over to one Auchenbach. According to his own evidence he told Auchenbach that it was not his own horse, and that he could not well sell it. Auchenbach, however, wanted the horse, and he said that prisoner sold it to him, and that he gave him £6 for it. Now, the horse was practically derelict, and according to the evidence of some of the witnesses the custom of the military was to shoot abandoned horses. This horse was not shot. It was true that it did not belong to prisoner, but it was reasonable to suppose from the evidence that he acted without *mens rea*. He had obtained permission from a military officer to use the horse, and when it recovered from a sore back, and had got into good condition, and was then claimed, prisoner got it back from Auchenbach and gave it up to the police. Under these circumstances it would be going too far to imply that prisoner has been guilty of theft. In all this transaction there was no concealment, and prisoner spoke to the military authorities about the horse. Under all these circumstances, the Magistrate would have been better advised if he had considered that this was a case where the prisoner did not steal the horse. The prisoner seemed to be a respectable farmer, a man in good position, and in communication with the military. Under all the circumstances, I am of opinion that this serious conviction should be quashed.

Maasdorp, J., concurred.

[Appellant's Attorneys, Michau and De Villiers.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

DAVIS V. DAVIS. { 1903. Feb. 11th.

This was an action for divorce brought by the plaintiff against her husband, William Davis, on the ground of his adultery. Forfeiture of the benefits of the marriage in community and costs were also asked.

Mr. Alexander for plaintiff; defendant in default.

Mr. Alexander called

Charles William Smith, clerk at the Colonial Secretary's Office in charge of the marriage register, who deposed to the correctness of the marriage certificate put in.

Sarah Catrina Davis said she married defendant on August 1, 1893, at Cape Town. There was no issue of the marriage. A week before last Christmas witness went to a cottage at Rondebosch, and as she got there defendant left the place. Witness went into the cottage and saw the woman who was living with defendant as his wife. Witness had been separated from defendant for six years, defendant having left her.

Sam Paulsen deposed that he occupied a room in the same house as defendant and a woman named Lena. The two last named lived together as man and wife.

Decree of divorce granted as prayed, with costs.

HAWKINS AND THOMAS V. EDWARDS.

The hearing of this matter, part heard on November 24 last, was resumed.

The plaintiffs alleged in their declaration that on the 18th February, 1902, they entered into a contract with defendant whereby, in consideration of a sum of £40 to be paid by defendant, plaintiffs undertook to remove and stack certain ship's timber from the wrecked S.S. Hermes. Plaintiffs also alleged that they performed other work, for which it was agreed that reasonable remuneration should be paid. They claimed £15 in

respect of this. Certain sums had been paid by defendant, and plaintiffs claimed that £31 7s. 7d. was still due. They applied for judgment for that amount. Defendant admitted the contract, but denied that plaintiffs had properly performed their part thereof. He tendered the sum of £14 7s. 7d.

Mr. C. W. de Villiers for the plaintiffs; Mr. Upington for the defendant.

Mr. Upington said that before the case proceeded he had to make an application upon notice given calling upon the plaintiffs to find security for the costs of the action. He read the affidavit of the defendant, which stated that one plaintiff was now resident at Middelburg in the Transvaal, and the other at Dundee, in Natal.

Mr. De Villiers pointed out that the last hearing of the case had been postponed owing to the defendant having gone off to Madagascar a few days before the trial. He also contended that the defendant had waived his right to ask for security, because when the case was previously before the Court it was known that the plaintiffs were leaving, and no question of security was raised until the end of January last, and it had been found impossible to communicate with plaintiffs on the matter in the time that had elapsed since then.

De Villiers, C.J., said it would be better to go on with the case.

At the last hearing of the case the evidence of the plaintiff Hawkins was taken. Mr. De Villiers now said that he would close his case, as he had no further evidence to lead.

For the defence, Mr. Upington called Morgan Edwards, the defendant, who said he was a salvage contractor, carrying on business in Cape Town. Prior to entering into the contract now in question witness had for some months employed the plaintiffs on other jobs of salving gear from the Hermes, and had in that connection paid them £60, the receipt for which he produced. Then he entered into this contract with plaintiffs to salve woodwork and so forth. Proceeding, witness said that the work set forth in that contract had not all been done, giving details as to what had been omitted. Witness had called for tenders to complete the work which plaintiffs had left unfinished and had received a tender for £27. Witness had, to enable plaintiffs to get a permit to return to Johannesburg, giving them on March 27, 1902, a certificate stating that the plaintiffs had been in his employ for several months, and "have now completed salving the gear." At that time there was a great difficulty in obtaining permits to go to Johannesburg. Witness gave them that certificate as being their last employer.

By the Chief Justice: He did not know how that certificate would enable them to obtain a permit.

Buchanan, J.: You know they wanted to go away, and you gave them a certificate to enable them to do so, and yet you say they have not finished their work.

Witness said that the work referred to in the certificate was that which plaintiffs had done for him before the contract, when they were working for a daily wage. Plaintiffs had to show such a certificate from their last employer before they would get a permit to go to the Transvaal. They worked on board for a day or two after the certificate had been given.

Cross-examined: Witness thought £27 was a heavy sum to pay for having the uncompleted work done, but it was not unreasonable. The man would not take less. Witness's tender of £4 7s. 7d. was arrived at by deducting the £27 from the balance due to plaintiffs. With regard to the salving of gear, previous to the contract, Thomas had been employed from October, 1901, to January, 1902, and Hawkins in January, 1902. They got 12s. 6d. and 10s. per day each, and the coloured men witness employed on the wreck got from 5s. to 7s. 6d. per day. The last payment for the work of salving the gear was made on February 1, 1902.

By the Chief Justice: Witness could not tell how many days the plaintiffs had been employed on the contract. Before they had made the contract they had asked witness to keep them on at the salving, but he had said that he could not afford to give them the same rate of pay for the work that remained, and they then offered to do it cheaper. Witness had made a complaint about some teak wood being taken away, but that was not the cause of his refusing to pay. Witness could not say when the last payment was made on the contract, as he did not get receipts.

William Evans said that he was in the employ of the defendant, and during the

work under the contract he was defendant's foreman on the Hermes. When plaintiffs left witness inspected the ship, and found that certain of the work mentioned in the contract had not been done.

Cross-examined: Witness would say that not half the work was done.

H. L. Hyland, master shipwright, deposed that in April last he went with defendant and inspected the Hermes. He corroborated as to a large part of the work mentioned in the contract not having been done. Witness had tendered to complete the work, excluding the stacking of the timber on the shore, for £27.

This concluded the evidence.

After hearing counsel in argument on the facts,

De Villiers, C.J.: There is great conflict in the evidence given in this case, and the Court should be guided by the probabilities in order to ascertain which side is correct in its statements. This is to be said in regard to the plaintiff's evidence, that he alone has deposed as to what took place, his partner, the co-plaintiff, was not called and no other independent evidence was called to support his statements. The only circumstance which is certainly in favour of the plaintiffs is the fact that this certificate was given by the defendant: "This is to certify that Messrs O. Hawkins and E. J. Thomas have been in my employ for several months, and have now completed salving gear, etc., from the above-named wreck." The defendant states that the reason why he gave this certificate was that the plaintiffs were anxious to obtain a permit to go to Johannesburg, that they represented to him that a certificate of this kind would materially assist them in obtaining such permit, and that the defendant gave this, not intending that the document should refer to the contract at all, and certainly on close scrutiny I think it cannot be said that it includes the whole of the work under the contract. The certificate states that the plaintiffs had been in his employ for several months, but says nothing in regard to the work done under the contract, and then adds that "they have now completed salving gear, etc., from the above-named wreck." The chief work, therefore, to which he refers here is the gear, and that, "etc.," might refer to the machinery and so on without referring to the timber for which they claimed under the contract. On the side of the defendant we have the evidence of the defendant himself and two independent witnesses, who positively state that the work required to be done had not been done. Mr. Hyland, apparently an experienced shipwright, states that in April last year he examined the ship, and he found that a considerable portion of the work they should have done under the contract had not been done, so much so that he would charge £27 for the completion of the work. In the face of that evidence, I do not see how we could give judgment for the plaintiffs for the full amount claimed. The Court will, therefore, give judgment for the plaintiffs for £4 7s. 7d., with costs up to the date of the plea, but the subsequent costs are to be paid by the plaintiffs.

Mr. Upington applied for the costs of the application made that morning.

De Villiers, C.J.: I don't think they should be included.

[Plaintiff's Attorneys, Michau and De Villiers; Defendant's Attorney, A. W. Steer.]

WALPOLE V. PALMER AND OTHERS. 1903. Feb. 12th.

Defamation—Report of trial—Newspaper comments—Functions of judge and jury.

A preliminary examination having taken place against the plaintiff for a criminal assault on a young girl the defendants published in their newspaper a report of the trial with some comments thereon. These comments were capable of the construction that in the opinion of the writer the plaintiff was guilty of the offence. The plaintiff was acquitted at the subsequent trial and thereupon brought an action against the defendants for defamation. The defendants excepted to the declaration on the ground that it disclosed no ground of action.

Held, *that as the comments were capable of the construction, placed on them by the declaration, the Court should not, on exception, decide the question as to whether the article was defamatory or not but leave the question to be decided at the trial, whether the trial should take place before the judges or be held before a jury.*

This was an argument on exceptions taken by the defendants to the plaintiff's declaration. The action was brought by Horace George Custance Walpole, residing at Cape Town, against Alfred Palmer, proprietor and editor of "The South African Review," the Central News Agency, the publishers, and Joseph, William Henry, George Impey, and Alfred Renfrew Richards, carrying on business under the style of W. A. Richards and Sons, the printers. The plaintiff was in September last committed for trial on a charge of assault by the A.R.M. of Cape Town, and when the trial took place at the Criminal Sessions in October he was acquitted and discharged. Two articles were published in the "Review," in which the plaintiff alleged that he had been libelled, and he claimed £1,000 damages. The defendants took exception to paragraphs 4 and 5 of the plaintiff's declaration, which were as follows:

4. On or about the 26th day of September, 1902, the defendants falsely and maliciously printed and published of and concerning the plaintiff in the said newspaper the false, scandalous, malicious, and defamatory words following, to wit: Men Street-Prowlers!—In Cape Town.—On the Look-out for Girl Victims!—A Matter of Great Importance to Parents and Others!—For some time past it has been known to the police authorities that the streets of Cape Town are infested with well-dressed men, who prowl about the streets for no other purpose than to molest ladies, and more especially young girls between the ages of about 13 and 16 years. I have it on high official authority that several recent cases have come within the cognisance of the police, where gentlemanly-looking miscreants of the class indicated have inveigled respectable girls into hotels and shops of a certain class, and there endeavoured to debauch their victims. These prowling scoundrels only rarely attempt to interfere with adults; their operations are chiefly confined to girls just budding into womanhood, whom they judge to be scarcely experienced enough in the world's wiles to have their suspicions excited, when addressed by strangers in a sufficiently plausible manner, and under sufficiently specious pretexts. The police have good reason to believe that in several cases girl victims have kept their experiences strictly to themselves, either through fear, or a sense of outraged modesty; but in the majority of instances, unfortunately, but quite naturally, the parents or guardians of the victims are deterred from placing these matters in the hands of the authorities, lest they should be called upon to face the glaring publicity of a magistrate's court. So invariably, indeed, is this the case, that the police are practically debarred from dealing effectively with the evil, for it is needless to say that the fiends pursue their trade in so circumspect a manner as to avoid attracting attention; while even if it were otherwise, they could not be brought within the arms of the law except by the co-operation of the victims themselves. This state of affairs has led to the evil becoming too common to be any longer ignored in the press, for these rascally street-prowlers are at present emboldened, by immunity from interference. I therefore make no apology for publishing the facts of one of these cases brought to light in the Magistrate's Court, before Mr. Lotter, Acting A.R.M., on Tuesday, the 9th instant. The evidence as disclosed speaks for itself. The girl victim is the daughter of a highly-respected suburban resident in a good position, to whom the public owe a great debt of gratitude for having set aside all personal inconvenience in a determination to bring the perpetrator of the outrage on his daughter to justice, in the interests of society at large. I have not given the name of the girl, because it is neither desirable nor necessary that it should be known; while of course it remains to be proved whether the accused person is the man who committed the outrage, the defence being, as will be seen, an *alibi*. The courageous action of the girl's father in bringing the matter

into Court will, I trust, lead to the elimination of this moral cancer from our midst, and meanwhile I publish this case with the object of putting not only parents and guardians, but ladies and girls themselves, on their guard, lest they might suffer molestation in a similar manner, for a perusal of the facts disclosed will show that it is high time precautionary measures were taken, especially in the cases of young girls of about the age indicated.

Then followed a report of the proceedings in the Police Court.

5. And the said defendants, on or about the 17th day of October, 1902, falsely and maliciously wrote, printed, and published of and concerning the plaintiff in that said newspaper the further false, scandalous, malicious, and defamatory words following to wit: Outrage on the Wynberg Line—(Wanted—Vigilance Committees): Information has reached this office of a terrible outrage committed in a railway carriage on the Wynberg line. It appears that a young girl, aged 13, living in the Constantia district, was travelling from Cape Town to Wynberg when a man entered the carriage at Rondebosch, and, it is alleged, committed an outrage upon her between that station and Wynberg. The ruffian appears to have decamped at one of the intermediate stations, for the girl was alone and unconscious when the train arrived at Wynberg. The family of the girl are anxious to avoid publicity, but it will be a thousand pities if the monster who perpetrated this outrage should be permitted to escape from justice. Owing to the determination of the parties concerned to keep the matter *sub rosa*, it is extremely difficult to obtain information, but it is unthinkable that such a miscreant should be permitted to roam at large, and that no attempt should be made to lay by the heels so dangerous a pest of society. In view of the disclosures in a recent issue of this journal concerning the inveigling of young girls into hotels, and the admission on the part of the police authorities that this class of crime is prevalent and on the increase, it is surely time to be up and doing. The reluctance of the girls themselves and of their parents and relations to bring their grievances to the police, naturally hinders attempts to cope with this growing social evil, and it would appear that nothing short of well-organised vigilance committees can effectively bring about a better state of things.

Sir H. Juta, K.C. (for the exceptors), said that to the fourth paragraph of the declaration exception had been taken on the ground that it disclosed no cause of action, in other words, that there was nothing in the article that in any way injured or prejudiced or insinuated anything against the character of the plaintiff. He called their lordships' attention to the fifth paragraph of the declaration headed, "Outrage on the Wynberg line." There was nothing whatever about the plaintiff there. There was the merest reference to disclosures in a previous issue of the journal. But the preceding paragraph was the more important one. He took it for granted that no one was going to argue in this year of 1903 that the proceedings of a Magistrate's Court could not be published in a newspaper. The innuendo alleged was that the defendants did in fact insinuate and state that the plaintiff was guilty of this charge, but that was exactly what the defendant did not do. He was very careful with regard to that. The case, as reported, gave the evidence and the defence of an alibi. What the defendant said was that so far from imputing guilt to the plaintiff or insinuating that he was guilty or insinuating that the evidence of the girl was to be believed, and that the plaintiff was the perpetrator of the outrage; on the contrary, the article said that it still remained to be proved that the accused person was the man who committed the outrage. There was nothing improper where they had a series of crimes going on in a town in commenting upon this sort of crime being perpetrated as long as they did not insinuate that any person who was on his trial for that class of offence was guilty of it. Nobody could cavil at his commenting on the prevalence of this crime and remarking in his article that "the defence is an alibi," and although the girl in her evidence and the other witnesses for the prosecution said that this was the man, notwithstanding this, the article went on, "it remains to be proved that this is the person who committed the outrage." Now could it in any way be said that this article said that the plaintiff was guilty? That was the gist of the whole thing. If the person commenting on these proceedings

guarded himself strictly by saying that it was to be proved that the person charged was the person who committed the offence, he submitted that it was impossible to say that there was anything libellous in the statement. The alleged libels were both published before the trial, the plaintiff said he had been acquitted, hence where was the prejudice?

Mr. Upington (for the respondent) said that the first exception that was taken to the declaration was that it disclosed no ground of action. He took it as admitted that newspaper reports of criminal proceedings would be privileged, if they were fair and impartial and accurate reports, and, while the case was still *sub judice*, without comment thereon. Surely, his learned friend would have to plead his privilege, and would have to plead his fair and *bona-fide* comment. The statements such as were contained in paragraph four of the declaartion, he submitted, were *prima facie* libellous. To prefix to the report of the preparatory examination, whilst a man was still on his trial, such sensational headings as "Men Street-prowlers in Cape Town on the Look-out for Victims," he submitted, would be a gross libel. It was exactly as if a report of a preparatory examination in which the charge was one of theft had been headed "Thieves and Robbers," and so forth. If he were asked to give authority for what was unfair and *mala fide* comment on the proceedings in a Court of Justice, he should refer to an old case which on one point was perhaps not an authority, but which was still interesting. He meant the case of *Duncan* v. *Thwaites*. Even the report of the Police Court proceedings was not fair, quite apart from the prejudicial matter which headed the report. The evidence of witnesses called for the defence was suppressed, and the briefest possible *resume* was given of their evidence. If the remarks did not refer to the plaintiff he challenged his learned friend to say who the perpetrator of these alleged outrages was. He contended that it was unfair comment, that it was *prima facie* libellous, that the reference there to the perpetrator of the charge was capable of bearing the construction that it was the plaintiff who was the perpetrator of the outrage. He submitted that the Court had not defined whether or not these words were in fact libellous, and did in fact refer to the plaintiff, that that would be a question for the Court or the jury to decide, and that the Court had now only to consider, as it had laid down in previous cases, whether the articles relied upon were capable of defamatory meaning. He submitted that they clearly were. He submitted that the whole tone of the article with the heading "Cape Town Street-prowlers, etc.," preceding the report of the case was *prima facie* libellous, and then it rested upon his friend to plead his privilege and his fair and *bona-fide* comment. Unless he could do that, he failed to meet the case. Then again, the article was not the less a libel because certain parts of it might be in favour of the person libelled. A man could not guard himself by making statements which would bear the meaning that the man charged had committed an indictable offence, and then say afterwards that, of course, it remained to be proved that he had committed it. Counsel also contended that the article on the second date referrring to the alleged outrage on the Wynberg line also bore a defamatory meaning.

[De Villiers, C.J.: Is the case set down for trial?]

Mr. Upington: No, my lord.

[De Villiers, C.J.: I suppose it is not decided whether it shall be tried by jury or not?]

Mr. Upington: No.

Mr. Upington added that if Mr. Palmer had been brought before the Court for contempt he ventured to think that the Court would have taken serious action against him.

De Villiers, C.J., pointed out that paragraph 5 of the declaration made no reference to the plaintiff.

Mr. Upington admitted that it made no specific reference to the plaintiff, but the plaintiff was the person indicated.

Sir H. Juta said he could not make out now from what his learned friend had said, whether he complained that the report of the proceedings in the Magistrate's Court was false, or whether the report was all right, but that the comments were incorrect.

De Villiers, C.J.: At this stage of the case I do not wish to say anything that might in any way prejudice the defendant at the trial. An exception is taken to paragraphs 4 and 5 of the

declaration. In regard to paragraph 4 of the declaration it is impossible for the Court to hold that the passages complained of are not capable of the construction placed upon them by the plaintiff. It is quite possible that either of the parties may desire to have this question tried by jury instead of by the Court, and yet the Court now, by holding that the fourth paragraph discloses no ground of action whatever, would practically be deciding that there was no libel, and although the words are capable of a defamatory meaning, yet the Court would be saying there was no libel, and would be taking upon itself the functions of a jury. If there had only been publication of the report, undoubtedly the Court would have said that such a publication is not capable of being construed in a defamatory sense. But, in addition to the publication of the report, there are certain comments in regard to the trial, and these comments are headed "Men Street-Prowlers in Cape Town on the Look-out for Girl Victims," and, although there is a reservation in one part of the article saying that "it remains to be proved whether the accused is the man who committed the outrage, the defence, as will be seen, being an alibi," yet it is possible that the reader, reading the whole of the comments in connection with the report, might come to the conclusion, I don't say will come to the conclusion, that the plaintiff was indicated as the person who was guilty of the offences named in the article. More than that I do not wish to say at this stage. It is quite possible, if the case came on for trial to-day, that the Court might agree with Sir H. Juta that the defendant is not liable, but in view of the circumstances that this case has still to be tried, and may be tried by a jury, it is better that the Court should not express a further opinion on the point. Moreover, I find in the plea that there is a general defence that the words complained of were printed and published in the public interest on a subject to which is was necessary to direct public attention. The defendants moreover deny that they said or did anything to show that the plaintiff did in fact molest and assault indecently or otherwise ladies and young girls, or that he did in fact indecently or lasciviously assault any young girl, or that the plaintiff was guilty of the said crime. This substantial plea the defendant will have an opportunity of proving at the trial. For the present the Court has to decide in regard to the fourth paragraph, that it was capable of a defamatory meaning. In regard to the fifth paragraph of the declaration, I quite agree with Sir H. Juta that in no sense can that be said to convey a defamatory meaning. It is true that it refers to a case recently tried and commented on, but there is no insinuation whatever in that subsequent article that the plaintiff had been guilty of this assault upon a girl in a railway carriage, and in no way does it connect the plaintiff with the outrage which had taken place. In my opinion, therefore, the exception to paragraph 5 of the declaration is a good one, and must be allowed.

Buchanan, J.: I concur. In regard to the fourth paragraph, seeing that it combined the report of proceedings in a Police Court with comments on those proceedings, including indirect references to the plaintiff, it was quite capable of being construed that the plaintiff was guilty of the crime which was being investigated by the Court. It was not advisable for the press or other people so to comment on pending proceedings as to leave it possible for the public to infer that a person against whom a charge was made was guilty. As his lordship the Chief Justice has pointed out, when the case comes for trial either by a Court or jury, the question of whether there has been an absence of defamation or not will have to be tried, and also whether there has been an absence of malice and a comment in the interests of the public. If the defences pleaded are established at the trial, notwithstanding that the Court now said that this paragraph 4 was capable of defamatory meaning, there may be a verdict for defendant. At present we do not wish to discuss this question. The fifth paragraph of this declaration cannot be construed as in any way applying to the plaintiff, and should therefore be expunged.

The Chief Justice, replying to Mr. Upington, said that the fifth paragraph should be expunged from the declaration.

The plaintiff was ordered to pay the costs of the day.

[Exceptor's Attorney: G. Trollip; Respondent's Attorneys: Fairbridge, Arderne, and Lawton.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

BRADLEY v. BRADLEY. { 1903. Feb 13th.

Mr. Upington moved for a declaration that respondent, Alfred Enoch Bradley, of Kimberley, now confined in the Valkenberg Asylum, was of unsound mind, and for the appointment of a curator of his person and property. Mr. Buchanan appeared for the respondent.

Dr. Dodds, medical superintendent at the Valkenberg Asylum, spoke to the admission of the respondent on the 16th of December, 1902, from Kimberley, under a judge's order. He was in a demented condition, his mind was very weak, he was very suspicious and irritable and certainly not capable of taking care of himself or managing his own affairs. Replying to Mr. Buchanan, witness said the respondent had told them that he ought to have been sent to Simon's Town, so that he could go home on a man-of-war. That might be explained to some extent by the fact that the respondent was an old naval man. Just before he came to the asylum he developed a tendency to set places on fire.

Mr. Upington suggested that the respondent's wife should be appointed curator. She had been connected with the business for 16 years. It was a large business, and was stated in the petition to be worth £10,000. The parties were married in community of property.

Mr. Buchanan said he saw Mr. Bradley yesterday (Thursday), and although his mind was certainly deranged, in his (counsel's) opinion, the respondent seemed to have an idea that his wife and Mr. Pooley, who was security to some trust bond at Kimberley, should have power to liquidate the business, because he wanted to go to England. The respondent carried on an aerated water business.

Mr. Upington said that formerly Mr. Pooley, who was the well-known secretary of the Loans and Trust Co. in Kimberley, was in charge of the business jointly with Mrs. Bradley, but, in her petition, the petitioner stated that all Mr. Pooley really could do was to look after the books. So far as the practical management of the business was concerned, she would have to do that herself.

De Villiers, C.J., said that for the present the respondent would be declared of unsound mind, and his wife would be appointed curator of his property, but the Court would consider the question of a curator of his person.

VAN RAHT v. VAN BREDA. { 1903. Feb. 13th.

Lease for life—Monthly tenancy —Ejectment.

The plaintiff, being the owner of a farm, allowed the defendant to build a house on it on condition that the defendant should pay one shilling a month as rent for his occupation and should not be entitled to compensation on leaving the premises. After the defendant had been in occupation for some years he received a month's notice to quit. The defendant refused to quit maintaining that he was entitled to remain in occupation for the term of his life.

Held, *affirming the Magistrate's decision that the defendant was only a monthly tenant and that, in the absence of any fraudulent conduct on the part of the plaintiff, he was entitled to eject the defendant from the premises.*

This was an appeal against a decision of the Acting A.R.M. of Bredasdorp.

From the evidence in the Court below it appeared that the appellant, defendant in the court below, Herman van Raht had tenanted a cottage at Struys Bay and an action for eject-

ment had been brought against him in the Magistrate's Court at Bredasdorp by the respondent, Henry H. van Breda, of Zoendalsvallei, who claimed that the cottage was his property, and that the appellant had been in the habit of paying him a monthly rent of 1s. The respondent said that he gave the appellant notice to quit because he had roused a spirit of independence and unwillingness to submit to rules and regulations and customs enforced by him and his predecessors, thereby giving respondent much annoyance and vexation, and he pointed out that if the appellant were moved much better order would be maintained amongst the fishermen. The Magistrate, in his reasons for his judgment, said the defendant through his agent took exception to the jurisdiction of the Court on the ground that the matter involved a question whereby rights in the future could be bound. The plaintiff's agent quoted Section 10, Act 20, 1856. It was clearly proved that the house in question was built on plaintiff's property, and that the defendant was allowed to build the house under certain conditions, and on paying a nominal rent. Defendant formerly left the house for five to seven years without demanding compensation for building, and during his absence the house was let to another party. On defendant's return to Struys Bay he asked to be allowed to reoccupy the house, and to build a stable, and permission was given to him on the old understanding. He (the magistrate) thereupon held that no rights in future were bound, and overruled the exception. The defendant, through his agent, then put in a claim for £500 as compensation, and took exception to the jurisdiction of the Court. After hearing evidence the magistrate came to the conclusion that the claim was an imaginary one, and certainly, if any claim at all, far beyond the value of the house. Plaintiff, in further evidence, clearly proved his right to eject the defendant from the house in question. After carefully weighing all the evidence, he could come to no other conclusion than that plaintiff had proved his case, and he gave judgment accordingly.

Sir H. Juta, K.C. (for appellant). Mr. Buchanan (for respondent).

Sir H. Juta: The action in the Magistrate's Court was for ejectment, and the whole question is, what were the conditions on which the defendant was allowed to occupy the ground. These conditions were that the lessee was to build a house and to pay rent for the ground. He has paid his nominal rent, and he has built a house.

[Maasdorp, J.: Is not this a case of precarious tenancy?]

No, the evidence does not support any such view. Reasonable occupation of the land must be allowed, for it is not to be supposed that any man will build a house upon land off which he can be turned at a month's notice. The only agreement between appellant and respondent was that if the farmer left the place the house was to go to respondent.

Mr. Buchanan contended that the appellant was only a monthly tenant, and that however hard it might seem on him, as he had voluntarily entered into this arrangement with respondent and had not been induced to do so by any fraud, he must be held to his bargain.

De Villiers, C.J.: Counsel for the appellant has not relied upon the exception taken before the Magistrate, and it is not necessary for the Court to express any opinion on the matter. Upon the merits of the case, however, he contends that the agreement between the parties establishes a lease in favour of the defendant which is to endure for the term of his life, but my opinion is that no such lease is established, or can be established, except by clear and distinct words to that effect. In the present case there is a total absence of any stipulation in the agreement from which such lease could be implied. The defendant himself, in his evidence, admits that the plaintiff gave him a right to build the house, and said that he could build a small or a large house, as he preferred, but he was to pay 12s. per annum as rent. There was no other or further agreement made. Defendant's evidence agrees substantially with the evidence given by the plaintiff, except that the plaintiff says that the lease was not per annum but per month, and that 1s. per month was paid. Then the defendant proceeds to say that the plaintiff did not agree to pay compensation when the defendant left. It is clear that no such arrangement can be inferred as that which has been suggested. It may be a hard case for the defendant, and no doubt

in some cases it would be a hardship for a person who has built a house to be turned out at a month's notice; but he knows before he begins the building what he can claim, and it is for him to consider before he builds the house whether he should undertake the work, and trust merely to the generosity or the good nature of the owner of the property. Of course, the owner of land would not be allowed to take advantage of his own wrong where, after fraudulently inducing another person to build on the land in the belief that he would, for a reasonable time, have the use of the building, he cuts short the tenancy before the tenant has had a fair return for his outlay, but no suggestion of the kind has been made in the present case. The appeal must, therefore, be dismissed with costs.

[Appellant's Attorneys: Silberbauer, Wahl and Fuller; Respondent's Attorneys: Herold and Gie.]

DUMA v. PUMENE. { 1903. Feb. 18th.

Consideration—*Nudum pactum*—Father of minor child—Lying in expenses.

The father of a minor daughter incurred expenses for her lying in and thereafter entered into an agreement with her seducer for the payment of a certain sum as damages.

Held, *that there was a valid consideration for the agreement*

This was an appeal from a judgment of the R.M. of Stockenstrom, brought by the plaintiff in the court below against the defendant. The action in the Magistrate's Court was for the delivery of a certain beast, or its value, £16, in consideration of certain loss or damage sustained by the plaintiff by reason of the seduction of his daughter by the defendant, who, it was alleged, agreed in August last to pay to the plaintiff a beast within one month for such loss or damage. The evidence of the plaintiff was that his daughter had given birth to a child, of which the defendant was the father, and that the latter had said that he would pay a beast in consideration of the loss sustained by the plaintiff in providing for the lying-in expenses of his daughter and otherwise. The plaintiff also stated that the defendant formerly desired to marry his daughter, and that he consented subject to the defendant doing so on condition of his giving his five head of cattle. The Magistrate in dismissing the claim held that if there was an agreement it was without consideration, and that if such consideration did exist, which was denied by the defendant, it was bad because it was founded upon an illegal and immoral arrangement.

Mr. Burton submitted that the defendant must be held liable for the agreement. The R.M. had made an error in dealing with this case as past consideration and in dealing with it as an immoral consideration. He contended that the Magistrate's reasons were incorrect, and that the appeal should be allowed, with costs.

Mr. Searle submitted that there was no consideration at all in the matter. It was known to the plaintiff and his daughter that the defendant was married. The affair occurred two or three years ago. Apparently the defendant took the girl away with him. The parties were Kafirs. The father wanted five head of cattle for his daughter, and it was really to recover these five head of cattle that the action was brought. That was very clear from the reading of the documents in the case. Counsel urged that a proper judgment was absolution from the instance.

Mr. Burton (for the appellant): The respondent had made an agreement and had received consideration for it, he must therefore be held to that agreement. The Magistrate is quite wrong in treating the consideration as immoral. The consideration appellant gave was not the immoral use of his daughter's person, but the loss of her services and the money expended on her lying-in expenses, for which the respondent was legally liable.

Mr. Searle, K.C. (for respondent): Here, if there was any consideration at all, it was decidedly immoral. Both the mother and the daughter well knew that defendant was a married man, and yet the daughter consented to receive his attentions, and her mother connived at her doing so. See *Matshoba* v. *Klaas* (10 E.D.C., 135), *Divisional Council of Barkly West* v. *De Pass* (6 H.C., 137).

The father gave no consideration. He was quite willing that his daughter should go and live with respondent if he only paid the five head of cattle. This is really a question of "lobolo," which usage the Court will not favour. Apparently the defendant did take the girl away with him. Then there is no proof that the girl was a minor at the time of this occurrence, and if she was not the father could have no right of action for damages. I submit that the Magistrate's decision was right

Mr. Burton (in reply) asked only that the case should be remitted back to the Magistrate for further evidence and for trial on the merits.

De Villiers, C.J.: On this appeal the Court can only deal with the record as it stands, and on the face of the record it appears that all the Magistrate has dealt with has been the exceptions. Mr. Sackville-West took exception to the summons "inasmuch as no date or place is named where the alleged seduction took place. Mr. Adendorff holds that the summons is not for the seduction, but for the fulfilment of an agreement made in August last in consequence of such seduction." This exception the Magistrate overruled. Mr. Sackville-West then took a further exception that the agreement quoted by Mr. Adendorff being for a past consideration is *nudum pactum*. This exception was upheld by the Magistrate, and the case dismissed with costs. This is the sole point which the Court has now to deal with. In my opinion, the Magistrate was wholly mistaken. The agreement between the parties is set out as follows: "I, the undersigned, hereby acknowledge my indebtedness to Duma for damages I caused him by seducing his daughter, and hereby promise to pay him one head of cattle within one month from date and four more head within a reasonable time." There is, on the face of the agreement, an allegation of consideration, viz., damages which had been caused by the plaintiff. The only way in which damage could have been caused the plaintiff was those he sustained as father of the minor child, for example, having to support this child during her illness, and having in consequence been put to certain expense. Now the claim is upon an agreement made in which a compromise was arrived at by which the defendant was to pay to the plaintiff one head of cattle within one month of the date of the agreement and four more head of cattle within a reasonable time. But that was a compromise for the damages which the plaintiff had sustained as father of the minor child in the way of lying-in expenses and maintenance of the child of the daughter. The question of fact will still have to be tried by the Magistrate: whether the girl was a minor child, whether the father was put to any expense in respect to the lying-in or maintenance. It is said there could not have been any such expense incurred, but I am inclined to think that such expense must have been incurred if this evidence is correct because the plaintiff said: "The defendant asked me for time, and was agreeable to pay the expenses incurred by the seduction and lying-in expenses." From that I gather that there were some lying-in expenses which the father was put to on behalf of his daughter. The plea must therefore be allowed, as the Magistrate was wrong in upholding the exception, and the case will be remitted to the Magistrate to try upon its merits. The Magistrate will take evidence as to the expense incurred by the father as to whether the girl was of age at the time, and, if the girl was not of age, whether the father had incurred any expense whatever. The appeal must be allowed with costs in this Court, and the case remitted to the Magistrate to try upon the merits.

Maasdorp, J., concurred.

De Villiers, C.J.: The plaintiff should be allowed to give his evidence again, so that he may give evidence on the points now raised, because the evidence that he has already given has been confined to the questions raised by the exception.

[Appellant's Attorneys: Silberbauer, Wahl, and Fuller; Respondent's Attorneys: Friedlander and Du Toit.]

Ex parte PATERSON. { 1903. Feb. 13th.

The petition of Robert Paterson set forth that at a meeting of the Land and Estate Company, of which petitioner is the chairman, held at Glasgow, in March, 1900, it was resolved that it was desirable to reconstruct the company, and that with a view thereto

the company be voluntarily liquidated and William Dunlop appointed official liquidator. This was duly confirmed at an extraordinary meeting of the company held in April, 1900. Mr. Dunlop proceeded to liquidate the company, and in the course of doing so found it necessary to transfer certain immovable property, situated at Mafeking, within this colony, but the Registrar of Deeds at Vryburg refused to allow the transfer until the appointment of William Dunlop as liquidator was confirmed by the Supreme Court. Accordingly such an order was now asked for.

Mr. Benjamin moved.

After hearing counsel as to the power of the Court to confirm such an appointment, the Chief Justice suggested that the better course would be to authorise the Registrar of Deeds to allow transfer to be passed.

Ultimately the Court granted a rule *nisi*, calling upon all concerned to show cause by the 20th inst. why William Dunlop, as liquidator of the company, should not be authorised to transfer the property named in the petition, rule to be published once in the "Government Gazette" and once in the "Bechuanaland News," Vryburg.

THOMAS V THOMAS.

This was an application by Thomas Rowland Thomas for leave to sue his wife by edictal citation for divorce. There was a further application for an interdict restraining the parting with certain moneys.

The petition set forth that petitioner was at present living at East London On August 13, 1893, he was married in community of property to one Mabel Jane Price at Bloemfontein, in the Baptist Church. In October, 1898, his wife mentioned casually that she desired to visit her relatives in the Cape Colony, to which petitioner agreed, but no date for her departure was mentioned. The next day, however, while petitioner was on duty at the Railway Works, where he was employed, his wife left Bloemfontein, en route for this colony. This petitioner discovered when a letter arrived from his wife dated at Springfontein, stating that she had left him for good and would never return to him. Petitioner had not seen his wife since then, but he had in compliance with her wishes, remitted to her monthly from £10 to £15 sterling, through her cousins at Queen's Town, Messrs. Price Brothers. Petitioner frequently wrote his wife letters asking her to return, but she did not reply to any of them. Petitioner resided in Cape Town for a year and nine months after the outbreak of hostilities, after which he went to Wales to visit his relatives. During this time he still continued writing to his wife, but received no reply. Petitioner finally decided to return to South Africa with a view to seeing his wife and effecting a reconciliation, and left England on December 6, 1902, with that object. On arrival in South Africa petitioner went straight to Queen's Town and ascertained that his wife had been living at East London for some time past. Petitioner thereupon went down to East London, and on going to the boarding-house where his wife had been living was informed that she had left for England with a man named Ballister. Petitioner made inquiries at the East London office of the Union-Castle Company and was informed by the booking clerk that a gentleman and a lady had booked a second-class cabin under the name of Mr. and Mrs. Ballister. Petitioner had information from the Union-Castle Company at Cape Town that Mr. and Mrs. Ballister continued the voyage in the Scot after reaching Cape Town and in the same cabin. Petitioner did not know where his wife had gone beyond the fact that she must have landed at Southampton, to which port the Scot was bound. Petitioner had been informed by his wife's landlady that his wife was frequently intoxicated owing to a habit of taking drugs in excess. Wherefore petitioner was desirous of instituting an action claiming (a) that the bond of marriage subsisting between him and his wife may be dissolved; (b) that the said Mabel Jane Thomas (born Price) may be declared to have forfeited all benefits under the said marriage in community of property; (c) that he may have such other and further relief as to the Court may seem meet, together with the costs of this action. Wherefore he prayed that the Court would allow him to sue his wife by edictal citation, by reason of her adultery as aforesaid; further, that the Court would be pleased to

give directions as to the mode of serving citation, and all other necessary processes, and to fix the time for the defendant's appearance to the said citation

As to the interdict, the petitioner stated that he was aware that there was a considerable sum of money standing to his wife's credit in the local branch of the Standard Bank, and there was also a promissory note made in her favour for £200 by one Muller, to whom she had advanced the money. Petitioner was afraid that his wife would withdraw such moneys as soon as she was aware of this action, and therefore he asked for a temporary interdict restraining the local manager of the Standard Bank from parting with the moneys belonging to the defendant in the possession of the bank, and also restraining Muller from parting with £200 or any part thereof.

Mr. Upington for petitioner; Respondent in default.

De Villiers, C.J., asked whether personal service on the defendant could be effected.

Mr. Upington said he was not sure, as all the information they had was that the defendant must have landed at Southampton.

The Court granted leave to sue by edictal citation, returnable on May 15, personal service to be effected if possible. Failing that, two publications in the "Daily Telegraph," London; leave was also given to serve the intendit and notice of trial with the citation. An interdict was also granted as prayed, pending the action to be instituted by plaintiff against defendant.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir JOHN BUCHANAN.]

EDMONDS V. EDMONDS. { 1903. Feb. 16th.

This was an action for the restoration of conjugal rights brought by the plaintiff, Arthur Edmonds, of Cape Town, against his wife, Julia Annetta Edmonds, and, failing that, a decree of divorce.

The declaration stated that the plaintiff resided at Cape Town and his wife at Sea Point. The parties were married in England in September, 1900, and there was no issue of the marriage. In February, 1902, the defendant wrongfully, unlawfully, and maliciously deserted the plaintiff, and she still refused to return and cohabit with the plaintiff and restore his conjugal rights. Plaintiff, therefore, claimed a decree of conjugal rights, failing compliance therewith, a decree of divorce.

Mr. Upington for plaintiff. Defendant in default.

Arthur Edmonds, the plaintiff, said that on the 22nd September, 1900, he was married to the defendant at Hampstead, London. In October, 1900, he came to South Africa with his wife, and resided at Weston House, Sea Point. His married life was not a happy one. Previous to coming to South Africa, he had to complain to his wife about her extravagance. He was a traveller for Clark and Co., and was earning £25 a month. In February, 1902, the defendant left him. She was discontented with her married life. In June he received a letter from her through a law agent, and he met her and endeavoured to settle the differences. He was willing to receive her and settle everything. When she originally left him in February, 1902, there was no cause for her action. He had written to her several times, and finally he issued a summons. She replied recently to his law agents stating that she was returning the wedding ring, and, as she had told him a hundred times, she would never return to him.

The Court granted a rule calling upon the respondent to restore conjugal rights, rule to be returnable on the 28th February, failing which respondent to show cause by the 12th March why a decree of divorce should not be granted.

Postea (March 12th). The rule was made absolute.

ALBRECHT V. ALBRECHT.

This was an action in which the plaintiff, John A. Albrecht, of St. James's, sued his wife, Maud Augusta Albrecht (born Cox), for the restoration of conjugal rights and, failing compliance, a decree of divorce.

The declaration set forth that the parties were married on the 13th May,

1897, at Reading, in England, in community of property, and there were three children of the marriage. In September, 1902, the defendant wrongfully, unlawfully, and maliciously deserted her husband, and she had since gone to England. Petitioner asked for an order requiring respondent to return and cohabit with him, or, failing compliance, a decree of divorce, with custody of the children.

Mr. Gardiner for plaintiff. Defendant in default.

John Auguste Albrecht, the plaintiff, said that he was married at Reading, England, in May, 1897. At that time he was studying for his profession of civil engineer. In August, 1901, he came to this country, and for a time the defendant and he lived happily together, but, later, his wife got very nasty, and commenced to quarrel with him. The quarrelling continued when they went to St. James's to live, where she left him, and wrote a letter stating that she would not return. She asked him to advance her passage money to England, but he refused. There were three children by the marriage, and he asked for custody of them. In July, 1897, he entered into a deed of settlement with the defendant. If she would return, he was willing to settle everything.

De Villiers, C.J.: What was her reason for leaving you?

Witness: She said she did not love me any more, and did not care to stay with me. Replying to further questions, witness said he did not advance money to the defendant to proceed to England. He gave her her own money back. He knew she was going to England, and he tried his utmost to induce her not to go, but she went.

The Court granted a rule calling upon the respondent to restore conjugal rights, the rule to be served personally, and to be returnable by the 15th May, failing which respondent to show cause by 31st May why a decree of divorce should not be granted, petitioner to have the custody of the children.

WATSON V. HAUPT.

Mr. Upington, on behalf of the defendant, moved to have judgment signed against the plaintiff in terms of a certain consent paper.

Judgment in terms of consent paper.

M

HADLEY V. LEONARD. { 1903. Feb. 16th.

Rei vindicatio—Litis contestatio— Loss or destruction of thing claimed.

A horse belonging to the plaintiff having been lost he found it in the possession of the defendant who had released it from the pound alleging and possibly believing that the horse belonged to him (the defendant). The defendant refused to restore the horse although the plaintiff afforded him proof which, in the opinion of the Court, ought to have satisfied the defendant that the horse belonged to the plaintiff. The plaintiff brought an action for the restoration of the horse or its value, and after the pleadings had been closed the horse died.

Held, *that the plaintiff was entitled to succeed and that, as the defendant retained the horse after he had sufficient reason to know that it belonged to the plaintiff, he was liable for its full value notwithstanding its death.*

This was an action for the delivery of a certain mare and the recovery of £20 damages for depreciation, or in the alternative for £40, the value of the said mare, and £20 damages, with interest and costs of suit.

The declaration set forth that the plaintiff resided at Observatory-road, and the defendant at Diep River. On the 7th November last the defendant unlawfully claimed and took possession of a certain mare, the property of the plaintiff, which at that time he had at the Claremont Flats pound. The mare was at the time of the value of £40, but had since depreciated in value, owing to the treatment of the defendant, and damages to the extent of £20 had been sustained by the plaintiff. The plaintiff called upon the defendant to restore the horse and pay damages for depreciation, or in the alternative, he sued for £40, the former value, and

£20 by way of damages, with interest and costs of suit. In his plea, the defendant admitted that he took possession of a certain mare at that time in the Claremont Flats pound, but he denied the allegations in the second paragraph, especially that the said horse was the property of the plaintiff, and claimed that the horse was his (defendant's) property, and he also denied that the plaintiff had sustained any damage for which he (defendant) was liable.

Mr. Benjamin for plaintiff. Mr. Upington for defendant.

Charles Arthur Hadley, plaintiff, sworn, stated that on the 20th January, 1902, he purchased a number of horses in the Queen's Town district, including the mare in question. The horses were taken to Mr. Cruywagen's stable at Salt River. The mare was of a grey or roan colour, and was two years old in January, 1902. She might be called a blue schimmel. The left ear was bent over the top, resembling the effects of a bite. All the horses were untrained. The mare was marked on the off hind fetlock. Plaintiff sold the remainder of the horses to the Hon. Wm. Ross. Subsequently he sold the mare to Messrs. Bailey and Curtis. In October a boy was sent to Newlands with two mares to the purchasers. Some weeks afterwards he met Mr. Curtis at Johannesburg, and in consequence of what he heard, he communicated with his wife at Observatory. Plaintiff had received a letter from the Chief Constable at Malmesbury reporting the loss of the mare, and describing, amongst other marks, a split ear. Plaintiff had received no notice of the death of the animal from the defendant. The defendant replied to plaintiff's attorney stating that the mare in question was stolen from him.

Cross-examined: He received the mare from Mr. J. D. Morgan, French Town, Cape Colony. The ear produced was a facsimile of the left ear of the mare. To be accurate, he would call her a grey roan mare. She was supposed to be an own sister to Boy Blue. Plaintiff did not get her from a jockey called Ansley, and he had no pedigree with her. His boy tied the mare to a tree at Messrs. Bailey and Curtis's yard at Newlands.

Louisa Hadley, wife of plaintiff, said that, in consequence of a communication from her husband from Johannesburg, she inserted an advertisement in the papers describing the two mares that had been lost. In answer to an advertisement from the pound master at Claremont Flats Pound, she went to Mr. Leonard's house to see the mare that he had claimed. The defendant said that it was very strange that two mares should be so much alike, but admitted that the mare was the property of witness's husband, and assured her that the mare would be well fed and cared for. The boy was sent up for the mare, but the defendant refused to deliver her. Later in the evening witness saw the mare at the stable door, and the defendant said that, in consequence of what the Hon. Mr. Ross had told him he would not give her up.

Cross-examined: She did not tell Mr. Leonard that her husband got the mare from Ansley, the jockey. The defendant was told that another mare had been the property of Ansley. She told the defendant that the mare was own sister to Boy Blue, but she did not tell him it was a racing pony. The defendant did not say that if the witness could get the breeder, the matter would be simplified.

De Villiers, C.J.: Did you get the other mare back?—Yes, my lord; we got it also from the pound.

The Hon. Wm. Ross stated that he had never received any communication from the defendant about the mare.

Isaac R. J. Cruywagen said he was the father-in-law of Mr. Hadley, and remembered some horses coming down for the latter at the end of January. Two were taken to witness's stables at Observatory and the others were sold. The horse now in question was in witness's stables. The roan mare and the bay mare were sent to Newlands. Witness heard no more about them until his daughter received a communication.

By De Villiers, C.J.: The bay mare had been in witness's possession about two months, and the other one for three months. Witness was formerly an auctioneer to the Corporation of Cape Town. At present he resided in the Transvaal. Witness had been an owner of and had many dealings with horses.

Examination continued: In consequence of the communication his daughter received witness went on November

14 to Newlands stable, but found out nothing. Later, he saw an advertisement about an auction of three horses. At the pound, he heard that the mare was claimed. The defendant said that the mare was not at the stable, but that he would bring it up later. Witness identified the mare when the defendant brought it up. Witness gave defendant a description of the mare before seeing it. Witness claimed the mare on behalf of Mr. Hadley, and the defendant replied that if it was plaintiff's horse it was his horse also, and he refused to give it up. Previous to that the defendant agreed to give the mare over.

Cross-examined: He had not the money at the time when defendant asked for the pound fees. His auctioneering business had been confined to vegetables at the Early Morning Market. When the boy returned after delivering the ponies, witness did not ask him if they were delivered all right. Witness did not see any mark of a kick when the mare arrived in January. The mark on the left ear caused it to bend backwards. When Mrs. Hadley and witness went down to see the defendant, the latter asked Mrs. Hadley to give a description, but witness described the mare. They went down to the stable, and witness pointed out the mark on the left hind leg. The defendant said that if witness could prove that the mare was in plaintiff's possession prior to July, 1902, that he would be willing to hand her over, on condition that she should not be sold pending inquiry. When Mrs. Hadley said that the mare was an own sister to Boy Blue, the defendant said that nothing would be simpler than to produce the breeder.

W. Palmer said he knew the mare in question, having had the use of it for about two months off and on. He heard about the finding of the mare, and when he went down, he identified the animal. He had no doubt whatever about the identity of the mare.

Cross-examined: The moment witness saw the mare he identified it as the one he had had from Mr. Hadley. There was no slit at all in the ear.

By De Villiers, C.J.: Witness was quite satisfied, judging by the whole appearance, that it was the same horse.

Cross-examination continued: The horse had only one cut on the right hind leg. It received that mark from a pole while with witness.

Melville Wynne Lloyd, a broker, said he knew the mare in question, having gone to Hadley's place on several occasions with a view to purchasing it. In November, in consequence of a conversation he had with Mrs. Hadley, he went and saw a horse which he identified as the mare he had seen at Hadley's. Defendant said he had bought the horse from the Hon. W. Ross, and seemed at first inclined to give the horse up, but later on said he would have to see Mr. Ross first.

By De Villiers, C.J.: Witness was positive it was the same horse.

John Tregarthen Birse, a veterinary surgeon, said one Saturday Mr. Hadley came to witness with the jawbone of a horse. As near as possible, the horse had been about three years old.

Cross-examined: Judging from the condition of the teeth, the horse could not have been five years old.

G. F. Theron said he was pound-master at Claremont, and on October 10 last two horses were brought to him for trespassing—one a bay mare and one a roan mare. Leonard came to witness the morning after the horses were advertised in November, and asked to see the horses. Witness asked him if his horse had got any particular mark, and he replied, "None." Witness then took him to the paddock, and when they were five or six yards away from the horses, Leonard said, "Did you see anything the matter with the horse's ear?" Witness said, "Yes, I saw that before." Witness asked Leonard where he lost his horse, and Leonard replied that he had lost it out of a stable at Malmesbury last July. He said he had bought the horse at Clanwilliam, and witness replied that it was rather strange that the horse should travel all the way to Cape Town. He also pointed out the manner in which the two mares agreed, as if they had been together before. When Leonard saw the horse, he said it was his, but as he was rather doubtful about it, he said he would come back the next day and see about it. Witness asked Leonard what age his was, and Leonard replied, "Rising six." Witness replied that the mare in the pound was rising four, and Leonard said that if that were so, it could not be his horse. The next day he came with a friend, claimed the horse, paid for the advertising and pound fees, and took the horse away.

Witness told him he must be satisfied that it was his *bona fide* property. On November 15 Mrs. Hadley came and claimed the horse, and asked what had become of it, and witness told her that Mr. Leonard had released it on the 7th.

This closed the case for the plaintiff

For the defence, Mr. Upington called

William Albert Patrick Glynn Leonard, the defendant, who said that in June last he was in charge of the Field Intelligence in the Clanwilliam and Van Rhyn's Dorp districts. He purchased at Clanwilliam a horse from one Nel, a farmer in the Calvinia district. He obtained from the Deputy-Administrator a permit to purchase this horse. In July witness went to Malmesbury, taking with him this mare and another one. He had then to go to Matjesfontein on business, and he left the horse behind. When he returned on July 16 or 17, he found the mare gone. He made inquiries, and then gave information to the police. In the description he then gave he said that the mare had no marks. He gave the age as four years, that being what Nel had told him. He did not examine the mare himself to find out her age, as he was no judge. On November 5 witness saw the notice in the "Cape Times" advertising the two mares in the pound. He went and saw the poundmaster, and when the latter asked if the mare had any marks witness replied that she had no brand marks. Then the poundmaster asked if she had any other marks, and witness replied that he would know her by her ear, ad also said that she had a saddle mark. The poundmaster then replied that that was not witness's mare, as she was only three years old. He also asked if witness's mare had been shod, and on witness replying that it had the poundmaster said that this mare had never been shod. When they went to see the mare witness recognised her at once, and he also pointed out by the nail marks that she had been shod. Witness did not take the horse away then, because he said he would get somebody down who knew more about horses than he did. Next day witness went down with Mr. Blake and another gentleman, and found that the poundmaster already had the paper made out that the mare was his (witness's property. He told witness that he had better pay the pound fees and the advertising and take the horse away, which witness did. When he took the mare home he did not further examine her. The mare was used under saddle by Mr. Blake and others. On November 15 Mrs. Handley came and asked if witness were Major Leonard, and on his replying in the affirmative she said, "I have come for my mare." Witness asked her what mare, and she replied, "The grey mare you took out of the pound." Witness asked her for a description of the mare, and also asked if she had advertised the loss of the mare, and she replied that she had done so that morning. She said she had bought the mare in company with another racehorse from the jockey Ansley. She never gave witnessness a description of the horse beyond saying that it was a grey mare. She refused to give any information, because she said she refused to give herself away. When Cruywagen came he gave the description of the horse as a grey mare with the left ear twisted over forwards, and a saddle mark made by a small saddle. He said that mark was not on the wither, and he also said he had a particular private mark, a kick on the leg, which he would know the mare by. He was not certain on which leg the mark was. Witness, Cruywagen, and the others then present went down to see the mare, and had actually passed it without Cruywagen recognising it, until Mr. Heyman called out from the gateway, and asked what he should do with the mare. Cruywagen then turned round and said, "There is the mare." He then examined the horse, and pointed out a particular kick mark. The horse was then examined, and it was found that the ear was not twisted forward but twisted back, and also that the saddle mark was on the wither, and not on the back. When Cruywagen came out he asked the constable if he had described the horse correctly, and the latter replied that he had, with the exception of the colour, that mare not being grey. With regard to the kick mark, witness afterwards examined it, and from its appearance he would judge that it had been made not more than three weeks previously. Mr. Blake had had the use of the mare for three or four days. Witness had told Hadley that if he could prove that the mare was his property previous to July he should certainly have

it Witness, however was perfectly satisfied that the mare was his property. Witness had never said that he purchased the mare from the Hon. W. Ross. Defendant did not tell plaintiff's wife to come back on the following Monday to take over the mare. He was quite willing to hand over the mare, if the plaintiff could prove that it was in his possession prior to July, 1902.

By De Villiers, C.J.: He was willing to give it up on those conditions, because he was certain that plaintiff could not prove that it was in his possession prior to that time.

Examination continued: When the plaintiff's party came for the mare, Palmer said that he had broken her in, and described a mark received in that process which defendant could not find. The boy stated that the right ear was split, and that there was a hole like a shot through it. Subsequently the boy recognised the mare as the property of his master. Defendant refused to give the mare up on the description given to him. Mrs. Hadley said that the mare was an own sister to Boy Blue, and defendant said that if she got the breeder, he would consider that evidence sufficient. The mare died from "blowing up" on the 13th January. During the time she was in his possession, from October till January, he took very good care of her, and he considered that the treatment had enhanced her value.

Cross-examined: He was astonished to hear the Hon. Wm. Ross say that he did not know him. When the mare took ill, defendant could not conveniently obtain a veterinary surgeon. Defendant was a cartage contractor, and had a good many horses. When the mare died, he did not notify the fact to the plaintiff nor to his attorneys. Defendant was Intelligence Officer at Malmesbury, and could say that all the horses were not branded. Defendant purchased the mare from Mr. Nel. The Chief Constable at Malmesbury was wrong in his reply when he described the mare to defendant.

By De Villiers, C.J.: The mare might have found her way from Malmesbury to Claremont, *via* Uitvlugt.

Cross-examination continued: Defendant did not meet a man who identified the mare on the 10th January, when defendant was driving at Diep River. The statements conflicting defendant's by Mrs. Hadley, Mr. Lloyd, and Mr. Palmer were wrong. Defendant did not advertise, as there was no paper at Malmesbury.

Constable Terblance, stationed at Diep River, said that on the 15th November last he was called to the defendant's place at Diep River, where he saw Mrs. Hadley and Mr. Cruywagen. The defendant asked Mr. Cruywagen to give a description of the mare, and he said that she was a grey mare, with a mark on the left ear, a sore back, and a kick mark on the hind leg. In September witness went to the Malmesbury district, and made inquiries.

Cross-examined: Witness did not care to mix up in the affair at all. He did not take particular notice of what transpired. With the exception of the colour, the description given by Mrs. Hadley was correct.

Robert Edward Blake stated that he knew the mare over which the dispute had arisen. He had her in his possession in November last, and noticed that she had a bent ear and marks on the wither and the back. The mark on the wither would be caused by a small riding saddle.

Cross-examined: He noticed the bent ear at once.

This concluded the evidence.

Mr. Upington (for defendant): Defendant was not a *mala fide* possessor of the horse, and, therefore, was not responsible for the loss of the horse.

[De Villiers, C.J.: Even if he was a *bona fide* possessor ought he not to have given up the horse when the claim of the plaintiff was known to him?]

I submit not. *Voet* (6, 1, 34.)

[Counsel quoted from a translation of Voet, and De Villiers, C.J., thereupon referred to the original.]

[De Villiers, C.J.: Should not *mala fide* possessor read *bona fide?*]

I see that it should, but even so the defendant was prepared to hand over the mare, if the plaintiffs had shown that she was theirs, hence Leonard's possession was *bona fide.* The animal having died without fault on our part they cannot, in any case, recover value.

[De Villiers, C.J.: The defendants gave no notice that the animal was dead.]

They were under no obligation to do so. Then again the mare had been

sold and delivered to the servants of Curtis and Bailey.

[De Villiers, C.J.: There is no proof of delivery.]

Yes, the horse was taken over to the purchaser by the instructions of the vendor.

Mr. Benjamin was not heard in reply.

De Villiers, C.J.: I quite agree with the contention of the defendant's counsel that the onus of proving ownership lies with the plaintiff, and in my opinion he has done so satisfactorily. In saying this I do not rely so much upon the evidence of particular marks as upon the general evidence of identification. It appears that the plaintiff had been in possession of the horse for a considerable time, but I do not depend so much on his evidence as on that of Mrs. Hadley, and Messrs. Lloyd, Palmer, and Cruywagen. All these witnesses had known the horse before it was lost. The horse had been in Cruywagen's possession a considerable time, and he was positive that the horse he saw in the pound was the one in question. There was another circumstance—the two mares were lost at the same time, and, according to the evidence of the Poundmaster, they seemed attached to each other throughout. That was a very important circumstance. Defendant's counsel has laid stress on the fact that there was some difference in the description that appeared in the advertisement and that given by the plaintiff, but we all knew how difficult it is to describe a horse that has two colours running into each other. It was extremely difficult to write it down on paper. The plaintiff has said that it might fairly be described as an iron grey mare, but at the same time it was so nearly a roan that the description as a roan would not be wrong, in fact, it seems that it might more properly be so described. Then we must also look at the fact that the advertisement was inserted by Mrs. Hadley, and naturally she could not give such a minute description as the plaintiff himself. All the witnesses who identified the mare had no doubt whatever that the mare belonged to the plaintiff, and the defendant himself, according to the evidence of the Poundmaster, was very doubtful, extremely doubtful, about the mare. Afterwards, the defendant was willing to hand it over upon payment of the amount of the pound fees, but on reconsideration of the matter he thought that he was not justified in delivering up the mare. Then we have the fact that the mare was bought at Clanwilliam, and lost at Malmesbury, and we have the extremely improbable circumstance that the mare would have wandered—it is not suggested that she was stolen—in the way she must have wandered if she came from Malmesbury. It was extremely improbable that she would wander from Malmesbury, and instead of going back to Clanwilliam turn in the direction of Cape Town, and then when she came near there turn from Cape Town towards Claremont. The plaintiff has proved his ownership. The question arises whether, notwithstanding the death of the mare, the plaintiff is entitled to recover her full value as it was at the time the defendant obtained possession of her. If she had died before *litis contestatio* then, according to *Voet* (6, 1, 34), the defendant—who cannot be regarded as a thief—would not, in the absence of proof of negligence, have been liable. But the mare died after *litis contestatio*. While she was alive, and in the defendant's possession, the plaintiff gave him satisfactory proof of his ownership, and the defendant himself was doubtful as to his own ownership. It was therefore a case in which the possessor having good reason to know that the mare did not belong to him chose to litigate as to her ownership rather than to restore her. In such a case, according to *Voet*, even a *bona fide* possessor would be liable for the loss if, at all events, such loss would not have occurred while the animal was in the possession of the plaintiff. It is in evidence that the plaintiff had sold the mare, and that she was lost while being sent for delivery to the purchaser. I have thus far assumed that the mare's death is not attributable to the defendant's negligence, but, as the case stands, such negligence may fairly be presumed. She died, as it appears, from being over-fed on mealies, and that fact by itself is sufficient to throw on the defendant the burden of disproving his negligence. The defendant is, in my opinion, liable for the full value of the mare, namely, £40, for which judgment must be given, with costs.

Buchanan, J., concurred, and said that he had only one remark to make, and that was as to whether the possession by the defendant was *mala fide* or *bona fide*. The defendant himself had stated that the mare he bought was five years old, and that at the time he took possession of this mare it would be rising six. The mare of which he took possession was only rising four years, and he must have known when he took the mare away that it was not the mare he had lost.

Mr. Benjamin asked for the expenses of the plaintiff as a necessary witness.

Mr. Upington pointed out that, while the plaintiff was now in the Transvaal, in the summons and the declaration he was stated to be resident at Observatory-road.

De Villiers, C.J.: It appears that the plaintiff was a necessary witness, and at the time when his evidence was required he was residing in the Transvaal. Now, without laying down any general rule, I am of opinion, that this is a case in which the plaintiff, although residing in the Transvaal, should have his expenses as a witness.

Buchanan, J., concurred.

[Plaintiff's Attorneys: Scanlen and Syfret; Defendant's Attorney: A. W. Steer.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

REVIEW.

REX V. GERT BOSTANDER, ALIAS GERT PHILIPS. } 1903, Feb 17th.

Buchanan, J., mentioned the above case, which had come before him as Judge of the week, for review. He said: The defendant was charged with forging the name of Mrs. Van Wyk to a permit for a bottle of brandy. The evidence in this case is altogether insufficient to support the conviction. There probably might have been a conviction if all the facts alleged had been properly proved, but we cannot sustain a conviction for a charge of this nature without evidence to the facts. The defendant gave another person a written order, on a licensed dealer, signed by Mrs. Van Wyk, for a bottle of brandy, and a bottle of brandy was sent to Mrs. Van Wyk. The barman says that Mrs. Van Wyk told him certain things in the course of a conversation, but that is not evidence. There is no evidence that Mrs. Van Wyk did not sign the order, or that any person had been defrauded. The papers have been submitted to the Attorney-General, and the Attorney-General declines to support the conviction.

DE KOCK V. WEINTROB.

Partnership—Terms—Evidence.

This was an action brought by Samuel Antony de Kock against Louis Weintrob, both of Paarl, to recover £188, in respect of the sale of a number of mules.

The declaration set out that the parties both resided at the Paarl, and that since the 19th June, 1902, the defendant had sold for the plaintiff ten mules for £160, two for £34, in respect to which £17 had been paid by the defendant, and two for which he still owed £11, so that judgment was asked for a total amount of £188. The defendant's plea was that he had been in partnership with the plaintiff, and that they had agreed to share equally the profits and losses arising on the transactions, that the mules referred to in paragraph 2 of the declaration were sold on behalf of the partnership, and that the defendant had received moneys for which he had always been ready and willing to account to the partnership. Plaintiff had also received larger sums of money, for which he had not accounted to the partnership. Defendant had disbursed sums amounting to £12 2s. 6d. for and on behalf of the said partnership, which had not been paid by the plaintiff. Defendant had always been ready and willing, and now tendered to the plaintiff any sum which might be found due to the plaintiff on an examination of the accounts of the partnership.

The replication was a denial of the partnership.

Mr. Benjamin (with him Mr. Close) for plaintiff. Sir H. Juta, K.C. (with him Mr. Upington) for defendant.

Mr. Benjamin applied for an amendment in the declaration by joining as co-plaintiff and partner Abraham Johannes Muller.

Buchanan, J.: Is there any objection?

Sir H. Juta: That is an entirely new case. Our case is that we were in partnership with the plaintiff. Apparently the plaintiff's case to be put now is that he was in partnership with this man Muller.

Mr. Benjamin: I would not press the matter. The plaintiff himself (De Kock) actually bought the mules, but as a matter of fact it was well known in the district that he was in partnership with this man Muller, and as a matter of fact, the cheques that were put in and the promissory notes were all signed by De Kock and Muller.

Samuel Antoni de Kock, plaintiff, said that he attended a sale at Klaapmuts on 19th June last. There he met Messrs. Huyssen, Swarts, and Weintrob, the two former of whom asked him if he would join them in the purchase of some mules. A Mr. Van Eyk said he could have the mules for £16 each, and plaintiff purchased 366 mules at £14 each. The mules were purchased out of hand for cash. Plaintiff instructed Mr. Van Eyk to go on with the sale on plaintiff's behalf. Altogether 197 mules were resold on plaintiff's account for a sum of £3,303 10s. The defendant then came over to plaintiff and asked him to give him a chance. Defendant said that he was a countryman of plaintiff's, and could sell the mules for him. Plaintiff told him that he was in partnership, and could not give him any allowance, but promised to give him £50 if he assisted in the selling of the mules. Defendant pressed for more, but plaintiff said that if the sale was a good one, he might leave the matter to him. That night defendant suggested taking the mules to his kraal, and next day sold some of the mules, and brought the cash to plaintiff. The second day he handed the cash short, but said that he would be responsible for the balance. Ten mules were subsequently sold by the defendant to a Mr. Supeir, and as the money was not forthcoming, plaintiff interviewed the purchaser, and in consequence of what he said, he interviewed the defendant, and told him that he thought he was up to some mischief. When he threatened to fight the defendant in a bar the latter laughed at him. Plaintiff had to go to Fraserburg to recover some mules that had been sold, and when he returned, he met the defendant with a number of Jews. Plaintiff told him to settle the outstandings, and defendant said he would, if plaintiff would give him £1 on every mule sold. Defendant said that he was in partnership with plaintiff. The mules were bought on behalf of Muller and plaintiff from Van Eyk. Defendant never paid a penny for any of the mules. Plaintiff was willing to pay defendant the £50 he promised him when he settled the outstanding amounts.

Cross-examined: Plaintiff had a big loss on the transaction. Plaintiff thought it unnecessary to produce his pocket-book when he made the sworn declaration to produce all documents. The defendant sold twenty-five mules for over £200. When the mules were removed from the defendants' place there were only 24 left. The sale by Ripley and Balfour did not go off very well, and the offer to purchase the lot was made through Van Eyk. If Mr. Ripley would swear that the defendant carried on all the negotiations, it would be untrue. If Honson would say that he heard plaintiff say that he was in partnership with the defendant it would be untrue. If Mr. Stephanus Malan would say that plaintiff referred him to the defendant to purchase the mules it would also be untrue. He arranged with Muller previous to the sale to go into partnership if there was a chance of a bargain. Plaintiff had no document at present in his possession to show that Muller and he were in partnership prior to the sale, but the Court could see a cheque signed "De Kock and Muller." It was true that the cheque was signed after the dispute arose. The original promissory note had only been signed by plaintiff. When the settlement was made with Van Eyk, plaintiff could swear that Muller's name was mentioned. At Bergl's office Weintrob claimed to be a partner, and plaintiff did not offer him a third share, but offered him "a first." It was true that he had said that he would sooner pay £100 than have a dispute with a man like defendant. Defendant was keeping the mules at his kraal for nothing, but he was well paid with £50 for two days. Plaintiff knew of heaps of actions against the defendant, and it was not on account of these that the defendant's name was deleted from the contract.

Re-examined: The defendant's name never appeared in any single transaction. His name did not appear on a single document.

Chas. Hitchcock, a clerk in the employ of Messrs. Van Eyk, auctioneers, produced the books showing Mr. De Kock's name entered for the sale of 397 mules.

Cross-examined: Witness could not say if the defendant spoke to plaintiff at the sale that day.

Abraham Johannes Muller said that he knew both the plaintiff and defendant. He entered into partnership with the former in May last. He was up-country purchasing sheep in June, and his partner was looking after mules at Klapmuts. When he came back he went up to Weintrob's place and took the mules away. Witness went with plaintiff to defendant to get money due for mules sold, and defendant said that he was in partnership with plaintiff. The plaintiff said he would smash his nose if he would say such a thing.

Cross-examined: They had a deed of partnership in the African Banking Corporation Bank. The document was there in case there was an overdraft. Witness was responsible for De Kock's cheques, and the plaintiff in turn for him.

Hyman Bailey, residing at Lady Grey, said that last June he heard that the defendant was selling mules, and as he owed witness some money for a couple of years, he went to see the defendant, and asked him for a couple of mules. The defendant said that the mules belonged to De Kock, and if he gave witness any of the mules, he would have to pay for them in full. Witness remembered a row at the hotel at the Paarl, and heard the defendant promise to give plaintiff a note.

Cross-examined: The defendant had given evidence against witness in a recent malicious prosecution.

Isaac Bailey said that he went with his brother to get a couple of mules from the defendant in respect of money due, but Weintrob said that the mules belonged to De Kock.

Isaac Kerbel said he purchased 46 mules from De Kock, and the next morning witness and Mr. Muller went to Weintrob's place to get the mules. The defendant had no objection.

Cross-examined: Muller went with him to Weintrob's place to get the mules.

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John Walter, residing at Laingsburg, said that in June last year he was at Mr. Van Eyk's office about some business, and later in the day he went to see some mules at Mr. Weintrob's place. Witness asked him if they were his mules, and the defendant pointed to the plaintiff.

Cross-examined: He had come from Van Eyk's place, and purchased 100 mules at £16 each.

This closed the evidence for the plaintiff.

Daniel Stephanus Malan, farmer, residing at the Paarl, said that he knew both the defendant and the plaintiff. Witness did not speak at all about what took place in the sale. Witness denied the statement as to his having said that Weintrob had told him what to say about the sale when he came to court. With regard to the sale of mules, witness went to De Kock and asked him if he had mules for sale. De Kock asked him to go with him and see Mr. Weintrob. They did so, and Mr. De Kock said: "Mr. Weintrob will sell mules to you; we are partners." Negotiations followed, but witness did not buy any mules, as Mr. Weintrob would not accept his offer of £15 each. Witness heard Mr. Weintrob selling to others. He did not see De Kock doing any selling. Weintrob was doing all the selling there that day.

Cross-examined: Witness had not seen the witness Bailey at the sale, and had not spoken to him. De Kock never said to witness that he could not sell the mules. He only said: "Weintrob can sell the mules; we are partners."

Herbert Ripley said he was a dealer in livestock, and represented the firm of Balfour, Ripley and Co., of Cape Town and Buenos Ayres. With regard to the sale in question, the mules belonged to the firm. There was a large attendance of people, but the sale did not go on well, and ultimately witness sold all the animals in a lump to De Kock and Weintrob. He did not sell to them directly, but through his agent, Van Eyk. There were several offers, and eventually witness authorised Van Eyk to sell to De Kock and Weintrob. The last-named negotiated the sale. Witness was not present when De Kock said Weintrob had nothing to do with the negotiations. Weintrob came to dinner with witness, but he did not mention De

Kock's name. Witness at no time negotiated directly with De Kock. He never authorised Van Eyk to sell to De Kock alone. No offer was ever made through Van Eyk from De Kock alone to buy the mules. The mules were afterwards resold through the auctioneer, and Weintrob was instrumental in selling them.

Cross-examined: Witness did not care to whom the mules were sold, Van Eyk was the auctioneer, and he could sell them to whoever he liked, as witness looked to him for the money.

By the Court: Van Eyk gave witness no reason why he sold the mules to De Kock alone. He did not say why he took the receipt from De Kock alone.

Daniel Malan, jun., deposed that he was at the sale and wanting to buy some mules he went to Mr. De Kock, having heard that he had some for sale. Mr. De Kock told him to go to Mr. Weintrob, and witness did so and made an offer for some mules. Mr. De Kock was not there then. De Kock only said to witness, "I am not selling mules; you can buy them from Weintrob."

Isaac Abraham Perold said he was a member of the firm of Lewis and Perold. He knew the plaintiff and the defendant in this case. One day in June he went with Mr. De Kock to Mr. Van Eyk's office. They went to Mr. Van Eyk in his capacity as auctioneer, and it was in order to bring about a settlement of the account between Mr. Van Eyk as auctioneer and Mr. De Kock. There was a sum of £1,500 with regard to 100 mules which had been sold upon which Mr. Van Eyk wished to charge double commission. Eventually Mr. Van Eyk agreed to remove this extra charge, as he seemed to want to get rid of this amount standing against him. On the settlement there was a balance of £1,500 outstanding and for that De Kock gave a promissory note. This promissory note did not have Muller's name on it. During the argument Mr. De Kock broached the subject of Weintrob, and said that he had offered to Mr. Van Eyk that Weintrob should come in as a partner. Mr. Van Eyk said, "I told you distinctly I wanted nothing to do with Weintrob; you have to pay me the money." That was said while they were discussing the commission. Van Eyk gave witness to understand that he was simply dealing with De Kock as far as payment was concerned. No money was paid into the venture by either party except the risk of this promissory note. Afterwards Weintrob and De Kock came to witness's office. Then De Kock maintained that Weintrob was only his agent, while Weintrob said he was a partner in the venture. De Kock said, "How can you be my partner? Muller is my partner, and I am not going to split it up into three." Afterwards De Kock made an offer of £50 to Weintrob for his services, and when Weintrob would not accept that, the offer was increased to £100. When Weintrob declined to accept that, De Kock threatened to have him arrested for theft. Weintrob offered to go with De Kock to the police-station, which was next door. De Kock went out alone, but returned and re-opened the argument, and eventually he offered Weintrob £175, which the latter refused.

Cross-examined: Witness was perfectly satisfied that De Kock offered £175, but he always maintained the position that Weintrob was his agent, and not a partner.

A man named Berman said he attended the Klapmuts sale. The sale did not go off well at first, and the auctioneer stopped selling altogether. Weintrob was busy going about from one to another selling privately. Witness afterwards went up to De Kock when the sale had restarted, and asked him how his business was. It was a general remark that Weintrob was all "over the shop."

Cross-examined by Mr. Benjamin: He spoke to the defendant several times during the sale. He was friendly with both parties. Witness was insolvent, and Weintrob was a big creditor.

Louis Weintrob, the defendant, said he carried on business at an hotel at Paarl, but he also dealt in live-stock. He was present at the sale at Klapmuts. The stock did not go off well at first, and he spoke to several persons about the sale. He asked De Kock if he was going in with him as a partner with these mules. Plaintiff said "Yes." Witness made an offer to Mr. Van Wyk of £13 10s. a mule on behalf of De Kock and himself; then Mr. Van Eyk went to Mr. Ripley, and returned and said he did not want to take that figure. Witness then spoke to De Kock as to a higher offer, and they agreed to offer £14, and witness went to Van Eyk and tendered the

offer. Van Eyk went and saw Ripley, and a little later came to witness and said, "Well, the bargain is closed." Van Eyk was selling in lots of eight to fifteen at first, but afterwards it was agreed that Van Eyk should offer the mules in small lots of two or more. De Kock informed witness that Van Eyk said he did not want to put his (defendant's) name on the vendu roll, because he said that in the Supreme Court he had been sued for debts and bonds. Witness did not object. He did his best to sell the mules. He denied that he came on the scene when there were only 169 mules left. He did not see Muller at the sale, and he had never known that Muller was a partner of De Kock. The auctioneer sold 126 mules, and 100 were sold to Dr. Mathers, of Fraserburg. The 100 sold to Dr. Mathers were put in witness's kraal. He paid boys to look after the mules, and had also bought forage for the animals. He had disbursed £12 2s. 6d. in this way. De Kock said he would put him into gaol for receiving certain money, and they were going to the police-station, when they called at the office of a law agent, where they talked matters over. Plaintiff offered him £75. He threatened witness with his fists. After that plaintiff mentioned something about Muller's share, but witness said he knew nothing about Muller, and plaintiff offered him £100, but subsequently this was increased to £175. Witness said he would accept £300.

Cross-examined by Mr. Benjamin: He did not calculate the cost of the mules when they were purchased. He did not know that £5,000 was involved. He put in the same amount as the plaintiff. The plaintiff put nothing in.

Replying to Sir J. Buchanan, witness said he made no payment to Van Eyk.

This concluded the evidence.

Counsel having addressed the Court on the facts of the case, the Court gave judgment for the plaintiff.

Buchanan, J.: The declaration alleges that on the 15th June last the defendant received the price of certain mules, which he had sold on acount of the plaintiff, and that the defendant did not pay over the whole of the purchase price of these mules, but retained the sum of £188 odd, which was still in his hands and unpaid; and the plaintiff sues for this amount. The defendant in his plea admits that he sold these mules, and received these various sums amounting to £188, but he states that there was an agreement of partnership between himself and the plaintiff for the purchase of a large number of mules, and that they were to share equally in the profits and loss, and he says that the plaintiff has made large profits, which he has not accounted for, and that when plaintiff does account for these profits, he (defendant) will account for the sum of £188. Here we have the fact that the mules were sold, and that this sum of £188 has been received, and the question we have to try is whether the defendant's allegation that there was a partnership between plaintiff and himself, has been established or not. It appears from the evidence that Messrs. Ripley and Balfour had and tried to sell by auction a number of mules, but as the sale did not go well, they stopped it. At the sale both the plaintiff and defendant and others were present, and according to Mr. Ripley's evidence the defendant personally communicated with him with the object of buying these mules out of hand, and that when the defendant came to him he did not mention Mr. De Kock's name. From what the defendant says it would appear that the defendant wished one Goosen to join in buying these mules on their joint account, but that Goosen refused. Defendant asked the plaintiff to join him, but again met with refusal. The plaintiff says that afterwards he negotiated through the auctioneer, Mr. Van Eyk, for the purchase of these mules direct from Mr. Ripley. Mr. Ripley corrobates this by saying that he never negotiated directly with Mr. De Kock, and he says that he authorised Mr. Van Eyk, to sell to De Kock and Weintrob. Now Weintrob, when he approached Ripley, never mentioned De Kock, and De Kock never spoke to Ripley personally, and it may well be that Ripley thought both these perties wished to buy. But as Van Eyk, as auctioneer, was responsible for the money, Ripley was only interested in the price received. When Van Eyk said that he had got a price of £14 per mule, Ripley was more interested in the amount than in the purchaser, and though his impression may have been that there would be a joint purchase, he did not concern himself about it. Van Eyk was

Ripley's agent, and if defendant's contention is correct, that Van Eyk in negotiating this purchase itended it to be a purchase for both the plaintiff and the defendant, one would certainly have thought that in the vendu roll of the sale on account of Ripley and Balfour, which has been put in containing the sale of 365 mules, both De Kock and Weintrob would have been mentioned as purchasers. But the vendu roll only mentions De Kock's name. The reason why Weintrob's name is not mentioned is attempted to be explained on this ground: that Weintrob had at that time been summoned, that he had creditors, and that it would perhaps complicate and injure the sale if Weintrob appeared as a purchaser for these mules. But this is an argument that cuts both ways. The purchase price of these mules was something over £5,000, and if Weintrob's credit was so bad that the auctioneer would not put his name on the vendu roll it would be a very strong argument for holding that a person would not go into partnership with a man to the extent of £5,000, whose credit was so bad. But we can go further When the mules were bought, Van Eyk was employed by the plaintiff to sell them in pairs or in small numbers. The vendu roll of this sale has also been put in, and here again Van Eyk in his own writing says he sells these mules on account of S. de Kock. There is no mention of Weintrob having any interest in it. Weintrob is an hotel keeper, and De Kock a speculator in stock. Weintrob was an active, pushing man, and certainly spoke to the plaintiff about the sale. It seems to me from all the documents put in that the plaintiff's version is much more likely to be correct; that he did not agree to take in Weintrob as a partner, but that he wished to use Weintrob's energy and influence to secure a satisfactory sale of these mules, and he offered him a very substantial commission to push the sale as much as he could. Weintrob did push the sale. Weintrob afterwards took charge of the mules not sold on that day, and put them in his camp, and certainly interested himself in obtaining purchasers for the mules not sold by auction. The plaintiff said he agreed to give him £50 as commission for his services. Weintrob asked hm to give him a further chance, and asked for a larger sum, and it would seem that if a good sale had gone through, Weintrob might have got more, but the £50 seems to me the only sum that has ever been mentioned as having been promised. Persons who were at the sale, and who bought mules either from the plaintiff or from the defendant, have been called on both sides. Witnesses for the plaintiff state that the defendant said that these were De Kock's mules, and it is said that he said that so that if these intended purchasers had claims against him (Weintrob), they could not set them off as claims against the purchase price. Witnesses called for the defendant state that the plaintiff admitted that there was a partnership between the two. Their respective statements are denied by the parties themselves. Here, then, we have a direct conflict in the *viva voce* evidence. To test the question, let us look at what took place when payment came to be made for this large purchase. The sale was on the 19th of June, and on the same day there were re-sold some £3,000 worth of these mules. On the 29th of June, Van Eyk gave De Kock a receipt as follows: "Received £1,938 13s. 6d., in full settlement of price of 366 mules, less vendu roll commission." In the vendu roll there was a sale of 100 mules to one Dr. Maeder at £15 each, and a dispute arose between De Kock and Van Eyk as to double commission being charged on this sale. The object of the double commission was that, if the auctioneer was paid double commission, he would take over the amount; but De Kock objecting to pay the double commission, the auctioneer could not take this purchase as a good debt, and therefore in this receipt it stated that it is given "without prejudice to the £1,500 to be received from Dr. Maeder." This £1,500 was not received from Dr. Maeder, and as De Kock would not pay the double commiasion, he took over the debt himself. This £1,500 was at first deducted from the purchase price, and to settle the matter, De Kock afterwards gave Van Eyk a promissory note on the 3rd July for the sum of £1,500. This promissory note is signed by plaintiff and by Muller. From the evidence, it would appear that there was some joint understanding between De Kock and Muller before the sale. Muller had gone up-country to buy sheep, and De Kock remained behind to purchase horses and mules. It was stated

that there was a partnership between these two. There was certainly some joint interest or venture between them, but the terms of their agreement do not appear. When the case was brought into court the plaintiff wished to add Muller as a co-plaintiff, but the defendant objected. I do not think it is material in this case, as it is clear that in whatever took place between Weintrob and plaintiff there was no mention of Muller's name. Muller may have an interest as between himself and De Kock, but it is not necessary to introduce Muller into this case. As to the payment of this large purchase price the defendant does not say that this was a contract where the plaintiff was to find the money, and he (defendant) was to give the labour. Defendant, on the contrary, spurns the idea that he could not pay his share. As a fact, he did not contribute a penny towards the purchase price. He takes no risk upon himself, and four days afterwards, when a dispute arises between the parties, defendant does not say, "I am a partner with De Kock, and won't give up these animals," but he gives them without remark. It is certainly very unsatisfactory in this case that we have not the evidence of Van Eyk. That is really to my mind the strongest point I have against the plaintiff's case. Van Eyk was the plaintiff's local attorney, and he could have given very substantial evidence as to what took place at the sale, and as to what was said to Mr. Ripley. But it was competent also for the defendant to have called Van Eyk. As neither party called him, we have now to decide upon the evidence before us. In this sale we have *viva voce* evidence on the one side and *viva voce* evidence on the other. I am not prepared to throw over the plaintiff's account of the transaction, supported as his evidence is by all the written documents put in in this case. There is nothing whatever in writing to support the defendant's claim as a partner in this transaction, but all the written evidence supports the plaintiff's account that he alone was the purchaser, and not jointly with the defendant. Under these circumstances, I think that judgment must be given for the plaintiff. Although the plaintiff in his declaration has made no tender, he admits that he has promised £50 to the defendant, and the defendant now also says that he has expended a sum of £12 2s. 6d. for herds and fodder for the mules, while the mules were in his possession. This amount has not been contested in any way. I think the defendant is entitled to have this amount. Judgment will, therefore, be given for the plaintiff for the sum that the defendant admits, viz., £188, less £50 and £12 2s. 6d., leaving a balance of £125 17s. 6d., which plaintiff is entitled to, with costs.

Maasdorp, J., concurred.

[Plaintiff's attorneys: Faure and Zietsman Defendan's: Walker and Jacobsohn.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon Mr. Justice MAASDORP.]

ADMISSION.

Ex parte MOORE. { 1903. Feb. 19th.

On the application of Mr. Bisset, Frederick Harold Burton Moore was admitted as a conveyancer.

PROVISIONAL ROLL.

VAN REENEN V. ISAACS.

This case had been adjourned from the 5th inst. to enable defendant to arrive at some compromise with his creditors.

Mr. Buchanan, for the applicant, stated that so far defendant had done nothing in the matter, and he accordingly asked for judgment against defendant.

Mr. Wilkinson, on behalf of defendant, asked that the case be adjourned for a week longer, as he was hourly expecting defendant to clear up his accounts.

Mr. Buchanan said he would not object to this course being followed if defendant paid the costs of the day.

This was agreed to, and the case accordingly stood adjourned.

Postea, February 26, Mr. Buchanan applied to have the provisional order for sequestration superseded.—Granted.

HEATLIE V. CAISSE

Mr. Benjamin moved for provisional sentence for £225, on a promissory note.

The application was granted.

WEINTROB V. WEINTROB AND ANOTHER. { 1903. Feb. 19th.

Provisional sentence—Promissory note—Accommodation.

Mr. Gardiner moved for provisional sentence for £20 on a promissory note.

Mr. Upington, who appeared for defendant, read affidavits from Louis, the plaintiff's brother alleging that defendant had advanced plaintiff £48 so that the latter really owed the former £28.

In an answering affidavit plaintiff stated that his brother originally owed him £60, his share of the proceeds of an hotel at Frenchhoek, Paarl. Defendant paid £45 for plaintiff, and gave him £15 to make up the total to £60, so that plaintiff did not owe defendant £48.

Mr. Upington (for defendant): The defendant has shown that he has a good defence to an action on this promissory note. All that the plaintiff can say is that defendant's name is of no use, but the name of Van Schalkwyk, the maker of the note, was of use, for the note was discounted.

[De Villiers, C.J.: No, the note does not appear to have been discounted.]

At all events, plaintiff may have raised money on it. Defendant shows that considerable sums of money were owing to him. It cannot be decided on the affidavits whether the note was an accommodation note or not. The defendant has shown a good case on the merits, viz.: That plaintiff owes him more than is due on the note, even if it is not an accommodation note.

Mr. Gardiner (for the plaintiff) was not called upon.

The Court granted provisional sentence with costs.

MARAIS V. PINKUS.

Mr. Buchanan moved for provisional sentence for £7.500 due on a mortgage bond, together with interest from June 1, 1902, the property specially hypothecated, to be declared executable. Mr. Buchanan also moved for provisional sentence under Rule 329d for £93, being the insurance premiums on the property in question.

Both applications were granted.

AUSTEN AND HODGES V. HODGES.

Practice — Affidavits — Size of paper.

Mr. Gardiner moved for provisional sentence on a promissory note for £326 8s. 1d.

Sir Henry Juta, K.C., appeared for defendant.

A question arose as to the admission of certain affidavits made in Rhodesia, which the Registrar had been unable to accept because they were not on paper of the proper size, while the signatures of certain justices of the peace had not been regularly authenticated.

De Villiers, C.J., stated that, under the special circumstances, the affidavits would be accepted, but it must not be regarded as a precedent. Unless affidavits were made on paper of the customary size, difficulty would be experienced in binding the records of the Court.

The defence was that the debt was due by defendant's brother, who was in partnership with plaintiff at Gwelo, Rhodesia. Defendant signed certain promissory notes for his brother, who had been unable to meet them, consequently he was being sued as surety for the principal debtor. The business was now being liquidated, and defendant maintained that if his brother sold his share of the business, he would be entitled to receive £5,186.

De Villiers, C.J., suggested that the best course would be to let the matter stand over, to see what the result of the liquidation of the business would be.

It appeared that notice of dissolution was given in October last.

De Villiers, C.J., thought the parties ought to know how the matter stood by March 12.

The case was ordered to stand over until the 12th prox.

Postea, March 12.—The case was ordered to stand over till April 14.

ESACK V ADAM.

Mr. Wilkinson moved for an order to restrain defendant from leaving the Colony, pending the trial of an action in which plaintiff was claiming £100 damages against him for alleged malicious and illegal prosecution.

Mr. Burton appeared for defendant.

Defendant, in an affidavit, stated that he was a hawker, residing at Johannesburg. He came

to Cape Town as a refugee, subsequently returning to the Rand. Last month he was summoned to appear as a witness in a criminal case—a charge of housebreaking and robbery. Defendant arrived in Cape Town on January 14, and remained here until February 13, when the case was withdrawn by the Crown. Defendant left the same night for Johannesburg, but on the train arriving at Victoria West he was arrested by two constables, handcuffed, and led by a rope tied between two horses to the local gaol. Subsequently he was sent to Cape Town, and he maintained that his arrest was carried out in a wrongful and irregular manner.

Mr. Wilkinson said that he had only just been made acquainted with this affidavit, and he would like to have an opportunity of replying to it.

The Chief Justice remarked that the affidavit stated that the arrest was improper, but how did that affect the case?

Mr. Burton said defendant was prepared to deposit £100 with the Registrar as security for his appearance.

Defendant was ordered to be discharged on this condition, and the case was postponed until Thursday next.

Postea, February 26.

Mr. Burton stated that when the case was last before the Court, it was suggested that copies of the evidence might be obtained to see whether there were reasonable grounds for an action for malicious prosecution. Counsel found that in the Magistrate's Court—and the case did not reach the higher Court—Adam did not mention plaintiff's name. It appeared that Adam was arrested for an assault on certain persons, and kept in the lock-up for the night, during which his house was broken into, and a certain amount of money taken. In the Magistrate's Court, Adam simply gave formal evidence as to finding his house broken into and the money missing, but he did not mention the name of any person. Defendant's servant stated that he heard a window broken, and saw persons, including plaintiff, in the house.

Mr. Wilkinson said the prosecution was commenced by statements made by Adam and his servant.

De Villiers, C.J.: Ample time has been given to produce the requisite evidence to show that there was some *prima facie* reason for supposing that plaintiff would succeed in his action. No such evidence has been produced. I am of opinion that the arrest should never have been asked for, and should now be discharged.

The order for arrest was accordingly discharged.

ILLIQUID ROLL.

DE WET V. MANSCHESTER.

The Court granted judgment under Rule 329D, for £50, rent owing to plaintiff by defendant.

DREW AND CO. V. DE VRIES AND CO.

Mr. Alexander moved for judgment, under Rule 329D, for £320, being balance of amount due to plaintiff for goods supplied and work done.

The application was granted.

WERNER V. KUKARD.

Mr. A. E. de Villiers moved for the transfer of certain land on payment of £225.

The application was granted.

TUCKMAN AND CO. V. LEVITON AND SON.

Dr. Grecar moved, under Rule 329D, for provisional sentence for £18 3s. 6d., for goods sold and delivered.

The application was granted.

LAWRENCE AND CO. V. PEACHEY.

The Court granted judgment, under Rule 329D, for £105 8s. 7d., for goods sold and delivered by plaintiffs to defendant.

REHABILITATION.

C. E. APPEL.

Mr. Bisset moved for the rehabilitation of Coenraad Edward Appel, and for his discharge under Section 117 of the Insolvent Ordinance. The creditors had been paid in full, and there was nothing unfavourable in the trustees report.

The application was granted.

HERHOLDT V. ESTATE HERHOLDT.

Will—Evidence—Handwriting.

This was an action by the widow of the late Abraham Peter Herholdt, who died

in February last, to have a certain will declared to be the last testament of the deceased. The will which it was sought to have declared valid was executed in 1901, but it was not discovered until some considerable time after the death of the testator, who died in February last. The will was discovered in November last, when it was tendered to the Master, who accepted it. The will executed in 1900 had, however, been previously filed, and the executors had received letters of administration. The action was now instituted to have the later document declared valid, and the previous will set aside. The first will was made in favour of the Dutch Reformed Church, Wynberg, with usufruct for Mrs. Herholdt, while the second will, which it was now sought to have declared valid, was entirely in favour of the plaintiff.

Mr. Benjamin (with him Mr. Gardiner) for the applicant; Sir H. Juta, K.C. (with him Mr. Burton) for the respondents.

Jane Dorothy Herholdt, the plaintiff, stated that she was married to the deceased in March, 1883. He had formerly been a clerk in the employ of Rutherfoord and Co., but after they were married he followed no occupation, but lived on his means. They led a very secluded life, her husband being visited by relatives only. She was present when the first will was signed, but she did not understand what its contents were. She was also present when the second will was signed on October 20, 1901; her husband died on February 4, 1902. The will was written on a piece of tissue paper, and as she objected to the flimsy nature of the paper, her husband said he would write it out again. He signed the will, and she placed it in the cash box. Her husband used to imbibe freely. Some few days after he drafted the second will he sent for two young men, named De Villiers, to witness it, but as only one attended, deceased got Miss De Villiers to witness it as well. The will was then placed in the cash box, and she never saw it again until November last, when she discovered it, while she was looking for a fan of her husband's. She then found the document in the bottom of the cardboard box in which he used to keep a lot of private matters. With the exception of about £100, she had no money at the death of her husband.

Cross-examined: She herself placed the things found in the cardboard box before the date of her husband's death. The box was kept on a table in her bedroom. She was not very much interested in the will, although it left her all the property. She was under the impression that she had placed the will in a cash box. No one was living with her when Mr. Herholdt died, but a lady had since been residing with her. She informed Mr. W. T. Buissinne that there was a second will, but that it could not be found. She also told Mr. Pienaar that the one proved was not the last will, and informed her solicitors to the same effect, and though they wrote certain letters about the property, they did not mention the second will in them, because she had given it up for lost. She had a copy of the last will written in her husband's handwriting, but she was told it was worthless, so she did not give it to her attorneys. When the first will was read, Miss De Villiers observed, "That is not the will I signed." Plaintiff was very angry at only one member of the Kerkeraad attending deceased's funeral, but she did not then say to Mr. Pienaar, "Here my husband is leaving the church his money, and none of the Kerkeraad have thought fit to attend his funeral."

Charles Bennett de Villiers, a clerk in the Railway Department and deceased's nephew, stated that he remembered receiving a message from his mother at the beginning of last year, in consequence of which he went to see his uncle. It was about the third Sunday in January, being about a fortnight before Mr. Herholdt died. Mrs. Herholdt took witness into a room in which her husband was lying in bed. Witness's sister was also in the room, and Mr. Herholdt told them that a document on the table was his will and that it bore his signature; he asked them to sign it. Witness signed the will in the presence of his aunt and his sister.

Cross-examined: The time was between three and four o'clock in the afternoon, and the room was rather dark. Deceased was in bed, and apparently very ill. Witness heard that he died from the result of injuries received through falling from a chair. Witness did not read the will.

Elizabeth Violet de Villiers, sister of the previous witness, stated that for-

merly she was a teacher at Plumstead. She used to see her aunt and uncle frequently. She remembered the particular Sunday in January, 1902, when the will was witnessed. Her aunt called her into the room, and her uncle asked her to witness the will. Her brother was already in the room. Her uncle pointed out his signature, and said the document was his last will and testament.

Cross-examined: While she was in the bedroom she did not see the will taken off the table and shown to deceased. She knew what the contents of that will were, because she read it—more or less. After the death of Mr. Herholdt she heard that the first will was being acted on. She did not mention to anyone that she had witnessed the second will, because she heard that it had been lost.

By the Court: She accompanied her aunt to Mr. Buissinne's office, when that gentleman read the first will. Mrs. Herholdt said that was not the last will, and she (witness) remarked that it was not the will she was asked to witness.

Harry Gordon Caffyn stated he knew the deceased intimately. He identified several signatures to certain letters put in a those of the deceased.

Harold Jones, clerk in the employ of Messrs. Findlay and Tait (solicitors), stated that his firm acted for Mrs. Herholdt. She called at the office on two or three occasions last year in connection with the matter. She showed him a copy of the second will in June last.

This closed the case for the plaintiff.

Sir Henry Juta called for the defence Daniel Joshua Pienaar, clergyman of the Dutch Reformed Church, Wynberg, who said he knew deceased, and had been in the habit of regularly visiting his house. On one occasion Mrs. Herholdt came to his house and asked him to go down to their residence, because her husband had been very unkind to her. On another occasion she sent the servant, and on a third occasion she made a similar complaint to him at her house. Deceased was at times in the habit of using very unkind language towards the plaintiff. The first will was drawn up by Mr. De Beer, law agent, of Wynberg. After it had been drawn up witness continued his visits to the house. Mrs. Herholdt was present when this will was signed. She did not say much about it, but she showed signs of very great dissatisfaction. Only one member of the Kerkeraad attended Mr. Herholdt's funeral, and she told him that she despised the Kerkeraad from her heart; she thought they ought to have attended the funeral, seeing that her husband had left his whole estate to the Dutch Reformed Church at Wynberg. Subsequently witness, as one of the executors, took out letters of administration. He had correspondence with Mrs. Herholdt about the property, but she never said a word to him about a will being lost.

By the Court: He first heard of the second will from the Master on November 6 last, and the first word Messrs. Findlay and Tait said about another will was at this time. Witness personally did not benefit from the will, deceased's property bein~ held in trust for the church. Mrs. Herholdt on one occasion told him that she would settle the whole estate, because there was some of her own money (£300) in it. She did not say anything about the second will. He was not certain whether he or Mr. De Beer took the will away from deceased house.

At this point, a witness being absent, the case was ordered to stand over *sine die*.

Postea (March 8).

Sir H. Juta called for the defence.

Wm. Templer Buissinne, of the firm of Van Zyl and Buissinne, attorneys, who said his firm were acting in the matter in dispute. He remembered Mrs. Herholdt calling with a young lady, but he would point out that the matter was in the hands of a capable clerk, named Reid, under the supervision of his partner, Mr. Kayser, and he saw the lady as a matter of courtesy, because she asked for him. He sent for Reid, who was present during the interview. He remembered showing Mrs. Herholdt certain accounts of the administration of the estate. If Mrs. Herholdt had said that there was another will in existence he should have promptly told Mr. Reid to report the matter to Mr. Kayser, and he should have sent word to Mr. Kayser to stop the administration of the estate under the will, which was in the office. On the other hand, if Mrs. Herholdt had said that she told him that there was another will he would not be prepared to deny it. He was perfectly sure that if she had told him that there was another will in existence he should have stopped what was going on in the office at that time. He had no recollec-

tion of the young lady saying anything about the will. If she had said in his presence that she had witnessed another will, and that the will in the office was not the one in question, he would have sent for Mr. Kayser and given directions that the administration of the estate should be stopped. As a matter of fact, they went on with the administration.

Cross-examined by Mr. Benjamin: If the alleged other will had been lost they would have gone on with the administration of the estate. He always sent for Mr. Reid when Mrs. Herholdt called. She had generally contended for something when she had called. She seemed querulous.

Walter H. Reid, clerk in the office of Van Zyl and Buissinne, said he recollected Mrs. Herholdt calling at the office in the company of the young lady, and he was present at the interview with Mr. Buissinne. His impression was that the young lady did not open her mouth during the whole of the interview.

Sir H. Juta: She says that Mr. Buissinne read the will, and Mrs. Herholdt said that that was not the last will, and that she (the young lady) had witnessed another will?—Witness: I never heard those words uttered at all. My impression was that Mrs. Herholdt was dissatisfied with the will.

Sir H. Juta: But she said nothing with regard to there being another will? -Witness: No, nothing at all.

Cross-examined by Mr. Benjamin: Witness took Mrs. Herholdt over to the Master's Office, and asked to see the will there. He did not remember her saying that that was not the will. When he showed her the will she said that the signature was Mr. Herholdt's.

Mr. Benjamin, after putting in the correspondence, addressed the Court on behalf of the plaintiff. He presumed, he said, that his friend would depend very largely upon the discrepancy in the signatures in support of his case.

Mr. Justice Maasdorp: It is not a question of the signatures; it is a question of the whole will.

Mr. Benjamin: Yes, that is so; but, of course, I suppose that the point that my learned friend will in the main attack is the fact that there is considerable discrepancy in the signatures. I will admit that, looking at the signature on the will, there does appear to be some difference between the signatures, but when these signatures are compared with other signatures that had been admitted and the other writings that had been admitted, I submit that much of the discrepancy that apparently exists disappears.

The Chief Justice: Are there no experts in handwriting in this town?

Sir H. Juta: I may say we did everything we could to get one, but we could not find one, because we wanted an examination of the tissue-paper with glasses and lenses.

Mr. Benjamin went on to argue that there was often dissimilarity between the handwriting of the deceased, and that the writing in the will now produced was such as could be found in admitted handwriting of the deceased. As to the fact of the later will being prepared on ordinary toilet paper, he said that if this signature had corresponded with some admitted signatures which had been put in, one might have said at once that this kind of paper had been used for the purpose of tracing the signature, but the signature compared with none of the signatures which had been put in. He contended that that did away with the idea that the toilet paper had been used for the purpose of fabricating the will. He also submitted that the delay which took place before the later will was found was an element in favour of its genuineness.

Sir Henry Juta asked why, if the testator intended to make a will, he should not have signed it. What prevented him from signing the paper? Not want of time, because he wrote two addresses at the bottom of the paper.

The Chief Justice: There were no witnesses; he could not sign without witnesses.

Sir Henry Juta: But he signed the toilet paper will. Counsel remarked that how the testator could have made the copy was another mystery. It was for the plaintiff to prove that the will was a genuine one. He contended that if this will had been made in the month of October this lady, who knew well enough that it had to be executed, would not have locked it up for three months and run the risk of her husband dying in the meantime without the will being executed. It would, he submitted, be a very dangerous thing if under the circumstances disclosed in this case the Court held that the testator knew he was acknowledging the signature. There was

no evidence to show that anything which contained testator's signature was shown to him. Counsel quoted the case of *Roux v. Lombard* (9 Eastern Districts Court, 201).

Mr. Benjamin, in reply.

De Villiers, C.J.: This is a case which certainly involves considerable difficulty and obscurity. It appears that a will, a perfectly genuine will, was duly executed by the testator on the 24th of October in the year 1900. After the death of the testator, which took place early in the following year, the executors appointed under this will took out letters of administration, and no objection was raised to them on the ground that another will was in existence. After they had been in their office for several months the plaintiff brought forward another will, which she said had been executed by her husband shortly before his death. That alleged will has been produced in Court, written upon what appears to be tissue paper, and the plaintiff has stated the circumstances under which she says it was executed. She said her husband had made a copy on blue paper, and had afterwards copied this upon this tissue paper and signed this tissue paper, and put it back into the cash-box, and that subsequently some relation of hers, a Miss De Villiers and her brother were sent for to witness the acknowledgment of the testator of this tissue paper will. These two persons have given their evidence as to what took place upon that occasion, and they say the testator pointed out this as his signature, and that they therefore witnessed it. The document is produced with their signatures to it. Counsel for the defendants has greatly relied upon the extreme improbabilities of this version, and he has relied also upon the dissimilarity of the handwriting in this document and the ordinary handwriting of the testator. Now, upon this point I must say I would have been glad to have been assisted by a person who has made the comparison of handwritings his study. For myself I confess that the two handwritings appear to be entirely different, and the supposed signature of the testator in this document is not the signature which, on any occasion in any of the undoubtedly genuine writings, he ever made. It is quite true that the letter "R" was sometimes written by the testator in the shape in which it appears on the document now in suit, but never in any signature of his name. It would be a strange circumstance if this man, having always signed his name in one way should, when on his sick-bed—I might have said death-bed—alter his ordinary signature when executing so important a document as his last will. But it is not only the signature, but the whole body of the document which appears to me to be different from the writing appearing in his books and letters. A good deal would depend upon this point, because, if this will was not in the handwriting of the deceased, then it would have to follow that the document was a forgery, because the case of the plaintiff is that the whole is in the handwriting of the testator. These are circumstances which certainly weigh against the view of the plaintiff that this document was a genuine will. On the other hand, there are circumstances which the Court cannot lose sight of. There is, first of all, the fact that these two witnesses were unshaken in their evidence as to what took place at the time when the testator was alleged to have acknowledged his will, and another circumstance which I must say does have very considerable weight with me is this: That if this were a forgery, if the plaintiff had set about making a forgery for the purpose of a fraud, it is unlikely that she would have used tissue paper for the purpose. My learned brother holds a strong view that the document is genuine, and, seeing that a decision to the contrary would involve the plaintiff and her witnesses in a charge of fraud and perjury, I am not prepared to differ from him. The judgment will be for the plaintiff, but as to costs they should come out of the estate. The defendants were justified, nay, bound to defend the action, and should not be made to bear any part of the costs in their individual capacity.

Maasdorp, J., said it was a pity that this case, depending as it did upon questions of fact, was not brought before a jury, or did not come on when a full Court was sitting. He had watched the witnesses for the plaintiff carefully while they were in the box, and from the manner of their evidence, and their agreements in regard to little details and circumstantialities upon which they could not have been in communication, he was impressed with the truthfulness of their evidence. Besides this oral evidence, there were written documents, and where

there was such an abundance of writings with which to make careful comparison, it ought not to be difficult when forgery was committed to prove such forgery. The document in question was of some length, and the whole of it was said to be a forgery. Here was a document which could be carefully compared with the book, which contained admittedly genuine writings of the alleged testator. He had listened to the argument of Sir Henry Juta, and he had not satisfied him that discrepancies between the writings could be proved. The presence of the second document also seemed to him strong evidence that the case put before the Court by the plaintiff was genuine. He could not for a moment conceive why this other document should have been produced if it were a forgery; he could not conceive how such preparation of fraud and forgery could have entered the mind of any person whose sole object was simply to prove that a document, witnessed by two individuals on a certain day in a certain bedroom, when no one else was present, was genuine. The presence of this other document, which was utterly useless for the purpose of establishing this case, satisfied him that the evidence as given by the plaintiff was truthful. He must say that he would have been very glad to have had the assistance of an expert, but looking carefully at the different writings, he was convinced that it was the same hand that wrote in both these documents, and the book. As to the signatures, it struck him that the only difference between the signatures to these documents and the admittedly genuine signature was in the formation of the letter "R." Now that would have been a very serious difference, because, as has ben said, a man does not vary his signature very much, but, strangely enough, in the book, this particular form of "R" was frequently used. It was undoubtedly the case that the signature was rather shaky, but to his mind this was very easily explained. It was stated by counsel that Mr. Herholdt was given to liquor, and was decidedly in a very shaky condition, and that would account largely for some difference in the general nature of the handwriting, which difference, however, was not much to his mind. He was sorry that the case should be supposed to go upon an opinion expressed by himself, and he would have preferred, if his view were correct, to have had the support either of a brother judge or a jury, but he was bound to come to the conclusion that this was a genuine document, that it was executed and witnessed as described by Mrs. Herholdt and the other two witnesses, and that it was consequently the will of Mr. Herholdt.

[Plaintiff's attorneys: Findlay and Tait. Defendant's attorneys: Van Zyl and Buissinne.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

Ex parte SEGALL. { 1903. Feb. 20th.

This was an application by Jacob Berman, of Cape Town, brother of Rebecca Segall, who had been declared of unsound mind by the Court, for a rule *nisi*, calling upon his sister's husband, Morris Segall, to show cause why the appointment of the said Morris Segall as curator of his wife's person and property should not be cancelled, such rule in the meantime to operate as an interdict restraining him from dealing with her property.

The applicant stated in his affidavit that the first intimation he had of Segall's appointment was a report of the case in the newspapers; that Segall was in Cape Town at the time, and was aware that if applicant had known of the application for his appointment as curator, applicant would have opposed such appointment; that a few months ago in the Transvaal the Courts had refused to allow Segall, on his application thereto, to deal with his wife's property; that there was every prospect of the wife recovering her faculties, and the husband was not a fit and proper person to be such curator, as he continually grossly ill-treated his wife and behaved in a brutal manner towards his wife and children, and had frequently expressed his intention to leave the country; that Mrs. Segall herself, before she became unwell, had asked her parents not to allow her hus-

band to deal with her property, which was of the value of something like £12,000, and situate at Johannesburg.

Mr. M. de Villiers, who made the application, said he was informed that Segall left for Johannesburg immediately after receiving the order, and there was some danger of his dealing with the property in a manner disadvantageous to the ward.

De Villiers, C.J., thought Segall ought to have informed the Court at the time that his wife had a brother in Cape Town who could protect her interests.

The rule was granted as prayed, returnable on March 12 next, the rule to be served personally on Segall, and to restrain him from interfering with his wife's property or person.

STO-BERG V. STOFBERG.

This was an action for divorce.

Mr. De Waal appeared for the plaintiff, Mrs. Stofberg, who stated that she was married to defendant at Clanwilliam on August 29, 1898, in community of property. The same day they left for the Paarl, and while living there he left her—on business, as he said. There was one child of the marriage. In September, 1900—since when she had not seen her husband—he had written admitting infidelity.

Evidence was given by a blacksmith of Clanwilliam to the effect that respondent, accompanied by a woman who was not his wife, had occupied the same room.

A decree of divorce was granted.

JACKS V. JACKS. { 1903. Feb. 20th. ,, 21st.

Restitution of conjugal rights—Domicile.

A wife who does not reside within the jurisdiction is entitled to a decree of restitution of conjugal rights against a husband whose domicile is in this Colony and who has maliciously deserted her.

This was an action for restitution of conjugal rights, or failing that, a decree of divorce.

The declaration set forth that the petitioner—the wife—resided in London, and the respondent in Cape Town. They were married in 1889, and ten years later respondent deserted petitioner, since when he had failed to maintain her and had refused to return to her.

The evidence of the petitioner, Mary Charlotte Jacks (born Bridges Todd) - given on affidavit made in London - was to the effect that she was married to the respondent, Walter Barrett Jacks, in London, at the Parish Church of Kensington, in July, 1889. They first lived in lodgings at Fulham, where the only child —now eleven years of age—was born. At the time her husband was a jobber's clerk on the London Stock Exchange, and subsequently was admitted as a member. Latterly he frequently came home in an intoxicated condition, and petitioner occupied a separate bedroom with her little girl. He left for Cape Town on February 24, 1900, and since April last she had received no letter from him. He left debts to the amount of £60, but these he had not since paid, nor did he send her any money, with the exception of 10s. as a Christmas gift. For some considerable time before her husband left England, and also since, she worked at dressmaking for relatives and friends in order to support herself and child, a girl now eleven years of age.

De Villiers, C. J., said this was the first case of the kind he could remember. The wife resided in England, and had never come under the jurisdiction of the Court. The desertion took place in England, because the husband left the petitioner in that country, and now the Court was asked for a decree of restitution of conjugal rights and custody of the child. What right had the Court to make a decree affecting the custody of the child who was in England? The husband might go back to England and claim the child.

He suggested that Mr. Upington should look up authorities on the point and mention the case on the following morning.

Postea, February 21.

Mr. Upington said he had looked up the authorities on the point. In this Court the first case was that of *Reeves* v. *Reeves* (1 Menzies, page 244). Then there were the cases, *Miller* (3 Searle, page 277), and *Verstander* v. *Verstander* (1 Menzies, page 280). In the latter case it was held that the domicile of the husband was the domicile of the wife. The

latest reported case was *Peters* v. *Peters* (16 Supreme Court Reports, p. 303). In this instance the husband had come to reside in the Cape, his wife remaining in Natal, and the Court granted the former leave to sue by edictal citation for restitution of conjugal rights. Counsel also quoted *Whip* v. *Whip* (12 Supreme Court Reports, p. 174), and *Walter* v. *Walter* (11 Eastern Districts Court Reports, p. 89). These were the main reported cases, but the Registrar had referred counsel to *Camp* v. *Camp* (12, C.T.R., 134). In this case the marriage took place in England, and the wife never came to this country, but the Court granted an order for the restitution of conjugal rights. Then there was the case of *Gush* v. *Gush* (12, C.T.R., 827), in which a rule calling upon defendant to restore conjugal rights was made absolute this year. The parties in this case came from England, where they were married, but the husband subsequently went back to England, and the Court granted an order calling upon him to return here, or to advance his wife £35, to enable her to proceed with the action.

De Villiers, C.J.: The declaration in this case alleges that the defendant resides in this colony and is domiciled here. There is no appearance on the part of the defendant, there is no denial of these allegations, nor is there any exception to the jurisdiction of this Court. The Court is, therefore, bound to assume on the case as it stands that the defendant is domiciled here, and being domiciled here the Court has jurisdiction over him to order him to return to plaintiff or to receive her in case she should come out to this colony. Plaintiff is entitled, owing to the defendant's residence in this colony, to a decree of restitution of conjugal rights as against him. The Court will, therefore, grant such a decree with costs, defendant to return to or receive plaintiff on or before April 15, failing which a rule *nisi* will be granted to show cause by May 7 why a divorce should not be granted, on the return day plaintiff to give satisfactory evidence that she has expressed to defendant her willingness to come out and settle in the Colony. The only point I am still in doubt about is the question of the child ; she has never been to this colony. I wish to express no opinion on the point, but plaintiff will have to consider before the return day whether she should not come within the jurisdiction of the Court with her child. The matter, however, will still be open to argument on the return day, but so far as the restitution of conjugal rights is concerned I have no doubt. Defendant is here and subject to the laws of this country, and he must restore conjugal rights to plaintiff. It is true that she resides outside the jurisdiction of the Court, but that is probably owing to the fact that the defendant refuses to live with her.

[Plaintiff's Attorneys: Van Zyl and Buissinne.]

VAN DYK V. VAN DYK.

This was an action for the restitution of conjugal rights.

The parties were married in community of property in Cape Town on August 8, 1893. There were four children of the marriage. On July 21 last, it was asserted, the husband deserted his wife, and, notwithstanding her demands, had since refused to maintain her or to receive her.

Mr. Buchanan for plaintiff; defendant in default.

Mrs. Van Dyk, the plaintiff, stated that at the time of their marriage her husband was a butcher's assistant in Cape Town. They lived happily together for four years, and then trouble arose, because she could not keep the house going on her allowance of £1 2s. 6d. per week, with which she was expected to pay the rent, provide food, and supply the children and herself with clothes. This led to quarrelling. Afterwards they went to live at Rondebosch, where he started a butchery, which failed. He then became a driver to a commercial traveller, with whom he left on a three months' trip in February last. On his return the question of the housekeeping allowance again caused unpleasantness. In July last he said she could do what she liked, but he did not intend to live any longer with her. He accordingly took the children and the furniture to her parents' residence, while she went to live with a lady friend. She had seen him on two or three occasions since, and asked him to support her and the children, but he refused. He was now living at Claremont.

The Court granted a decree of restitution of conjugal rights, respondent being also ordered to return to his wife on or before March 21, or to show cause on April 12 why a decree of divorce should not be granted.

Postea, April 15, a decree of divorce was granted.

MANSON V. AURET.

This was an action for transfer of certain property.

Mr. J. E. R. de Villiers, who appeared for defendant, stated that the case had been set down by defendant. Due notice had been given to plaintiff, who was unrepresented, and under Rule 30 of the Court defendant now claimed absolution from the instance, with costs.

The Court granted defendant absolution from the instance, with costs.

HILLS V. COLONIAL GOVERNMENT.

1903.
Feb. 23rd
" 24th.
" 25th.
" 26th.
" 27th.
Mar. 2nd.
" 6th.
" 17th.

Condition precedent—Obligation Fulfilment — Meaning of words "actual cost."

The condition of an obligation is taken to be accomplished when the debtor, who is obliged under such condition, has prevented its accomplishment.

The plaintiff entered into a contract with the Government for the construction of a line of railway by which it was provided that in case of certain defaults on the part of the contractor, the Government should be at liberty to take over the incomplete work and pay to the contractor the "actual cost" thereof, which was to be ascertained by the certificate of the Government engineer, who was to be at liberty to inspect the contractor's books.

Held, *that such "actual cost" was the cost actually incurred by the contractor in constructing the work; and did not include (1) interest on payments, or (2) expenditure wasted in consequence of any part of the work having been condemned by the engineer, or (3) any work or material of which the Government had not received the benefit.*

The Government having taken over the work, a correspondence ensued between the Government and the contractors, from which it appeared that the Government placed a different construction upon the words "actual cost," and was prepared to pay only for the value of the work as appearing from certain scheduled prices. The engineer accordingly tendered to the contractor a certificate which did not purport to be a certificate of actual cost but was based upon the scheduled prices as contended for by Government.

Held, *that, although the production of an engineer's certificate was a condition precedent to the plaintiff's right to recover the actual cost, the refusal of the Government to pay the amount of actual cost dispensed with the necessity of providing such certificate and entitled the plaintiff to recover upon independent proof of actual cost.*

This was an action in which Arnold Frank Hills, of London, in his personal capacity, and as trustee of the Grand Junction Railways, sued the Colonial Government for payment of various sums of money, amounting in the aggregate to £612,565 4s. 7d., together with 50,000 Thames Ironworks shares. Or, in the alternative, for £1,053,330 15s. 6d. The declaration was as follows:

1. The plaintiff is Arnold Frank Hills, of London, England, who sues both per-

sonally, and in his capacity as trustee for and on behalf of a certain joint co-partnership venture called the Grand Junction Railways.

The defendant is Arthur Douglass, who is sued in his capacity as Commissioner of Railways, and who in such capacity is the proper person to be sued in this action as representing the Colonial Government.

2. On or about the 19th day of May, 1896, a certain company registered in the Cape Colony, and known as the Grand Junction Railways, Limited, entered into a contract with the Colonial Government (copy of which contract marked (a) is hereunto annexed, the plaintiff craving that it may be considered as inserted herein) for construction by the said company on the terms and conditions therein set forth of certain three lines of railway, to wit: (a) From Somerset East to Fort Beaufort; (b) From Fort Beaufort to King William's Town; (c) from Oudtshoorn to Klipplaat.

3. Thereafter the said company duly proceeded with the construction of the said lines of railway.

4. On or about the 18th day of March, 1899, a certain further contract was (in so far as the construction of the said lines of railway was still to be erected) entered into between the Colonial Government and a company registered in England, and known as the Thames Ironworks and Shipbuilding Company, for the further construction and completion of the said lines of railway.

5. The terms and conditions of the contract of the 18th March, 1899, are fully set out in the annexure hereto marked (B), which the plaintiff craves may be considered as inserted herein.

6. For the purposes of, and in connection with the said contract of the 18th March, 1899, which was entered into with the consent and approval of the Grand Junction Railways, Limited, the latter company on or about the 20th July, 1898, duly ceded and assigned all its right title and interest in and to the contract of the 19th May, 1896, to the said Thames Iron Works and Shipbuilding Company, and to the plaintiff.

7. Thereafter the Thames Iron Works and Shipbuilding Company duly proceeded with the execution of the contracts of the 18th March, 1899, and expended moneys and incurred liabilities in connection with the construction of the aforesaid lines of railway until on or about the 4th day of July, 1900, when by mutual consent of the parties to the contract of 18th March, 1899, two fresh contracts were entered into between the said parties in lieu of the contract of 18th March, 1899, in so far as the said contract still remained to be executed. The contracts of the 4th July, 1900, are fully set forth in the Schedules G and H annexed to, approved of, and incorporated in Act 19 of 1900, and the plaintiff craves leave to refer to the said Schedules as if inserted herein.

8. The plaintiff specially craves leave to refer this Hon. Court to the recitals in the preambles to the Section 10 of Act 19 of 1900, whereby all acts done, rights acquired, or liabilities incurred in connection with the contracts therein referred to are preserved and kept intact.

9. The Thames Ironworks and Shipbuilding Company duly proceeded with the construction of the said lines of railway; but in or about December, 1900, the said company, with the consent of the Colonial Government, as required by Article 51 of the "General Conditions" annexed to and forming part of the said contracts of the 4th July, 1900, duly ceded and assigned to the plaintiff all the right, title, and interest of the said company in respect of the said contracts.

10. On or about December 1900, the Thames Iron Works and Shipbuilding Company likewise ceded to plaintiff all the right, title, and interest of the said company in respect of the contracts of 18th March, 1899, and 19th May, 1896, aforesaid.

11. Thereafter the plaintiff proceeded with the construction of the lines of railway aforesaid, and duly and properly carried out the conditions of the said contracts.

12. Difficulties and delays occurred in the construction of the said lines, owing to various breaches of the contracts by the Government in respect of withholding payments to which the contractor was justly entitled, non-delivery of materials, and hindrances wrongfully and in breach of the contracts, caused by the officers of the Government; also owing to war, and to other extraordinary and unforeseen circumstances, accidents, and causes beyond the control of the plaintiff, and on or about the 12th day of May, 1902, the

Government having had repeated notice that if payments were not made the contracts could not be proceeded with, obtained an order of this Honourable Court under and in terms of Article 24 of the aforesaid "general conditions." The plaintiff craves leave to refer this Court to the said order. The said order was obtained upon motion, and the full facts of the case were not able to be put before the Court by the plaintiff (then respondent).

13. The Government thereafter entered upon and took possession of the said lines of railway, and the works, plant, and material in connection therewith, and dismissed the workmen and others employed by plaintiff, and otherwise exceeded the powers given under the said order.

14. Thereafter, on the 19th June, 1902, the Colonial Government obtained in this Honourable Court an order under Article 52 of the aforesaid "general conditions," and the Government thereon determined the contract, and has since the said date remained in full possession and control of the said lines, works, material, and plant. The said order was obtained upon motion, and the plaintiff (then respondent) was unable to place the full facts of the case before the Court, through absence from the Colony and insufficient time to communicate with his representatives here.

15. The termination of the contract and the entering upon and taking possession of the lines, works, and materials was wrongful, and in breach of the contracts of 4th July, 1900, and the plaintiff has suffered loss and damage thereby generally and specially in respect of the loss of profit to which he was entitled under the contracts and in respect of liabilities on divers agreements for the supply of material and otherwise which he had entered into for the purpose of carrying out the contracts of 4th July, 1900.

16. The Colonial Government wrongfully and unlawfully, and in breach of the contracts of 19th May, 1896, 18th March, 1899, and 4th July, 1900, failed and neglected to carry out its obligations under the said contracts; more particularly, the Government failed to carry out its undertakings to afford every reasonable assistance for the speedy and economical construction of the said railways and works in connection therewith, it has failed and neglected on numerous occasions to pay monies to which the plaintiff and the other parties, whose rights have become vested in him as aforesaid were entitled; and on many occasions it has, by suspending or delaying payment beyond the due dates, knowingly caused great financial inconvenience, and done great injury and damage to the credit of the plaintiff. At divers times it has unreasonably caused the contractors to provide materials and do work of a class or nature such as the contractors were not reasonably bound to do or provide. And generally throughout the construction of the line, the Government has repeatedly caused loss and delay by its vexatious and unreasonable treatment of the contractors.

17. The plaintiff has sustained damages in the sum of £120,000, by reason of the wrongful and unlawful acts set forth in paragraphs 12, 13, 14, 15, and 16.

18. The actual cost of work and labour done and materials provided by the plaintiff and the companies aforementioned in connection with the construction of the lines of railway amounts to: (a) £269,255, for work, labour, and materials, from 19th May, 1896, to 20th July, 1898; (b) £223,310 4s. 7d. for work, labour, and materials from 20th July, 1898, to 20th June, 1902—or in all, the sum of £492,565 4s. 7d., which, together with interest on this sum from the 20th June, 1902, the plaintiff is entitled to claim as damages from the Government.

19. The Government wrongfully and unlawfully detains certain 50,000 £1 shares in The Thames Ironwork and Shipbuilding Company, the property of and temporarily deposited by the plaintiff with the Colonial Government in March, 1902.

Wherefore the plaintiff claims: (a) £120,000 as and for damages, as set forth in paragraphs 12, 13, 14, 15, 16, and 17; (b) £492,565 4s. 7d., as and for damages, as set forth in paragraph 18, with interest *a tempore morae*; (c) an order calling on defendant forthwith to restore to plaintiff the 50,000 £1 Thames Ironworks shares wrongfully detained by defendant as aforesaid.

(d) Interest *a tempore morae*.

(e) Alternative relief.

(f) Costs of suit.

And for an alternative claim should this Honourable Court hold that the en-

tering upon and the taking possession of the said lines and the termination of the said contracts was not wrongful and unlawful, and in breach of the covenants aforesaid (but not otherwise) the plaintiff says:

21. He craves leave to refer to paragraphs numbered 1 to 14, and to paragraphs 16 and 19 above as if inserted herein.

22. Upon the entering and taking possession of the lines, and termination of the contract by the Government as aforesaid, the plaintiff personally, and in his capacity as aforesaid, became entitled under Art. 52 of the said contracts of July 4, 1900, to be paid by defendant, the actual cost incurred in respect of constructing the said lines from the 19th May, 1896, up to the date of entry less the amount of payments made under the contracts to the plaintiff or to the said companies by or through whom cession of the rights under the various contracts had from time to time been made to plaintiff as aforesaid.

23. The actual cost of the lines from 19th May, 1896, to 20th day of July, 1898, is shown on the schedule forming annexure C hereto: the actual cost from 20th July, 1898, to 20th June, 1902, is shown on annexure D hereto. The plaintiff craves that the said annexures may be considered as inserted herein.

24. The amounts due to the plaintiff as on the 20th June, 1902, in respect of actual cost incurred in each of the two periods respectively are (a) £269,255 and (b) £223,310 4s. 7d., amounting in all to £492,565 4s. 7d.

25. There has also become due to plaintiff the sum of £8,209 8s. 4d., being interest on the actual cost which has accrued since the 20th June, 1902.

26. All things have happened, all conditions have been fulfilled, and all times have elapsed necessary to enable the plaintiff to claim the said sums of (a) £269,255, (b) £223,310 4s. 7d., as in paragraphs 23 and 24 set forth, and the sum of £8,209 8s. 4d. as in paragraph 25 set forth, but the defendant has wrongfully and unlawfully failed and neglected to pay the said sums or any part thereof, though repeatedly requested so to do.

27. The Government has, moreover, caused serious loss and injury to plaintiff by delaying and failing to make payment of the amounts due as in the preceding paragraph set forth.

28. By reason of the premises the plaintiff has sustained damages in the sum of £60,000. Wherefore the plaintiff claims:

(1). Payment of the sum of £492,565 4s. 7d., as the actual cost of the lines as aforesaid, being:

(a). The sum of £269,255, the actual cost incurred between 19th May, 1896, and 20th July, 1898.

(b). The sum of £223,310 4s. 7d., the actual cost incurred between 20th July, 1898, and 20th June, 1902.

(2). The sum of £8,209 8s. 4d., interest on the said sums from the 20th June, 1902.

(3). The sum of £60,000 as damages sustained by plaintiff as aforesaid.

(4). Interest *a tempore morae.*

(5). An order calling upon defendant forthwith to restore to plaintiff the 50,000 £1 ordinary shares in the Thames Iron Works and Shipbuilding Company, wrongfully detained by the defendant as aforesaid.

(6). Alternative relief.

(7). Costs of suit.

ANNEXURE A.

CONTRACT OF 19TH MAY, 1896.

Articles of agreement made and entered into this nineteenth day of May, eighteen hundred and ninety-six, between Sir James Sivewright, K.C.M.G., in his capacity as Commissioner of Public Works, and as such as representing the Colonial Government of the one part, and Sir Gysbert Henry Stockenstrom, Baronet, M.L.C., as chairman, and as representing the Grand Junction Railways (Limited), hereinafter styled the concessionary of the other part.

For and in consideration of the subsidy to be paid as hereinafter mentioned and the rights and privileges conferred under the provisions of the Railway Extension Act of 1895, the concessionary agrees to construct in terms of the Railway Extension Act of 1895 the following lines of light railway in accordance with plans and sections signed or to be signed by the Engineer-in-Chief. The concessionary having the right to deviate at any point, with the consent of the Commissioner namely:

(a) A line of railway from Oudtshoorn *via* Willowmore to a point on the Graaff-Reinet Railway at or near Klipplaat.

(b) A line of railway from a point at or near Somerset East *via* Cookhouse and Bedford to Fort Beaufort.

(c) A line of railway from Fort Beaufort *via* Alice to King William's Town upon the following terms and conditions, namely:

1. The lines of railway shall be constructed in accordance with the specification hereunto annexed marked "A," and with the plans and sections referred to in the preamble hereto which plans and sections the concessionary hereby undertakes to accept as the plans and sections under this contract and as such to sign the same forthwith when required.

2. The Colonial Government shall pay to the concessionary or their assigns provided such assigns are approved of by the Colonial Government by way of subsidy for and in respect of the construction of the said lines of railway a percentage of one-third of the actual cost of construction but not exceeding the total of £1.500 per mile of railway laid.

3. The subsidy shall be payable upon the due completion of sections of not less than 20 miles each. Payment in advance however will be made before the completion of any section of the line upon the certificate of the Government Engineer as to the actual cost of the work then done upon such section and provided that the amount so advanced shall in no case exceed either 40 per cent. of the actual cost so certified or £1,500 per mile of the portion of such section then completed.

4. The amount of actual cost incurred in respect of the construction of any section of the line shall be ascertained either by the certificate of the Government Engineer, or in such other manner as the Governor shall approve, and the total amount of the subsidy shall be computed upon the actual cost of the construction of the entire line, including the cost of such bridges, culverts, tunnels, stations, or other fixed appurtenances of the line, as the Governor may approve. All books, vouchers, drawings, and other documents relating to the construction of the line, whether in the possession of the Concessionary or of their contractor for the purpose of checking the cost of materials of work done, shall be available at all times for inspection by the Government Engineer, or by any other duly authorised officer.

5. At any time after the expiration of twelve years from the date hereof, it shall be lawful for the Governor with the authority of both Houses of Parliament, and after giving at least six months notice, to purchase from the concessionary and take possession of any of the said lines; the purchase price to be the amount of the actual cost determined as aforesaid with the addition of ten per cent., and the deduction of an amount for wear and tear, to be determined in case of difference by arbitration; credit to be taken in the account for all amounts paid by way of subsidy.

6. The tariffs of fares for passengers and rates for goods, produce, live-stock, and vehicles shall be reasonable tariffs, subject to the approval of the Governor, and shall after settlement be liable to be readjusted by the concessionary from time to time, with the like approval, at the request of the Governor, acting upon a resolution of both Houses of Parliament; and the toll, fares, or rates of charge to be taken or made for passengers shall be at all times charged equally to all persons, and after the same rate in respect of all passengers travelling under the same conditions, and the toll, fares or rates of charges to be taken or made for goods shall be likewise charged equally after the same rate, whether by ton or otherwise, in respect of all goods of the same description, and no reduction or advance in any such tolls, fares, or rates shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the said railway.

7. The Government shall have the right to run trains with through traffic over the lines to be constructed under this contract, upon the following terms and conditions:

(a) Such trains shall receive equal treatment with those carrying the ordinary traffic of the company.

(b) The engines and rolling stock to be used by the Colonial Government shall not be heavier than those employed by the concessionary upon the lines constructed under this contract, nor run at any higher rate of speed than that used in conducting the ordinary traffic upon said lines.

(c) That so long as through traffic is confined to special trains, the toll or compensation to be paid by the Colonial Government to the concessionary shall be 40 per cent. of the fares or rates fixed and determined under Clause 6 of this agree-

ment. If and when the Colonial Government require a regular service of through trains, then the conditions shall be such as may be mutually agreed upon, and in the event of any difference the terms shall be settled by arbitration.

(d) The through trains shall only stop for the purpose of taking water or when required by the concessionary for the purpose of working their traffic.

(e) That any water required for such through trains shall be hitherto charged to the Metropolitan and Suburban Railway by the Colonial Government.

(f) That the officials of the Colonial Government conducting the through traffic shall be under the concessionary's rules and the orders of their officials when and so long as the through traffic is upon the concessionary's lines.

(g) That if any extra or special assistance is required at stations, signals, sidings, line-staff, or junctions for conducting the through traffic, the cost of such shall be borne in equal shares by the Colonial Government and the concessionary.

(h) That the Colonial Government shall not compete against concessionary for the traffic at terminals or crossings of the lines, such as Cookhouse—to be constructed under this agreement.

(i) The amount of toll shall be settled monthly for the earnings of the previous month, and the accounts of all such through traffic shall be open to the inspection of the concessionary's duly appointed officer, for the purpose of checking and agreeing the accounts in respect of such through traffic.

8. The junction works shall be carried out and subsequently maintained by the Colonial Government or by the Concessionary to the satisfaction of the Government as the Government may determine.

The cost of the works at the junctions shall be borne in equal shares by the Government and the Concessionary.

9. The staff and other requirements for working the junctions including signals and other appliances, shall be provided by and be under the control of the Colonial Government, the cost of the same over and above the existing outlay of the stations where the junctions will be to be borne in equal shares by the Government and the Concessionary.

10. The lines shall be commenced forthwith and shall be completed by the 2nd August, 1899, unless the Governor shall for special reasons extend the said period with authority of both Houses of Parliament, and provided that any delay caused by the Act of God or strikes or from or on the part of the Railway Department shall be allowed for.

11. In the event of the insolvency or liquidation of the Concessionary the Governor shall be entitled then to exercise without notice the option provided in clause 5 (five) to purchase the said line and in the event of the said option not being exercised and the line being disposed of the purchaser shall be liable to all the conditions of the agreement with the Concessionary save in so far as the same may be modified with the consent of the Governor.

12. All materials, plant or stores required for or in connection with the construction of the said railways shall be carried and conveyed over the Government lines at the rate of one penny per ton per mile, and all materials, plant or stores sold, supplied, or lent, or work done by the Railway Department for the Concessionary shall be sold, supplied, lent, or done at net cost, and shall be charged against and deducted from the subsidy herein before mentioned. Further, every reasonable assistance for the speedy and economic construction and working of the proposed lines shall at all times be afforded by the Government, including the lending of all type drawings and sections and results of surveys.

13. If and when the Government shall decide to purchase all or any of the lines constructed under this contract the Concessionary shall be paid at the prices fixed under the Act for all additions to or betterment of the said railways.

14. In the event of the Concessionary failing to complete the said lines of railway or any of them within the time specified in Clause 10, or within such extension of time as may be allowed under said clause of this agreement the Colonial Government shall be entitled to take possession of the line (*a*) between Oudtshoorn and Klipplaat upon payment to the Concessionary of the actual cost which may have been expended upon said railway or payment of the amount of a valuation to be by arbitration, less the amount of any sum or sums advanced by the Colonial Government, or the lines (*b*) and (*c*) between Somerset East and King William's Town, and to sell the same by public auction after reasonable notice, and from the proceeds of such sales to deduct any sum or sums ad-

vanced by the Colonial Government on account of said railways, with interest at the rate of three per cent. per annum from date of any such advances until date of taking possession, any balance after deduction of such advances to be paid over to the concessionary or their assignees or at their option. the security mentioned in the next succeeding clause shall be forfeited to the Colonial Government.

15. As a security for the due completion of the aforesaid lines of railway, the concessionary undertakes and agrees to deposit with the Colonial Government the following bonds, namely: 45 first mortgage bonds of the Metropolitan and Suburban Railway Company (Limited), each for the sum of £100, and numbered 154 to 178 and 211 to 240 inclusive, and 60 first mortgage bonds of the New Cape Central Railways (Limited), each for £25, and numbered 633 to 692. It being understood that the concessionary or his nominee shall until a claim arises against the security be allowed to draw interests payable thereon, and that the bonds deposited may be exchanged at any time for similar bonds of same value and that the bonds shall be returned to the concessionary of his nominee *pro rata* as the sections or works are certified as completed.

16. Any differences arising out of this contract shall be settled by arbitration under the Lands and Arbitration Clauses Act, 1882.

In witness whereof the said parties have hereunto set their hands and the Company its common seal this day and year first above written, in the presence of the subscribed witnesses.

J. SIVEWRIGHT,
Commissioner Public Works.
G. H. STOCKENSTROM,
Chairman.

As witnesses to both signatures:
GEO. M. PALMER,
LEWIS MANSERGH.

SCHEDULE A.

SPECIFICATION REFERRED TO IN AGREEMENT.

The concessionary shall provide all land required for the construction and maintenance of the line of railway, bridges, approaches, roads, etc.

The centre line of railway shall be marked upon the ground by the Government. A working plan and section of the line shall be provided by the Government.

The formation surface of the railway upon which the ballast is to be laid shall be formed everywhere, in cutting or embankment as the case may be, according to cross section, Drawing No. 1, and to the levels shown by reference to the line of formation in the longitudinal section.

Cuttings shall be formed to a width of not less than 14 feet at the bottom, ample provision for side-drains being made in all cases.

Whenever an embankment is less than 10 feet above the surface of the ground, the width shall be not less than 12 feet at the top.

Whenever an embankment is 10 feet or more above the surface of the ground, the width shall be not less than 14 feet at the top.

All the dimensions given and the forms shown on the drawings are those to which the cuttings and embankments shall be ultimately formed after they have been completed and have become consolidated.

The ballast shall consist of gravel, broken stone, or other suitable material approved by the Government Engineer, and shall be formed as shown on Drawing No. 1 to a depth of not less than 12 inches above the formation level, save where the Government Engineer shall certify that a reduction may be permitted.

The permanent way shall consist of steel rails of not less than 46½ lb. to the yard. If heavier rails be laid, the concessionary shall bear the extra cost, that is to say, if heavier rails be laid no subsidy shall be payable in respect of the extra cost involved thereby.

Sleepers are to be made of wood, iron, or steel, and shall be spaced on an average of not less than 1,760 to the mile.

The sleepers at the joints of rails shall be not more than 2 feet 6 inches apart from centre to centre.

If wood sleepers be laid, they shall be of not less than the following dimensions, viz.: 6 feet 6 inches long, 9 inches wide, and 4½ inches deep, and are to be efficiently creosoted.

If iron or steel sleeyers be laid, they shall be of a design approved by the Government Engineer.

The designs for permanent way, including rails, sleepers, fastenings, swit-

ches, crossings, and connections for same, whether interlocking with signals or not, together with method of fixing, laying, and spacing the same, shall be submitted for and be subject to the approval of the Government Engineer.

The drawings and specifications for masonry abutments, piers, wing wails, and retaining wall in bridges or culverts shall be submitted for and be subject to the approval of the Government Engineer. The designs of all superstructures in iron or steel shall be submitted for and be subject to the approval of the Government Engineer, and shall be capable of bearing the loads which the class of railway authorised by Act No. 28 of 1895, more specifically defined in schedule B of the said Act, may fairly be called upon to bear.

All stations, goods sheds, engine sheds, dwelling houses, tanks, turntables, cranes, signals, and other appurtenances shall be erected according to drawings and specifications submitted for and subject to the approval of the Government Engineer.

All buildings may be constructed of wood and corrugated iron or other equally economical material.

Fixed structures erected over or at the side of the railway shall have not less clearance respectively than is shown on drawing No. 3, and the maximum dimensions of the rolling stock employed shall be in conformity with the same drawing.

J. SIVEWRIGHT,
Commissioner Public Works.
G. H. STOCKENSTROM,
Chairman.

ANNEXURE B.

CONTRACT OF MARCH 13, 1899.

Memorandum of agreement made and entered into this eighteenth day of March eighteen hundred and ninety-nine, between the Honourable Jacobus Wilhelmus Sauer in his capacity as Commissioner of Public Works, and as such representing the Colonial Government of the one part and David Urquhart in his capacity as the duly authorised representative of the Thames Iron Works and Shipbuilding Company (Limited), of Blackwall, London, hereinafter called the company, of the other part.

Whereas on the second day of August, 1898, a contract for the construction of certain lines of railway to wit:

(a) A line of railway from Oudtshoorn *via* Willowmore to a point on the Graaff-Reinet Railway at or near Klipplaat.

(b) A line of railway from a point at or near Somerset East *via* Cookhouse and Bedford to Fort Beaufort.

(c) A line of railway from Fort Beaufort *via* Alice to King William's Town.

(d) A line of railway from Mossel Bay *via* George to Oudtshoorn, was entered into between the Commissioner of Public Works as representing the Colonial Government and the said company subject to the approval of Parliament, in so far as the same might be necessary.

And whereas the said contract was confirmed by Act No. 40 of 1898, with certain amendments and subject to certain provisos set forth in section 1 of the said Act.

And whereas the said company failed to comply with the provisos required by the said section.

And whereas in consequence of such failure the Colonial Government did on the 7th day of March, 1899, obtain an order from the Supreme Court of this colony restraining the said company from proceeding with the construction of the said lines of railway, ordering them to give up possession of the said lines.

And whereas the said company has now offered to comply with the provisions of Act No. 40 of 1898 and to carry out the agreement of the 2nd August, 1898, as amended by Parliament and subject to the conditions of this agreement, and to give the security required by the Commissioner of Public Works.

And whereas the said Commissioner of Public Works is prepared on behalf of the Colonial Government to allow the said company to continue the construction of the said lines of railway under the agreement of the 2nd August, 1898, and the contracts of the 19th May, and 13th October, 1896, subject to the conditions herein set forth.

Now therefore it is hereby agreed that the said company shall construct the complete lines (a), (b), and (c) before mentioned in terms of the agreement of the 2nd of August, 1898, as amended by Parliament.

1. The route of the line from Mossel Bay to Oudtshoorn shall be *via* George as set forth in Act 28 of 1895 under which construction of the said line of railway was originally authorised.

2 The terms and conditions upon which the said lines Mossel Bay, Oudtshoorn *via* George shall be constructed shall be those set forth in the contract of the 15th day of October, 1896, made between the Colonial Government and the Grand Junction Railways Limited as amended by the said agreement of the 2nd of August, 1898, and the present agreement.

3. The ten per cent. retention money provided for in the said contract of the second day of August, 1898, in respect to each and every of the above mentioned lines shall be lodged on or before the execution of this agreement with the Cape Agent-General in London.

5. Interest at the rate of four per cent. per annum on the retention money in respect of each of the said lines shall be paid to the company from the date of the completion of such line until payment of the same is made.

6. A reasonable amount of work shall be done in the first six months from the date hereof that is not less than ten miles of formation of the Mossel Bay-Oudtshoorn *via* George line, and in each succeeding period of six months up to the 31st of July, 1899, until the work is completed an amount proportionate to the total amount of work required to be done to complete the said lines, failing which the company shall forfeit to the Government the sum of five thousand pounds sterling for each six months in which they shall be in default.

7. In the event of the non-completion of the several lines of railway within the time required by the said agreement of the second of August, 1898, a penalty of one pound sterling per week shall be incurred, and shall be paid by the said company in respect of each line to the Commissioner of Public works for the time being until the due completion of the said lines, unless the delay has been caused by Act of God or strikes.

In the event of the line from Mossel Bay to Oudtshoorn *via* George not being completed for the 31st day of July, 1901, and the other lines before the thirtieth day of June, 1900, the security referred to in the agreement to wit:

The ten per cent. retention money and the security lodged with the Cape Agent-General in London, shall be forfeited to the Colonial Government as and for liquidated damages sustained by the said Government for the non-completion of any of the said lines as aforesaid, and thereupon all contracts or arrangements between the Government and the said company in respect of all or any of the said lines shall cease and determine, and it shall be lawful for the Government to enter upon and take possession of so much of the said lines of railway as has been constructed by the said company, and the said Government shall thereafter, so soon as the amount of the actual cost of the said lines shall have been ascertained, pay to the said company the amount so ascertained, less amount as shall have been paid on account, and less the amount of retention money hereinbefore referred to.

8. The time fixed by the said Act within which the company shall satisfy the Commissioner of Public Works that it has the power to construct railways will be extended to the 31st day of May to enable the company to alter its memorandum of association.

ANNEXURE C.

Statement of actual cost incurred between 18th May, 1896, and 20th July, 1898, in respect of construction of lines.

	£ s. d.	£
To cost of Work done by the Grand Junction Railway, Ltd., and taken over in 1898	254,769 13 6	
Less subsidy paid	39,894 13 6	
		214,875
„ Interest on £100,000 for 5¾ years at 4 per cent. ...	23,000 0 0	
„ Interest on £50,000 for 4½ years at 4 per cent. ...	9,000 0 0	
„ Interest on £64,000 for 4 years at 4 per cent. ...	10,380 0 0	
		42,380
„ Goodwill	10,000 0 0	
„ Interest for 4 years at 5 per cent.	2,000 0 0	
		12,000
		£269,255

ANNEXURE D.

Statement of actual cost incurred between 20th July, 1898, and 20th June, 1902, in respect of construction of lines.

EXPENDITURE IN LONDON—

	£ s. d.	£ s. d.	£ s. d.
Rail, &c.	130,119 16 10		
Sleepers	104,908 11 0		
Cement	18,704 19 11		
Bridgework	47,106 13 1		
Sundry Material	13,810 10 7		
Freight and Insurance	99,809 17 10		
Tools, Plant, &c.	2,787 13 10		
Sundries	902 6 11		
Stores	1,063 7 11		
		419,213 17 11	
To Salaries	7,819 17 6		
„ Passage Monies and Travelling ...	9,187 5 3		
„ Laws and Accountancy Charges	3,505 18 11		
„ Petty Expenses	896 9 10		
„ Interest per cent. and Exchange	36,746 4 9		
„ Office Rent Expense, &c. ...	1,713 3 3		
„ Interest on Capital	18,147 10 1		
	71,956 10 1		
„ Less 1/5 to be charged to Mossel Bay	14,391 6 0		
		57,565 4 1	
By Subsidy paid in London ...	...	...	394,582 15 10
To Expenditure in Colony } Oudtshoorn, Klipplaat } ...	415,830 16 10		
Somerset East, Fort Beaufort ...	161,181 3 10		
Fort Beaufort, King	116,384 8 5		
Wages and Salaries unpaid ...	28,562 14 7		
		722,909 3 8	
By Subsidy paid in Colony ...	...	...	572,254 3 5
„ Sundry Credits	...	...	9,541 1 10
„ Balance	...	...	223,310 4 7
		1,199,688 5 8	1,199,688 5 8

To this declaration, the plaintiff Government pleaded as follows:

1. For a plea to the declaration, the defendant says:

1. He admits that Arnold Frank Hills, of London, is the plaintiff herein, but denies that he is entitled to sue in any other than his personal capacity, or to sue as a trustee for a joint co-partnership venture called the Grand Junction Railways. The remaining allegations in paragraph 1 of the declaration are admitted.

2. Paragraph 2 is admitted, but as to paragraph 3, while admitting that the company therein referred to commenced the construction of the lines of railway therein set out, he denies that it duly proceeded with such construction.

3. The defendant admits and craves leave to refer to the terms of the contract executed on the 18th March, 1899, referred to in paragraph 4, and says that the said contract was preceded by a contract executed on the 2nd August, 1898, between the then Commissioner of Public Works and one David Urquhart as representative of the Thames Ironworks and Shipbuilding Company, Limited. The said contract was duly confirmed by Parliament, and is set out as Schedule A to Act No. 40 of 1898.

4. The defendant craves leave to refer to the proceedings heard in and the order made by this Honourable Court on the 7th March, 1899, which order is referred to in the recitals of the agreement aforesaid dated 18th March, 1899.

5. As to paragraph 5 he craves leave to refer to the terms of the original agreement.

6. As to paragraph 6 he admits that on or about the 20th July, 1898, the Grand

Junction Railways, Limited, ceded and assigned their rights under the contract of the 19th May, 1896, to the Thames Ironworks and Shipbuilding Company, Limited.

7. The defendant admits that the said Thames Ironworks and Shipbuilding Company did proceed, but denies that it duly proceeded, with the execution of the contract of the 18th March, 1899, and he admits the execution of the contracts dated the 4th July, 1900, craving leave likewise to refer to the terms of Act No. 19 of 1900, of the schedules G. and H. thereto and also of the schedules to the said contracts mentioned in the said contracts, but not printed in the schedules G and H. Save as aforesaid he does not admit the allegations in paragraph 7.

8. As to paragraph 8, the defendant does not admit the construction placed by the plaintiff on section 10 of Act No. 19 of 1900. The contracts referred to in the said section are the contracts referred to in sections 8 and 9 of that Act.

9. Except as to the allegation that the company "duly proceeded" with the construction, the defendant admits the allegations in paragraph 9, but says that the Government refused to comply with the plaintiff's request to recognise the firm styled the Grand Junction Railways as assignee of the said contracts or interested under the said assignment.

10. The defendant does not admit the allegations in paragraph 10, and puts the plaintiff to the proof thereof; and says that the contracts attached to and confirmed by the aforesaid Act No. 19 of 1900, which were substituted for the theretofore existing and thereby cancelled contracts, are the only contracts between the plaintiff and the defendant.

11. As to paragraph 11, the defendant denies that the plaintiff, while proceeding with the construction of the said lines of railway, did so duly or properly, and says that the plaintiff wholly failed and neglected to perform his obligations under the said contracts of 1900 and the conditions thereof.

12. With regard to paragraph 12, the defendant says that such extensions of time were allowed as, in the opinion of the Government Engineer or the Commissioner respectively, the plaintiff was entitled under the provisions of his contract to receive. He admits that he obtained upon motion the order referred to in that paragraph under Article 24 of the "General Conditions" in the respective contracts; but he denies the remaining allegations, which allegations are vague and embarrassing and remain vague and embarrassing notwithstanding the supply of certain particulars under Order of Court with regard to the said allegations and those in paragraph 16.

13. As to paragraph 13, the defendant says that the Government, in working upon the said lines of railway, in utilising the work, plant and material in connection therewith and in dismissing certain workmen or others employed by the plaintiff, did so only in so far as it was authorised by Article 24 of the general conditions and in the exercise of the powers given under the said Order; but he denies the other allegations in that paragraph.

14. As to paragraph 14, he says that on the 19th June, 1902, the Colonial Government obtained an order on motion in this Honourable Court under Article 52 of the aforesaid general conditions, that by such order the contracts became and were determined, and that he thereupon entered upon and took possession of the said lines, and also of certain buildings, material and plant in connection therewith. The remaining allegations in the said paragraph are denied.

15. The allegations in paragraphs 15, 16, 17 and 18 are denied.

16. (1) The defendant begs to refer this Honourable Court to articles 52 and 53 of the aforesaid general conditions in each contract, whereby it is provided that the amount of actual cost incurred in respect of the construction of the respective lines shall be ascertained by the certificate of the engineer or in such other manner as the Governor shall approve.

(2) The Governor has approved of no other manner of ascertaining actual cost, and the amount of actual cost has since action brought been ascertained by three certificates of the engineer, copies of which, with the particulars, have been furnished to the plaintiff.

(3) The aforesaid certificates of the engineer, made in terms of the aforesaid articles, constitute a condition precedent to the recovery by, or rendering to, the plaintiff of any payments in respect of the construction of the said respective lines of railway, and were and are binding on the plaintiff.

(4) The plaintiff is not entitled to receive any portion of the amount of actual cost so ascertained by reason that the aforesaid certificates show that the amounts paid to the plaintiff from time to time and the amounts of 10 per cent. retention money, referred to in the aforesaid article 52, exceed the amount of actual cost so ascertained by the several amounts of: (1) £77,618 9s. 11d. (in respect of the Oudtshoorn-Klipplaat line). (2) £9,633 11s. 7d. (in respect of the Somerset East-King William's Town line; Somerset East-Fort Beaufort section. (3) £4,950 17s. 7d. (in respect to the Somerset East-King William's Town line; Fort Beaufort-King William's Town section), amounting in all to £92,901 19s. 1d. whereof the plaintiff has had particulars.

17. No credit has been allowed in the aforesaid certificates in respect of the allowance of £80 per mile provided by the aforesaid contracts in respect of expropriation of land, the plaintiff having failed and neglected duly to expropriate and pay for the necessary land, and having failed and neglected to cause all land acquired for the lines of railway under the said contracts to be registered in favour of the Colonial Government, but the defendant is ready and willing to credit the plaintiff with any sums of money duly expended by him in the matter of such expropriation on due proof by the plaintiff of such expending of moneys as aforesaid.

18. The plaintiff is entitled to be credited, and has been credited with the amount of £15,367 10s., being the value of the buildings, material and plant, etc., hereinbefore referred to in paragraph 14, particulars of which amount have been rendered to the plaintiff.

19. (1) In terms of clause 16 of a certain other agreement also dated 14th July, 1900, and annexed as Schedule I. to, and enacted by, the aforesaid Act No. 19 of 1900, the plaintiff was bound within 18 months from the approval of the said agreement by Parliament to complete the section of a certain other line of railway, referred to in the said agreement, from Mossel Bay to George, with the exception of platelayers' cottages and station buildings.

(2) The said Act was promulgated on 19th October, 1900, and the said period of 18 months expired on the 19th April, 1902.

(3) An extension of time of three months was granted by the defendant or his predecessor, having regard to the terms of the concluding paragraph of the said clause, but the plaintiff did not complete the said section of the said line within such extended period, or at all, and therefore forfeited to the Government, in terms of the said clause, the sum of £10,000 sterling, the delay beyond the extended period not having been proved to the satisfaction of the Commissioner to have been caused in manner set out in the said clause.

(4) The plaintiff is accordingly indebted to the Government as represented by the defendant in the sum of £10,000 under and in terms of the aforesaid clause.

20. The plaintiff is further indebted to the defendant in the sum of £4,233 6s. 0d., being money due by the former in respect of carriage, coaching, engine and truck hire supplied by the Government in terms of the said contracts, of which the plaintiff has had particulars.

21. The defendant annexes hereto a summary account, marked X, of the matters aforesaid showing the final balance in which the plaintiff is indebted to the Government, in respect of the matters involved in this suit, namely, the sum of £91,067 15s. 1d., less such amount as the plaintiff may be able to prove to have been duly expended as set forth in paragraph 17 hereof.

22. As to paragraph 19, the defendant denies that the detention of shares therein referred to was or is wrongful or unlawful. The said shares were duly handed over by the plaintiff to the defendant, and the latter lawfully received the same, and has since so held them. The defendant is ready and willing to return to the plaintiff, and tenders taxed costs to the date of this plea.

Wherefore, subject to the said tender, defendant prays that the plaintiff's claim be dismissed with costs.

2. For a further plea to the alternative claim, the defendant says:—

23. He craves leave to refer to the several matters and things hereinbefore by him pleaded.

24. As to paragraph 22, he specially craves leave to refer more particularly to the matters and things set out in paragraphs 16 to 21 of the said plea.

25. Subject to the above, he denies the allegations in paragraphs 22 to 28 of the declaration.

Wherefore he prays as before that the plaintiff's claim be dismissed with costs.

3. And for a claim in reconvention, the defendant (now plaintiff) says:—

26. He craves leave to refer to the several matters and things hereinbefore by him pleaded in his plea to the claim in convention, and more particularly to the balance of £91,067 15s. 1d. set out in paragraph 21 hereof as being due to him by the plaintiff (now defendant). The said amount is now due and payable to the defendant (now plaintiff).

Wherefore the defendant (now plaintiff) claims:—

(*a*) Judgment in the sum of £91,067 15s. 1d., with interest *a tempore morae*, less such sums as the plaintiff (now defendant) may prove to have been duly expended in the expropriation of land aforesaid.

(*b*) Alternative relief.

(*c*) Costs of suit.

STATEMENT SHOWING NET OVERPAYMENT TO MR. A. F. HILLS TO 19TH JUNE, 1902.

Overpayment to Contractor		£92,201	19 1
Credits allowed to Mr. Hills for Buildings, Plant, Materials, Stores, &c., found on works and valued at		£15,367	10 0
		£76,834	9 1
Forfeiture under Mossel Bay Contract, Clause 16	£10,000 0 0		
Charges for Engine Hire, &c., on two Contract Lines	£4,233 6 0		
		£14,233	6 0
Net total Overpayment		£91,067	15 1

The replication was as follows:—

1. As to paragraphs 2, 7, 9 and 11 the plaintiff says that the lines were constructed in a thoroughly sound and efficient manner.

2. The plaintiff admits that a contract was duly entered into on the 2nd August, 1898, as set forth in clause 3, and says further that the Thames Ironworks and Shipbuilding Co. took over and proceeded with the construction of the lines, and entered into large contracts for materials in connection therewith under the said contract. But the plaintiff says that the agreement as submitted to and confirmed by Parliament (as set forth in Schedule A to Act 40 of 1898) contained a provision which had not been submitted to or approved of by the Company, to wit, the last portion of Clause I, section 6, of Schedule A aforesaid beginning with the words "and also less the value of equipment."

3. The company protested against the said alterations and work on the lines was suspended, but, after the order made by this Honourable Court on the 7th March, 1899, referred to in paragraph 4, the said company entered into the agreement of 18th March, 1899, aforementioned.

4. As to paragraph 9, the plaintiff says that the Government is and was aware of the legal interest of the Grand Junction Railways in the contracts therein referred to.

5. The plaintiff specially denies the allegations in paragraph 10 that the contracts of 4th July, 1900, are the only contracts between the parties hereto, and refers this Honourable Court to the terms of the said contracts of 4th July, 1900, and to the Act No. 10 of 1900.

6. The plaintiff admits, as to paragraph 12, that he has had an extension of time, but says that by reason of the premises the same was wholly insufficient.

7. As to paragraph 14, the plaintiff specially denies that by reason of the order of Court of the 19th June, 1902, the contracts became and were determined.

8. As to the 1st clause of paragraph 16, the plaintiff refers this Honourable Court to the said Articles 52 and 53. As to the 2nd clause, he admits that he has received certain certificates and particulars, but he specially denies the accuracy thereof, or that they are binding on him. He also specially denies the

allegations set forth in the 3rd and 4th clauses of paragraph 16 and the construction of clauses 52 and 53 as therein set forth.

The plaintiff says that the said certificates were framed without reference to plaintiff's books or documents, and are drawn up on a wholly incorrect basis and contrary to the provisions of the said clauses 52 and 53, and that they do not show what is the true amount of actual cost incurred in respect of the construction of the lines.

9. The plaintiff denies, with regard to paragraph 17, that there has been any failure or neglect on his part in respect of the expropriation of land for the lines, and says that he has furnished particulars to the defendant in respect of the said expropriations .

10. As to paragraph 18, the plaintiff says that the value of the buildings, material and plant exceeds £50,000.

11. As to the 1st clause of paragraph 19, the plaintiff refers this Honourable Court to the agreement therein referred to.

He admits the allegations in the 2nd clause.

As to the 3rd clause, plaintiff admits that he did not complete the line to George within the extended time, but says that it was impossible so to do by reason of the delay by Government in passing plans for the bridgework, which was extensive, great scarcity of labour, prohibition by the military authorities on dealings in dynamite, which was extensively required, and generally owing to the causes set out in paragraphs 12 and 16 of the declaration. By reason of the premises, the Government is not, under the contract, entitled to the forfeiture .

The plaintiff further says that if any portion of the said sum of £10,000 is due, which he denies, it is due under a wholly separate and independent contract, unconnected with the contracts sued on in this case; further, that if the said sum or any portion thereof is due, it is due by way of penalty, and cannot be set off in the present action.

12. As to paragraph 20, the plaintiff says that he has already paid to the defendant all sums reasonably due in respect of the hire of rolling-stock.

13. The plaintiff specially denies paragraph 21.

14. As to paragraph 22, the plaintiff says that the tender only partially meets his claim and is wholly insufficient.

15. Save as above and save in so far as the plea contains admissions, the plaintiff denies all the allegations of fact and conclusions of law therein contained, joins issue thereon, and again as before prays for judgment with costs.

Replication to further plea:—

16. The plaintiff craves leave to refer to the matters and things above set forth, and joins issue and again prays for judgment with costs.

Plea to claim in reconvention:—

17. The plaintiff (now defendant) craves leave to refer to the matters and things set forth in the declaration and replication in convention.

18. Subject to the above, he denies the allegations in paragraph 28, wherefore he prays that the claim in reconvention may be dismissed with costs.

Mr. Searle, K.C. (with him Mr. Close), for plaintiff; Mr. Schreiner, K.C. (with him Mr. McGregor), for defendants.

Mr. Searle said the case was before the Court in December last, and the evidence of Mr. Hills was taken, and the case then stood over until some day to be fixed by the parties, and it had been set down for that day in the ordinary course. Certain formal amendments of the declaration had been decided upon.

Mr. Schreiner said he did not object to any of the amendments. He wished to correct a printer's error in the plea. In section 16 the figures £92,901 19s. 1d. should read £92,201 19s. 1d.

Mr. Searle said that the pleadings in the case were many. There were two portions of the case. Plaintiff claimed damages for breach of these different contracts for the different lines. He claimed damages which he assessed at £120,000 by reason of acts set forth in certain portions of the declaration, and then he went on to say that the actual cost of the work and the labour and the materials provided by the Grand Junction Railway Company, to whom he had succeeded, was £269,000 between May, 1896, and July, 1898, and £223,000 for work and labour and materials between July, 1898, and June, 1902. The contracts were taken over by the Government under section 52, and the plaintiff said he was entitled

to claim £490,000 as damages, as well as the £120,000 which he had sustained as damages in lieu of profit. In the alternative of the declaration the plaintiff claimed £492,000 odd as being the actual cost of the lines with interest from 5 to 10 per cent. on a basis which would be set before the Court. But the main claim was for damage as actual cost. This was a question which would be largely determined by argument.

Evidence was then called in support of the claim.

Thomas Mouat Cameron Walker, a resident of Cape Town, stated that he was manager for plaintiff from May, 1899, and also performed certain secretarial work. He acted as manager for John Walker and Sons in 1896, and was familiar with what took place when the first contract was entered into. The first payments took place in October for work done up to September, 1896. The accounts were paid by schedule; the second schedule, which was used for the Oudtshoorn line, had reduced prices on it. The schedules formed the basis of payment for the 1896 contract. There was no inspector of the company's works under that contract. A new schedule came into existence from 1898 onwards for the Oudtshoorn-Klipplaat line, but the old schedule remained in force for the King William's Town line. Difficulties arose in 1896-7 between the contractors and Government; there was a difficulty about getting any payments at all. It was some time before a schedule was agreed upon, and it was then understood that it was a permanent one; but Government held that it was only temporary. Six thousand pounds per mile was the contract price between John Walker and Sons and the Grand Junction Railways. Some trouble occurred about getting advances on the material shipped. A schedule, including that, was arranged in May, 1897. Mr. Urquhart, manager of the Thames Ironworks Co., came out here in 1898, and took over the control of affairs. In October and November, 1899, difficulty arose because the Government refused to make further advances on materials as they were shipped from England, America, and Tasmania. As a result the company were seriously hampered, through arrangements being upset. The Government stopped payments on construction works. The company had as a consequence to give notice to their employees on the King William's Town-Fort Beaufort section, some 200. The payments were actually suspended for a month. They were also very much hampered because the Government could not supply them with sufficient engines and rolling stock to bring up supplies for the construction works. They had great difficulty on this account from the commencement of the war. They were stopped continually for want of one or other of the stores, and the result was that at one time they had some 14,000 tons of material accumulated on the Harbour Board's ground, involving extra charges for off-loading and handling. In 1901 a portion of the line was destroyed, and a considerable amount of damage was done by Boers and rebels. A claim for about £15,000 had been sent in to the Imperial Government in respect to this damage. The men in the company's employ were approached by the military to guard the line, and for three months they were off their ordinary work. During that time no work was done except repairs for the military. Since November, 1900, a passenger coach had been running on the line from Klipplaats to Willowmore. There was considerable dispute between the company and the Government as to payment for that section, which was sixty-five miles in length. The Government took up the position that the line was not completed. One of the objections with regard to the completed sections was as to some 10,000-gallon tanks. He was present at the interview when the matter was brought up. That was when the 1900 contracts were signed. The contract drawings were not supplied to them until about nine months after the contract had been signed. One of the particulars of breaches related to the payment for the Gouritz Gorge survey. At the end of 1900 £667 12s. 6d. was paid. The first material shipped under the contract was cement, in respect to which £1,100 was paid by the Agent-General in London. That amount was afterwards deducted, and the payments were then stopped. They took up the position that the Government were bound under the contract to pay for cement. There was considerable dislocation through the non-advance of materials. A further question arose between them with re-

gard to some underground tanks, the company's position being that they could not include the tanks unless they were put in as extras. He believed that there were about nine tanks mentioned, and the actual cost at a rough estimate was about £70 each. Then there was the rejection of certain sleepers from Tasmania. Mr. Urquhart signed the contract for the Thames Ironworks Company. The quantity supplied was 113.000. In June, 1900, the Government refused to allow these sleepers to be put in on the contract lines, and they also refused to allow them to put them in on the remaining subsidised line, Mossel Bay. The contract was with a Mr. Robertson, of Hobart, Tasmania, and was for 300.000 sleepers, and as a consequence they had been compelled to abandon the rest of the contract, and they had to get fresh sleepers, which meant a difference in cost of 2s. 1½d. They got the later sleepers from the Baltic. The difference was about £20,000. They were continually stopped on account of not getting the sleepers up to the spot. In November, 1900, they had a consignment of sleepers by the Esther. The same dispute occurred in this case as formerly, the Government having discontinued to make advances on the subsidised lines. There was also a dispute with regard to the taking over of the Somerset East-King William's Town section as to the payment of the balance due on that line at the time. They claimed that as this section had been taken over as a Government line, they should be paid 90 per cent. on the certificates instead of 30 per cent.

Mr. Searle: Did the Government ever pay what you claimed had to be paid when they took that over as a Government line?—Witness: No, we claimed that all material and work done previously certified should be included in this section, and should be paid at 90 per cent.

You claim, with regard to the certificates upon which 30 per cent. had been paid, that when they took over this as a Government line you be paid 90 per cent.?—Yes.

You disputed that. Have you ever been paid the balance?—No, the contract was £16,000. £5,000 was paid some months later, and there was also a small payment on certain materials, but the balance is still unpaid.

All work that has been certified as having been done?—Yes, certified previous to that date.

With regard to the general measurements of work disputes arose between you and the Government?—Yes.

Thomas Roy stated that he was a member of the Institute of Civil Engineers, and was one of the chief engineers of the Thames Ironworks Co., in connection with the construction of these railways. In 1901 terrible delay was caused in the construction of the railways, the work being interrupted by martial operations and also retarded by the delay in forwarding goods and materials. The works of the Oudtshoorn-Klipplaat line were completely stopped for three months on account of the Boers invading the district. Then there was great difficulty in getting dynamite and food for the natives. The number of engineers engaged on the works varied at different times. Almost without exception they had since been taken over by the Colonial Government. He complained of the unfair inspection of the work, as a result of which a portion of the lines had to be re-ballasted, it being alleged there was not proper depth of ballast. Then it was stated by Government that the culverts and bridges had not been built at correct levels, and great sums of money were spent in altering them. He presumed this was after the work had been passed, because it was paid for. He contended that these deficiencies should have been pointed out at an earlier stage. The Government were dissatisfied with the level of which they had previously approved. The matter was held in abeyance until they gave the contractors a re-graded section. Two very high floods occurred, which proved that the original line was a proper one, and then the Government gave a very much modified scheme. That necessitated the alteration of several cuttings, which had to be filled up to meet the requirements. The men were stopped at Twover Waters Poort from October, 1899, till September, 1900. Plaintiffs took up the position that what they undertook had been approved of by the Government. The stoppage at Twover Waters Poort upset all the arrangements. The line had been constructed at Twover Waters

Poort, and the contractors had spent between thirty and forty thousand pounds. By adopting the Twover Waters Poort scheme the line would be shortened by about half a mile. Mr. Dalton had computed the line through Twover Waters Poort at eighty thousand pounds per mile. Witness did not think there was any work as rough and heavy in the Colony as deviating. The original Government line was 300 feet higher than the line through Twover Waters Poort. On many occasions the Government were not able to supply rolling-stock, and in many cases the locomotives were not in a proper condition, and several times they were refused on account of leaking tubes and other defects. It was provided in the contract the the plaintiffs should pay for wear and tear of the rolling-stock. The witness agreed with Mr. Hills in his computation of the betterment of the line at £2,000 per mile. The ballast he reckoned at from £8 to £10 a chair, and the average value of the Cape Government's ballast would be about £4 a chair. The work by the Government was no comparison to the work done by the plaintiffs, and the Government were at present actually using ballast that they had previously condemned. The Government were putting in a worse quality of ballast than that which they had insisted on the plaintiffs taking out. The Government were not now constructing the line on such a standard as they had called on the plaintiffs to do. On the whole, he thought the company would have pushed the work better than the Government. Witness had been through the Government accounts, many of which they objected to on principle. In deviation M 9, which was 50 miles long, the Government allowed for 34,000 cubic yards of hard rock, but witness asserted that there were 185,000 cubic yards of hard rock at that section. The average width from Klipplaat to Willowmore was 15 feet, and beyond Willowmore very nearly 15 feet. The Government had only allowed for a 12 feet width. In the Government account they allowed 700 sleepers for the curves, and the number required by the company was 3,600. The Government allowed £5,000 for plant taken over on the Oudtshoorn line, but witness computed the value at £11,000. In 1896 witness worked on Mr. Dalton's report, which was more of a light line, and the construction now was by no means a light line. It would not be possible even to build a light line at the rate of £4,150. When the company stopped work, there were fully 133 miles ready for rails on the Oudtshoorn-Klipplaat line, and rails were laid for 100 miles. The only thing that remained to be done was odds and ends, which could have been constructed whilst the road was running. The superstructures were better than a standard Cape line, where many of the bridges were made of old iron, whereas on the Grand Junction line everything was of the best steel. There were many delays in the inspection of culverts, during which time the men were practically idle. At certain periods during the war it was very difficult to get labour. On the Mossel Bay-Oudtshoorn line the work was hung up for eight or nine months during the Boer invasion, and as they were not allowed dynamite, it was impossible to proceed with the work.

Cross-examined: Witness reckoned that the easing of the gradient from 1 in 70 to 1 in 40 practically doubled the capacity of the line. Witness advised that the whole thing should be shut down in the beginning of 1900 on account of the war. The contract in 1896 was to finish the lines in August, 1899, but it was not finished yet. The contract was not proceeded with till 1898. The company claimed that it was the Government's fault that they had not been financed to push the work, and witness was not prepared to say whether the company were in a position to go on with the work. It was true that workmen had left wholesale at the latter end of the job, but witness did not know of their being compelled to repay any money. On occasions the men had to wait on their wages. There had been instances of the workmen finding the centre of the culverts. Witness contended that the ballasting work should not have been condemned by the Government, as their contract had been carried out. He had been told of instances whore sleepers had been laid down without any ballast. He had nothing to say about any of the Government engineers, but objected to the system they worked under. Witness had never been chief engineer over any system of railways, but in Canada he had been divisional engineer. On a devia-

tion it was the duty of the contractor to show the centre of the line to be constructed. The only instance of an error in the setting out of the centre of the line was about 43 miles from Klipplaat, where they were fully 2 feet 6 inches out. Witness contended that, irrespective of specifications or contracts, the company were justified in using ballast compatible with the country. Witness admitted that it was usual to have the plans approved of before proceeding with the work, but he denied that most of the work which was condemned was completed from the detailed report, which had not been sent to the Government. Witness had practically measured the hard rock at deviation M 9, and still adhered to the computation of 185,000 cubic yards, as opposed to 30,000. The only test witness applied in distinguishing hard rock was common sense. Witness considered that the rock placed on the embankment came under the distinction of hard rock. When the rolling stock was sent up defective, witness believed that the matter was reported to the Government engineer. The Government would be getting a bargain at the rate of £2,000 a mile for the betterment of the line, and if Mr. Hills put it down at £8,900 the Government would be getting it at a fair price. The Government were using all sorts of sleepers that the plaintiffs were not allowed to use. Under the contract the section for Klipplaat to Willowmore was completed when the work was taken over by order of Court. In June, 1901, witness computed that £2,000 would complete the three sections, but the Government engineer put it down at £1,900. The company had to make the increased width of the formation, as it was absolutely necessary, and although it was not specified in the contract, witness considered that the company should be paid for the betterment of the line.

Re-examined: Witness considered the line completed without the few accessories, such as mile posts, etc. The Government were aware that the work was proceeding, and when the company had proceeded at length with it the Government objected, stating that they were going beyond the 15 feet level. The culverts had given satisfaction for the first 40 miles. When the workmen were underpaid witness was aware that the Government had suspended payment. The work was most economically carried out. The contract specified for engines in good working order, and in many cases they had to be returned.

Mr. Schreiner stated that, acting on the suggestion of the Court made on the previous day as to the desirability of shortening the evidence, the defendants had decided to abandon the claim in reconvention for £10,000 for non-completion of the section of the line from Mossel Bay to George. Defendants would leave this to be raised when the matter of the Oudtshoorn-Mossel Bay line came up for settlement between the parties.

Charles Trollip stated that at one time he was deputy-chairman of the Grand Junction Railways (Limited), but ceased his connection with it about 1898. The balance sheet showing the condition of the company in July, 1898, referred to the basis on which the claim was made up. Debentures were issued by the company as the work of building proceeded.

Cross-examined: When Mr. Hills came into the matter, witness practically ceased to have anything to do with the Grand Junction Railways.

David Urquhart, an engineer by profession, stated that he came out to this country in January, 1898, on behalf of Mr. Hills, who at that time was negotiating to take over the contracts of the Grand Junction Railways (Limited). He came here for the purpose of ascertaining whether they could get from Government any better terms than the Grand Junction Railways then had. While he was here, Government advertised for tenders for the Oudtshoorn-Klipplaat line. No specification was arranged whatever. There was no change in the character of the line when the work passed from the hands of the Grand Junction Railways to the Thames Iron Works Co. After the agreement had been definitely signed, the company, in August, 1898, ordered large quantities of material, including 40,000 tons of rails. The agreement was altered by the Commissioner, against the protest of the witness, who unsuccessfully petitioned the House on the matter. The contract for the rails was a most favourable one, the rails being landed at East London at £5 a ton; the average price for rails in the States and England at that time was from £6 15s. to £6 17s. per ton. Every precaution was taken to build the line as economically

as possible, both in the way of materials and labour. He went over the Toverwater Poort line, and in his opinion that deviation was a very valuable one. In February, 1899, there was a dispute between him and the Government over the passing of the Act; after it had been promulgated, Government refused to make payments until he furnished securities. Witness objected to £300 a mile being taken off.

Cross-examined by Mr. Schreiner: The contract of 1898 was one he had negotiated with Sir James Sivewright when he was Commissioner. When Mr. Sauer became Commissioner certain new provisos were made with which witness did not agree. He was not content with the alterations, and when the Act had been promulgated in Parliament he entered into the agreement with conditions. The breach that was alleged against the Colonial Government was the forcing of the contractor to sign the agreement. The difference of £1,000 was due to the difference between the standard Colonial railways and light railways.

James Smith said he was forwarding agent at Port Elizabeth to the chief resident engineer of the construction of the lines in question. He was formerly employed in a similar capacity to the Grand Junction Railways. During 1901 he made every effort to get the goods away to the lines. There were long delays, some of the shipments lying down at Port Elizabeth fifteen months. Extra cost accrued through handling, and an extra 6l. per ton was put on for taking the goods to Humewood. He had about 5,000 cases of cement stored at New Brighton, a suburb of Port Elizabeth, which were required on the line. For this 2d. per ton extra haulage had to be paid, as well as 6d. per ton per week for storage and 1s. 3d. per ton for handling. Since the war was over more trucks had been available, and the same difficulty did not occur now. The difficulty extended from October or November, 1899, until he left, in May, 1902.

Cross-examined: They had no difficulty about coal. They always had cement, in fact he did not remember that they ever ran short of stores. The department, during the time of the war, gave him all the assistance they could in getting up materials, but they had no trucks. The 15 months' delay was not altogether a delay in landing; there would probably be 2 months to 4 months' delay in the ships. The Theodore took six months to land. The cargoes of certain vessels were still in Port Elizabeth, rails, sleepers, cement, and so on. The charges he had mentioned were not Government charges. Large quanties of sleepers, some 19,640, on which the Government had made advances, were seized and sold in execution by the Sheriff. They were attached and sold by the creditors of Hills and the Grand Junction Railways.

Benjamin Theodore Tonkin said he kept the books of the Grand Junction Railways, John Walker and Son, the Thames Iron Works, and Hills. No. 2 schedule represented 100.15 per cent. of actual cost; No. 3 schedule worked out at 74.4 per cent. of the actual cost. The payments on the schedule were never made from any inspection of the books. Awards had been made for properties expropriated in connection with the lines.

Mr. Schreiner said the Government's position was that they were willing to allow the plaintiff in the account against their claims whatever the Court found in expropriation, because the plaintiff never completed the contract, which was to give the Government transfer of the whole of the lands.

Mr. Searle said that the amount actually paid for land was £2,000, and the amount payable was about £5,000.

Witness said he had examined the Government accounts, and he found that £41.000 had been excluded from the accounts in connection with the Oudtshoorn-Klipplaat section. He also took objection to several other features of the accounts.

Cross-examined by Mr. Schreiner: The £5,000 mentioned as payable included costs of surveys. Government had never given the company a chance to complete the line to Bedford. The Government engineers included work done at Toverwater Poort in the extra prices.

Re-examined: There was a deviation in Toverwater Poort, which required more work than the line as originally arranged.

By Buchanan, J.: The company's books showed the actual cost of construction to the company. Government had made no examination of these books.

Robert Anderson Wise, civil engineer, stated that he was employed on the Fort Beaufort-King William's Town section from January, 1901, and after that

on the Oudtshoorn-Klipplaat section up to April, 1902, when the works stopped. The Government's standard of inspection was very rigid, and the work was altogether of a higher class than that done on the Government lines, on which he had been employed for four years. Some of the ballast that was condemned was superior to some of that used on the Government lines. The superstructure and masonry were both superior to those on the Government lines. In one instance the inspecting engineer asked that a bridge might be built of stones of one particular colour. This was done as far as possible.

Cross-examined: The company's lines were superior to Government's in respect of buildings.

Peter Hendry, a mason employed on the Oudtshoorn-Klipplaat and King William's Town lines, stated that the company's masonry work was very good indeed. In the building of the cottages greater care was exercised than was usually the case, while the foundations of the bridges and culverts were deeper. The inspection was very rigid, and on many occasions the work had to be done over again. He altered a large culvert on the Klipplaat line because it was an inch out. Less scrupulous care was being taken over the work now that it was in the hands of the Government. At times the work was stopped because of delay in inspecting the foundations of culverts. He had had previous experience on the Cape Government Railways, when he was employed on the Maintenance Department of the Eastern System.

Cross-examined by Mr. McGregor: His work was supervised on the Oudtshoorn-Klipplaat line by Mr. Saland:r. Mr. Gordon was the Government engineer, so far as his section was concerned. They had no plans or sections for the nine-feet culverts, but for the larger culverts they had plans. As regarded the reconstruction of one of the culverts, he was certain it was only done for the sake of a one-inch difference.

James Lennox, foreman of the carpentery work of the Oudtshoorn-Klipplaat line, said he was still in the employ of the Government on this section. The work done by the company was first-class work throughout. There was a very rigid inspection. Often work was condemned and taken out. The cottages, for instance, had imported iron windows, which were condemned and taken out. The windows had been framed at Klipplaat. They were splendid windows, but he believed the objection taken by the Government engineer was that the windows were too large. Special matchwood lining had to be obtained. They were required to get one-inch floorboards, whereas now the Government were actually using half-inch boards. The loading platform at Willowmore was different to other platforms, and was built more strongly than any other that he knew on the Government line. The platform was built on trestles. The passenger platform at another place was quite superior to the platforms usually erected on the line. Generally the workmanship was quite the same now as formerly, but the material used was lighter now when the Government had taken the construction in hand than when the company were carrying out the contracts.

Cross-examined by Mr. Schreiner: As to the window frames, he did not see any detailed specifications. The plan supplied by the Government Engineer said they must be ¾-inch frames. Mr. Good was the Government Engineer who saw the frames. The Government required 14 gauge galvanised iron, a standard which was never used for cottages but generally for sheds. There was considerable delay in getting some of the material.

Charles Richards, foreman of the ballasting on the Oudtshoorn-Klipplaat line, said he had been engaged about four years on the line in the employ of the company and the Government. He was well acquainted with ballasting. He was now doing the ballasting on the Oudtshoorn-Klipplaat line. He remembered some ballast being condemned about 85 to 86 miles from Klipplaat, and the Government, as a matter of fact, had since used stuff from the same pit. He had seen the ballast now used by the Government; it was simply muck with a little grit in it. The ballast used by the company was far superior to the stuff now used by the Government. He had not the least doubt that the Klipplaat-Oudtshoorn line was better than any other line in South Africa as far as construction was concerned. The sleepers which had been condemned by the Government

when used by the company had since been put in by the Government. Sand used for cement was formerly sifted, but since the Government took hold of the work it had been used unsifted.

Cross-examined by Mr. Schreiner: The ballasting of the company cost 47s. 6d., but the Government had to pay 53s. 6d. The "muck, with rough grit," was put on by a sub-contractor named Lyons. Only certain parts of the ballast were condemned.

David Childers said he had been engaged in railway work in this country for 26 or 27 years. He was engaged for the Grand Junction Railways in 1896. The ballasting was well done, and was deeper than certain contractors had recently put down for the Government at Toverwater Poort.

Samuel Henry Webber, foreman of the ballasting party on the Cookhouse section, said he was with the company for about 18 months. He was now working for the Government in a similar capacity. The ballasting now being done on the section was not quite so good as previously, the Government Engineer informing him that it was not necessary to be so particular as before, when the work was being carried out by the company.

Joseph Roskelly, a mason, stated that he was employed by the company on the King William's Town section for eleven months; he was now working for the company. The masonry was better than the average, and superior to that now being put in for Government. Stone and sand were now being used, which the company was not allowed to utilise.

David Alexander Walker, a mechanical engineer, stated that he was formerly locomotive foreman on the Oudtshoorn-Klipplaat section. The average number of the locomotives on this section was about six and trucks 70 to 80. Generally speaking, when the locomotives arrived on the section they were in a bad condition. The trucks were also in bad order. If they had had good engines they would have got through the work quicker.

Cross-examined: This was his first practical experience of railway building.

This concluded the evidence for the plaintiff.

Mr. Searle handed in a number of documents showing the assignment of the rights and obligations of the Grand Junction Railways and the Thames Ironworks to Mr. Hills, so far as the Cape Railways contract was concerned. He also asked that the books belonging to the company which, he said, filled two or three cases, should be taken as put in.

The Court agreed.

Mr. Schreiner said that he also proposed to put in a large pile of documents, and he suggested that the whole of the documents be referred to the attorneys on each side, so that a selection might be made of such correspondence as was material to the case.

Mr. Searle said he assented to this course.

For the defence, Mr. Schreiner called

Thomas Smith McEwen, who said that he was at present General Manager of the Cape Government Railways, having held that position since August last year. Previous to that he had been Assistant General Manager from April, 1901. From April, 1899, to March, 1901, he was Chief Resident Engineer on construction on the Grand Junction Railways. When he left there, he was followed for a short period by Mr. Dalton, who was succeeded by Mr. Tippett, who retained the position until the line was taken over by the Government, under order of the Court. Since then Mr. Tippett had supervised the work done under the Government. While witness was Chief Resident Engineer, he made himself familiar with the work going on. The contractors were dilatory in the work. Due progress was not made. The plant was very meagre for the magnitude of the work. On the Oudtshoorn-Klipplaat line, witness's attention was drawn several times to errors in levels. Witness confirmed the correspondence on this point. The setting out of the centre line for culverts by the Government Engineer was a matter of grace. Witness's instructions were that all the assistance possible was to be given to the contractors. Witness never heard of any complaint by the contractors to the effect that all the assistance possible was not given to them. Proceeding, witness gave evidence as to the alleged breaches of contract, confirming the contentions of the Government in that connection. With regard to the stoppage of advances on cement and other material shipped in 1898, 1899, 1900, and 1901, witness said that such advances were never made in his time. There

had been such advances at one time, but it was stopped on the advice of witness, who pointed out that cement was part and parcel of the finished work of the masonry under the contract, and was taken into the schedule when the work was finished. If they advanced the money on shipment, it would be very difficult to earmark the cement in the masonry. The same applied to timber and galvanised iron. The only result was that the contractor did not get the money as soon as he would have done under the system of advancing on shipment. It was merely a question of delayed payment. With regard to Mr. Dalton's report, the only difficulty they had with the contractors was as to some 10,000-gallon iron tanks. So far as Mr. Dalton's report and estimate differed from the contract, witness never insisted upon Mr. Dalton's report. As to betterments, at a meeting between the Commissioner, Mr. Elliott, and witness and Messrs. Ainslie and Walker, as representing the contractors, a rough estimate was made of the betterments, and they were put anywhere between £600 and £800 per mile. As to the bridge superstructure, that was paid at so much per ton, so that any better or heavier superstructure would be paid for. As to the non-payment of all the money on each completed section of twenty miles, witness denied that any such section had been completed or taken over. There was correspondence on this point which witness confirmed. Permission had been given to the contractors to run goods over the sections, but in giving the permission, witness was careful to say that that did not include the taking over of the line. It was distinctly understood that the contractors did that at their own risk. The Government had not claimed any of the receipts, although in plaintiff's account a certain amount had been allowed. The only receipts witness knew about were the amounts which the contractors agreed to pay to certain charitable societies. With regard to the alleged delay in the carriage of material, witness deposed that he had done everything in his power to facilitate the carriage of material, and he detailed the steps he had taken. The contractors had, with the approval of the Government, sold 3,000 tons of material to the military authorities. That was material delivered at the contractors' depots for the Klipplaat and Willowmore lines. Proceeding, witness explained the allowances which had been made to the contractors in regard to the Somerset-King William's Town line, when that became a Government, instead of a subsidised line. As to joint measurements, he explained that these were not always made, because it was desired to fix the monthy amounts to be paid to the contractors as quickly as possible, and in cases of dispute the matter was rectified in the following month. He denied the statements that there had been any unfair inspection or rejection of work. Mr. Gillespie told the contractors to stop the work at Toverswater Poort until he had a certified plan. When witness was appointed to supervise the work Mr. Urquhart suggested that he should not settle this deviation first, but the one from Bedford to Somerset East. When he visited the Poort, where he found work going on, he said that the work could not continue until an approved section had been submitted. To witness's knowledge the central line was never approved by Government. The reason he wanted the line at a higher level at the Poort was because he was not satisfied that it was sufficiently high above high-water mark. He accordingly increased the height of some portions of the line by nine feet, but after further inquiry he made the increase only at two places. There might be places where they increased the height by a couple of feet. The highest increase was 5 ft. 6 in. Witness expressed the opinion that the cost of raising the levels should fall on the contractors, and not on the Government, because the former did not get their approved levels. The contractors were informed that the work they did before he gave them their levels was done at their own risk. The standard of masonry and ballasting insisted on by the Government engineers was not too high. With regard to the Tasmanian sleepers, large quantities of them were being got out. Some of the sleepers were attacked by white ants and began to shake and crack. Witness recommended Government not to take any more of these stringy bark sleepers, seeing there was a large quantity going into the line a considerable risk was being run as to their "life." He advised that it would be

better to utilise creosote sleepers, the "life" of which they knew. A quantity of Tasmanian sleepers was utilised, Government accepting all that came up to sample and all those on the water. The others they would not allow to pass; there was nothing in the contract to say that they should take them. They had to be approved. Witness explained the difference between what was meant by hard and soft rock. The former could not be got out without boring or the use of explosives; the latter was a bedded, disjointed rock which could be taken out without considerable labour with the pick. For the purpose of cheapness in working witness would blast a good deal of what he would call loose rock. As far as witness's experience went, the plaintiff's lines were well constructed. Witness insisted on the contractors sticking to the specifications. The lines were equal to good Government work. He had not authorised anything like an inferior standard of work since Government took over the operations. The schedule prices were fair. He had worked out the cost per mile as upon the basis of the figures that the Government had actually paid. The Government had advanced £1,005,232 upon the whole construction of the lines, and there was the claim now brought against them of £492,000, making a total of £1,497,232. Deducting the value of material which was on hand on the working of the lines, £206,254, they had £1,290,000 which, divided by the total distance of rails laid, 179 miles, gave the amount that the Government would be paying as £7,212 per mile. The lump sum in the contract was £4,450, plus betterment, which would be £600 to £800 per mile. A lot of work had to be done over again, costing £20,000 to £30,000. There was also loss to the contractors through various reasons, the Boers invading the district, and so forth.

Cross-examined by Mr. Searle: He admitted that the department made a very good job of the Toverswater Poort section, but he did not express any opinion on the suitability of the route.

Thomas Rees Price, at present General Manager of the South African Railways, said he was formerly General Manager of the Cape Government Railways until August, 1902, from May, 1901. He also carried on the functions of chief traffic manager from 1893. He was familiar with the Hills contracts. There was an anxiety on the part of the Department to get the work along, and they did every thing they reasonably could to help the contractor. He considered it was quite incorrect to state that the Department starved the contractor in the matter of advances. At that period the country was in a disturbed condition, and many of the advances were made without submission to Parliament. Mr. Hills arrived in the latter part of 1901. He endeavoured to secure special advances from the Government. Witness had correspondence in his department with Mr. Hills, and the Commissioner and the engineer-in-chief. It was correct that £10,000 was advanced to Mr. Hills a week after his arrival. Mr. Hills was mistaken in saying that one-third of the Mossel Bay line had been completed at that time, and that the £5,000 was not to be deducted on the certificates to be given. Mr. Hills was hoping to get £40,000 on the Mossel Bay line, and by a very liberal interpretation of the contract they were able to give him £35,000 on the line, but it was not on the basis that one-third of the line had been completed. The result of the discussion later on as to the granting of the remaining £5,000 was that there was a belief that £5,000 worth of work had been done, for which certificates were to come in and £5,000 was advanced. This was not on the Mossel Bay line. Mr. Hills was mistaken in his view as to the deduction, as the records showed. While he was traffic manager he gave every possible facility to the contractor in the construction of the line.

Cross-examined by Mr. Searle: Mr. Hills, when he came to this country, wanted £20,000 in South Africa and £20,000 in England at once; he was urgently in want of money. He wanted the money before he sailed back home. Witness did not know that the contractor was very short of material, for he sold 3,000 tons. He knew that 3,000 tons of material was sold to the Imperial Government as a special favour during the war. While the C.G.R. had delayed material the contractor was, he said, not so short of material that he actually required.

George Gordon, acting resident engineer on the Oudtshoorn-Klipplaat line, said that he had been engaged on that line since 1898. The contractor and him.

self made joint measurements up to April, 1899. After that joint measurements were not always made. There was only one dispute. Witness made measurements and worked out the prices. In case of dispute if witness's certificate did not accord with that of the contractor's engineer, and they were unable to adjust the difference, his own certificate had to stand, and it was backed by the Chief Resident Engineer. When the Government took over the line they proceeded to finish the work. None of the three sections on the line were completed. On three occasions in 1901 and 1902 he drew up a schedule of the value of the work remaining to be done. He was district engineer for a portion of deviation No. 9; his part contained Kraantz Poort, but not Toverswater Poort. At that time the question arose of their proceeding with the work. He told them to stop, because he could not get the complete section showing what the contractors were going to do. He reported to Mr. McEwen. There was not a complete plan when the contractors did that work. The levels were dealt with on an approved plan and section sent in by Mr. McEwen. In the contract of 1900 there was the classification of material, but no such classification was made before the contract, and a good deal of the work had then been done. The rock was nowhere so difficult to get out as it was in Toverswater Poort. He based his calculations on this rock. In his section he had not allowed for any embankments got out in quartzite. He prepared the data for the final certificate on that line. He had good assistance, and he checked the work as far as possible. There was no great divergence between his certificate and the provisional certificate under the contract. As to the alleged rigid exaction in this inspection, he had not been exacting beyond his duties as an engineer of the Government. It must have cost the contractor a great deal to do rightly work that had been done wrongly. He did not know that the work had been delayed at Kraantz Poort through any action on his part, except on one occasion for a finished plan and section where there was a high embankment. They were deviating from the Government standard of curves. When the Oudtshoorn-Klipplaat line became a contract line he had to do with the measurements of all work done on the old contract in 1898. He showed all the work done up to that time. The contractors' engineer's certificate and his own certificate were identical in amount—£59,015. As to the allowance to the contractor for plant works, etc., taken over, on which the Government had made no advances, those figures were prepared by his staff. The stock was taken by the contractors' own storekeeper. Witness actually gave more value on one section than the figure recommended by a man who had previously been in the contractors' employ. There was a serious discrepancy between the materials advanced upon and the materials found on the line. He had no knowledge of any ballast condemned by the Government officials when used by the contractor, having afterwards been used by the Government. He did not think that the work was afterwards inferior.

Cross-examined by Mr. Searle: The match-boarding was shown on the plans. The measurements in Kraantz Poort were made by witness; the bulk of them brought up in the accounts were the original monthly certificate measurements. In some cases they measured over again, but the larger proportion were the monthly certificate measurements. The classification was done by Payne on witness's instructions. He was not aware that the classification as given to Mr. Roy was different to the Government's account. Mr. Keeling, district engineer, classified the figures for Toverswater Poort. The bulk of the valuation of plant had not been made by witness himself. There was quartzite at Kraantz Poort, but he called that quartzite loose rock. The work at Toverswater Poort was commenced in November, 1898. His first objection was to a certain gallery; he thought the work was below the 15 ft. level. On the 29th January, 1899, he took this objection. It was not a question of plant, but of river level.

Buchanan, J., said that these mistakes were made, but were afterwards rectified by the contractor, and so far as damages were concerned there was an end to them.

Witness, further cross-examined on the point of the alleged difference of work now and formerly, said he had no knowledge as to the alleged use by the Government of materials which had been condemned under the contractor. That matter belonged to his District Engineer, Mr.

Keeling. Re-examined: He could say from his own observation that the Government was not putting in inferior ballast. In his figures for the Government he allowed for embankments at 1s. 3d. When they worked at Toverswater Poort at first they had no plans or sections.

Arthur May Tippet, chief resident engineer, said he had supervision of these lines. He commenced as Acting Chief Resident Engineer in 1901. The certificates were under his supervision. The gross value of work done and material working to line on Mr. Hills's contract at schedule rates amounted to £369,413 14s. 7d., representing the gross value of work done under the contracts of 1900. From this amount 10 per cent. deductions had to be made for retention money. The figures were put in at the schedule prices. The value of work done based on the prices in the superseded contract on the Oudtshoorn-Klipplaat line was £59.015. Adding this to the gross value, less 10 per cent., they got a total of £391,487, from which had to be deducted £2,263 10s. 1d., value of work done under clause 2 of the contract. He had stock taken of the material which was in possession of the Government and against which advances had been made. He also had stock taken of buildings, plant, and material, which had not been advanced against, but which was taken over by the Government on all the lines. The value against which no advances had been made was £15,000. He could not express any definite opinion personally as to whether this was a reasonable value; he had been given the value by the subordinate engineers, and he had no reason to doubt that they had made a fair valuation. When the work was taken over and got into full swing, Government found that they could do the work at less than the schedule prices in use when the contractor did the work.

The ballasting in the schedule was put down at 103s. 8d. per chain; the Government was doing it at 65s. He thought 103s. 8d. was too high a figure to pay, even during the time of the war. He denied that the work was now of an inferior class, compared to what it was under the contractor; in fact, from his own knowledge he could say it was exactly of the same description now as previously. As to the contractors' work, when correctly done, it was well done; but there was an immense mass that was incorrectly done. The levels had in many cases not been worked to. The ballasting on the Oudtshoorn-Klipplaat line was originally very badly done. As to the embankments, the specifications were 12 to 14 feet wide embankments. If this width had been exceeded by way of betterment, it would be a considerable item. Assuming that that was not allowed to the contractor as a betterment, he could only get the information as to the cost from the contractors' books, and even then it would be difficult. When stocks were taken, a considerable discrepancy was found in the materials against which advances had been made, whether working to the line or not. Certain of the material advanced against was seized and sold in execution. As to the question of betterments, he did not allow anything for the extra width of embankments, because it was not allowed in the contracts. His actual allowances for betterment on the Oudtshoorn-Klipplaat line were: Permanent way, additional ballasting, etc., £502 18s. 2d. per mile; over the 106 miles to deviation No. 9, according to comparative quantities, the amount would be £259 1s. per mile; bridges and culverts, £37 9s. per mile over the 106 miles. He thought some of the betterments were necessary, but the widening of the embankments was not required, and it was no benefit to the line. On the Somerset East-King William's Town line, the permanent way came to exactly the same figure, £502 18s. 2d.; earthworks, £364 7s. 8d.; and masonry, £8 19s. 5d.—making a total of £876 5s. 3d. It thus turned out that if the contractor had continued and had completed the lines, the fullest possible allowance that Government could have made would have been: Oudtshoorn-Klipplaat, £4,150 per mile, plus £799 8s. 2d. for extras; Somerset East-King William's Town, £4,500 per mile, plus £876 for extras. He did not know that they had insisted on Mr. Dalton's report, though he had referred to it as indicating what would be a complete line, and the contractor was to build a complete line. He called upon the contractor to build underground tanks for the cottages. He found mention of the tanks in Mr. Dalton's report, and he knew that it was the custom to build

them on the Cape line. The tanks cost the Government £43 each. The contract said that "omissions were provided against," and he put the tanks in as omissions. None of the 10,000 gallon tanks had been supplied. The completed mileages when the Government took over the work were: Oudtshoorn-Klipplaat, 93.6; Somerset East-Fort Beaufort, 40.62; Fort Beaufort-King William's Town, 24.9. This made a total mileage completed by the contractor of 159, while the total length which had not been touched was 71½ miles. Roughly speaking, the total length running was 180 miles, but this was not open; it was simply the length of rails laid by the contractor. As to Toverswater Poort, he did not think the contractor should be allowed for quartzite, seeing that he was already paid twice over as bank and cutting. With regard to the alleged delay in the transport of material to the contractor, there were delays, but not for long; they were of short duration, for cement and coal. During his association with the work, it was proceeding very slowly, and at a very unsatisfactory rate. He was not aware of any undue inspection and exaction by the Government officials on the Oudtshoorn-Klipplaat line. He was put in as referee, and when complaint of rigid inspection was made, he made his decision as lenient as possible. He knew of no superior masonry on the line, such as had been alleged by the witnesses on the other side.

Cross-examined by Mr. Searle: He admitted that on annexure 3 A the Government put down the value of the work done at £2,263, while the actual cost, according to the schedule, was £4,100. He thought that was quite reasonable, when they bore in mind the disorganisation of the works, the natives having left their work and so forth.

Mr. Searle: Yes, but that won't do, Mr. Tippet—collecting natives.

Witness: If you don't agree with me, why ask me? I give you my opinion, that it can easily cost three times as much.

Mr. Searle: But is that your explanation of the large margin of nearly double the amount?

Witness: My explanation is the general disorganisation of the work, and that it was very much more costly to restart it.

Mr. Searle: Will you give me the figures on the other annexures?

Witness: On 3 B schedule, rate £917 14s. 11d., cost to us £864, and 3 C schedule, rate £119 13s. 8d., cost to us £196 5s. 4d. You have naturally chosen the worst from our point of view.

Mr. Searle: Oh, no; I took the first.

Witness, further cross-examined, said he had not said that the contractor was entitled to "better" up to a standard Cape line. He knew that Mr. Dalton allowed £157 extra for the widening of the line up to the standard width; but still it was not authorised in this particular case. The contractor would naturally want to throw his stuff out, and it would be convenient to him to have a wider embankment. He was not aware that an order had been given by the Government to the contractor to bring material to widen the embankment. The speed on that line was, in Mr. Dalton's report, limited to 15 miles an hour. He did not know that there was anything remarkable in that. On the Port Elizabeth-Avontuur line, for instance, the speed was limited to twelve miles. The speed on the principal lines was limited to twenty miles. The work actually done by the contractor was equivalent to 159 miles completed.

Mr. Searle: I suppose you contradict those witnesses who have come here and said that the work which they are doing now on the line is inferior to the work that they were required to do when they were working under the contractor.

Witness: I can only say that if they are doing that they are rogues, because it is against our wish and instructions.

Mr. Searle: Yes, but you know you are at Port Elizabeth, and you can't speak as to the character of the work.

Witness: I have not ordered any deterioration of the work, and my engineers, to my knowledge, have not ordered it.

Mr. Searle: As to the progress of the work, the condition of the country was very different then to what it is now?

Witness: The condition of the country was not such as to interfere materially with the contract if it were properly conducted.

Re-examined, witness said that a great amount of expenditure was incurred in

the cost of reparation of the line from Middle Drift to King William's Town.

Allen Grant Dalton said he was assistant engineer-in-chief of the Cape Government Railways. He had been over twenty-eight years in the service of the Cape Government. The report of 1894 was his report. In regard to the origination of the line, he was the author of the estimate for a light railway. The idea of that railway was fairly represented in the Act of 1895. He made a distinction in his report between a new permanent way line and one equal to the Cape Government main line. He showed in his estimates a difference of£1,600 for betterment between one and the other. The principal difference was in the heaviness of the permanent way material. The steel superstructures on the Government line in his opinion were as good as those used in this line built by the contractor. Generally speaking, the specifications for the bridge superstructures were practically the same in the case of the Government line and the contract line. The altering of the gradient from one in 40 to one in 70 would probably increase the cube of earthwork. For the construction of the lines 12 to 14 feet deep, embankments were maintained in the specifications, but the ballast was increased from 12 to 18. He corroborated the figures given by Mr. Tippett. Those figures bore out his own estimate. As to the line between Klipplaat and Willowmore, a great deal of that line was a deviation from the plans. He understood that the contractor started with his alterations right away, actually from the station.

Cross-examined by Mr. Searle, witness said he had no instructions as to making his report on the basis that the Government would call for tenders. In one case his estimate was £4,450 a mile, and in the other £5,000, less £300 for equipment. He adhered to his reports. He considered that a line equal to a Cape Government line, Oudtshoorn-Klipplaat, could be built for £6,058 per mile. It would be a one in 40 line, 5 chain curve. If the gradient and curve were altered to one in 70 and 8 chains respectively, the cost would be increased, but he could not give figures. His idea in his estimate of £4,450 was that the ballasting could be reduced in the Karoo. In some respects this Oudtshoorn-Klipplaat line was not equal to the Cape Government line. The stations were not so good. He would not say that in some respects the line was not superior to the Cape Government line. The superstructures on the bridges were heavier on the Thames Ironworks contract than on the Cape Government line, but that did not make a better bridge. The bridges might be heavier, but it did not follow they were more substantial. He believed the bridges were very good work. The 6 ft. and 9 ft. culverts on the contract line were of steel. He did not know that any old rails had been used for culverts on the main line. The speed limit of fifteen miles an hour was not unusual for a branch line or a light line. He did not think they would find trains running on the ordinary C.G.R. line at twenty miles an hour, except fast passenger trains.

Re-examined by Mr. Schreiner, witness said the width of the embankment remained the same as when he made his report for a light line. Taking the contract lines as a whole, the actual work itself was, he believed, as good as they put into their Government lines. The embankments were wider on the Government lines.

Alexander Keeling, district engineer on the Oudtshoorn-Klipplaat line, said his district was No. 3, including Toverswater Poort. The contractors' engineer and himself calculated the quantities after measuring, and they jointly completed the measurements each month. He based his final calculations on the contractors' cross-sections. The greater portion of the rock at Toverswater Poort was quartzite. The Poort extended a little over a mile and a half, and it was in this portion that the quartzite appeared. Outside the Poort he found no quartzite in deviation No. 9. He found there a big proportion of shale. The regrading occupied about three months, and was done for the purpose of making the line safe from the water. The work was good when it was done, but it took a good deal of worry getting it done. The levelling was badly done. There was also an error in masonry. He believed a small portion of ballast was condemned. As to the alleged inferior stuff now in use, he denied that it was "muck, with a little grit." It was pure grit, with a little loose earth on the surface. His inspection was not exacting.

Cross-examined by Mr. Searle, he did not approve of the surface stuff that he had mentioned. It was recently put in by the sub-contractor, and he should not sanction it whether it had been done by the Government or the company. Most of the portion in his district was deviation. There ought not to be any difficulty in the levels of the line. That was an elementary principle of railway engineering. He knew a survey had been made some years before, and it was not surprising to him that the centre pegs should have been lost. Very little in the way of widening the formation was carried out in his district. The contractors' engineer and himself made out joint certificates; that practice was continued until December, 1901. The monthly certificate was drawn up by Mr. Gordon. Witness could not say whether Mr. Gordon would draw it out on the joint measurements of himself and the contractors' engineer.

Re-examined by Mr. McGregor: The disapproved surface stuff in the ballasting was put in last December. It ought to be stripped off the ballast. It was put in by the sub-contractor.

George Lacey Good, district engineer, now in charge of the Klip River water scheme, said he had been an engineer on the Oudtshoorn-Klipplaat line up to 40 miles from Klipplaat. When he got there he found the earthworks completed, except the trimming. The 20 miles sections had not been completed when he left. As to the monthly certificates, the contractors' engineer often carried out a joint measurement with himself. He did not think the material or work on the line was any better than on the Government line. He had had to complain very often about the ballast at first, but an improvement afterwards took place, though even then when his back was turned they would go and put in big stones again. He did not think there was even sufficient supervision on the part of the contractors' engineer. The re-grading was consented to as a convenience to the contractor. There was loss through errors. There was a good deal of ballasting to be done over again owing to bad formation. He had to take up all the points and crossings at Willowmore Station at the Government's expense. There were other features in which loss was incurred. There was fault to be found in connection with Swanapool Poort Station. The work was slowly carried out. As to the standard of inspection no complaint was made to him that this was too vigorous. When he made his measurements for the final certificate the contractors' engineer refused to accompany him, as, he explained, he had instructions from the general manager of the works not to do so, because they did not recognise the right of the Government to take measurements at all.

Cross-examined by Mr. Searle: He did not know that Willowmore Station had been paid for a couple of years before this fault was found with the points and crossings. The embankments were trimmed up during his term of office. The embankments were widened at the same time, but he would not say the widening was the result of the trimming. As to levels, they did not expect to have much difficulty in that matter; it was the simplest thing. His assistant (Mr. Everton) told him that even after he had given the contractors' men the levels they would not work to them. He had no complaint to make of the style of work that the contractor did after the faults pointed out had been rectified.

John Gillespie, engineer of the Somerset-King William's Town and the Oudtshoorn-Klipplaat line at different periods, said he did not think there was any undue inspection of the work. The levels were ignored in the first instance in several places, and re-grading or re-adjustment of the section was necessary. There was considerable deficiency in the ballasting on the Oudtshoorn-Klipplaat line. At Toverswater Poort, Deviation No. 9, the men were working without having approved and signed plans before them. It was his opinion at the time that the formation level was too low. Plans were afterwards approved. He formed a very bad opinion of the quality of the sleepers received at Cookhouse in 1896. They were stringy bark sleepers, and were described to him as Tasmanian. The quantity was about 18,000. During the war the temporary bridges between Willowmore and Toverswater Poort were damaged by the enemy. He always thought the engineering staff of the contractor was inadequate, and that there should have been more supervision.

Cross-examined by Mr. Searle: He did not know what afterwards became of

the sleepers that he condemned. There was no practice, as far as he knew, of inspection of materials at the port of arrival.

Edward P. Popkis said he had been engineer on the Fort Beaufort-Somerset East line. At times they had joint measurements, between the contractor's engineer and himself, and at other times he made the measurements on his own account. Mr. Brady (his assistant) took the measurements for the final certificates; it was all measured up again and found to correspond with the provisional certificates. Witness checked Mr. Brady's measurements. A deduction of 7,440 cubic yards was made on account of unauthorised embankment in the neighbourhood of Cookhouse. This was prior to the adoption of the deviation. There were repeatedly mistakes as to levels on the part of the contractor. Fault had also to be found with the ballast over a three-mile length. It was not true that a lower standard of work was sanctioned on the Klipplaat-Oudtshoorn line when the Government took it over, as compared with the work while the line was in the hands of the contractor. He was not aware of any serious delays which would have hampered the contractor in the execution of the work. The engines and rolling-stock furnished by the Government to the contractor were similar to those now in use on the construction, and were similar to those generally used by the Government for construction works. He did not consider that the engines were kept in proper order by the contractor, and he also found that the trucks were roughly treated in the course of the excavations. Except for a fortnight there was no stoppage of work, owing to the disturbed state of the country. Labour was scarce about that time, and there was difficulty in procuring a supply, but he also knew that the contractor discharged men. The men were not paid regularly, a fact which caused a good deal of dissatisfaction, especially among the natives. He invited the contractor's representative to join him in the preparation of the final measurements, but no one joined him representing the contractor, as they said they were not authorised to do so.

Cross-examined by Mr. Searle: When he told the witness Weber not to be particular about the ballasting, it was in cases where the banks had subsided, and he said that refuse material could be used up to 9 or 10 inches below the surface. He denied that the Government were now using ballast that had been condemned when used by the contractor. He made the deduction of 7,000 odd cubic yards of embankment, because it was unauthorised work.

Thomas K. Brady, assistant to the last witness, spoke to the measurements which he carried out for the final certificate.

Evidence was also given in corroboration of the testimony of previous witnesses by Sidney Firth, Acting Resident Engineer on the Somerset East-King William's Town line; Henry Reid Gordon, assistant engineer to Mr. Firth; and others.

Mr. Schreiner closed his case.

Mr. Searle, K.C. for plaintiff): This action is brought on two counts, viz., on the grievances set forth in paragraphs 12 and 17 of the declaration.

[Buchanan, J.: You do not say that the Government acted unlawfully in taking over the line?]

No; they had power to do that under Article 52 of the General Conditions.

[De Villiers, C.J.: We must assume that the judgment of this Court delivered on June 19th, 1902, was warranted.]

I submit that the Court would never make a final order on two affidavits such as were then produced.

[De Villiers, C.J.: That is not now a matter of argument. The Court heard full argument before giving its decision.]

Then I come to the agreements of May 19, 1896, and March 18th, 1899.

[De Villiers, C.J.: But the agreement of July 4th, 1900, is quite against your contention. Would not the Government be entitled to claim damages for your breach of contract?]

I do not think so; the Government tried to get out of their agreement. The mere fact that the Government says that the company has not complied with certain provisions cannot disentitle us to damages. No final settlement was ever arrived at under any of these contracts. These questions of settlement have not been raked up lately, but these different contracts were ways of carrying on business from time to time,

and from time to time the conditions have been changed. A considerable portion of our claims accrued while matters were more or less under discussion. Under the agreement of 1898, £120,000, being 10 per cent. of the profits of the company, were agreed upon as rent; but before going into this more fully, I may say that we sue for £492,565 as the measure of our damages. The rest of our claim is for interest, work, labour, and materials. Our alternative claim is based on the value of the property and the actual cost of construction. My first point, then, is the question of damages. I may here point out that during the progress of the work alterations were made in the schedules. Under Act 40 of 1898, as well as under the agreement of May, 1896, the Government recognised the difference between "actual cost" and "value," and yet they made no effort to ascertain what the actual costs were. They, however, knew perfectly well, and even suggested the very principle of ascertaining the actual costs, which we now put forward. As to the refusal of the Government in December, 1898, to allow us to continue our works, Government stood aloof and refused to grant any advance unless we consented to accept it on their terms. In one way the company was bound to go on with the works, but to have done so on the condition the Government now wished to impose would have been to throw away their whole case. On October 12th, 1899, Elliott refused further advances on material for the Oudtshoorn section. A long correspondence ensued, and subsequently the Government undertook to pay for the importation of material. In December, 1899, the Government for the first time took up the position that they would no longer pay on the basis of Sec. 3 part 3 of Schedule A to Act 40 of 1898, but only on the basis of actual costs. This was opposed to Section 5 of the schedule, which was still in full force and operation. Again they changed their ground, and in a most unbusiness-like way come and seize on our whole plant, and most unfairly based their estimate of the actual cost on the cost as over the whole line, instead of on that part which had been actually completed. They had no right to stop payment on construction work certified by the engineer and on the importation of material. (See Sec. 5, part 1, of Schedule A of Act 40 of 1898 and Sec. 8 of Schedule G of Act 19 of 1900. Mr. McEwan's evidence goes too far. There has been no suggestion that the company was not honestly endeavouring to carry out its contract, and yet the Government now say that they were at liberty to delay payment on cement, timber, etc., and that it did not matter to the contractor when he might get paid.

[Maasdorp, J.: If you had gone on with your contract, you would have lost by it.]

No; none of our witnesses have said that. Some witnesses have said that the cost would work out at £72.000 odd per mile, but some miles are better than others.

[De Villiers, C.J.: But if the same ratio of expenditure had been kept up, the contract would have been a loss.

Mr. McEwan worked out his estimate on 179 miles of rail, but he gave no credit for line completed but on which trains were not yet running. Then the contractor agreed to take over the Mossel Bay line, which was a white elephant to the Government. Mr. McEwan's evidence does not help the Government. The Government again broke their contract with us by refusing to recognise some 2,000 miles of line actually completed. Even now they still refuse to recognise this betterment. We say the betterment is worth at least £2.000. Again in December, 1900, trains were actually running over the line from Willowmore to Oudtshoorn, and yet the Government contended that these sections were not completed, and that their completion would cost over £19,000.

[Buchanan, J.: The Government never took over a single mile of that line.]

It was not a question of taking over, but of paying for work completed. As to the conveyance of material, I admit that the Government did their best to help us; but this was one of the few things they positively undertook to do, and they failed to do it. (See the evidence of Captain Smith.) According to Sec. 30 of the agreement of 1900, the Government will excuse delay in completing the works on account of war, but a state of war actually existed when that agreement was entered into. Again, from £20,000 to £30,000 worth of work

which had been completed and certified for was ordered by the Government to be done over again at our cost.

[De Villiers, C.J.: Was the work redone under protest?]

Not, I believe, under a formal protest, but we complained about it. Now that our contract of 1900 has been terminated, we ask the Court for an expression of opinion on the merits.

[De Villiers, C.J.: But you are claiming damages with costs. How can you do that if you do work over again without a protest?]

We also objected to being called upon to re-ballast the line. The Government complained of the way in which we had done the work, but we say that the correspondence shows that they approved of the work.

[De Villiers, C.J.: Will not this item come in better under the question of actual costs?]

Yes, possibly, but we say that "actual costs" means the cost of all work done. The men now empoyed by Government say that the Government made exceptional requirements in regard to this line, and that it was quite up to the standard of any Government line. (See the evidence of Hills and of Roy.) Some of the locomotives supplied by the Government were very bad. As to the delivery of sleepers, Government was bound to deliver them at 3s. 9d. each; and yet, after having approved of these sleepers, they rejected a certain quantity. In consequence of this, we had to get sleepers at a higher price, and this cost us £20,000. A reasonable construction of Sec. 52 of Schedule H (Act 19 of 1900) would refer it to all material imported for the purposes of railway construction; but we are not now bringing an action against the Government for taking possession of this material; we ask only for the value of these sleepers at 3s. 9d. each. Again, the Government refused to pay some £12,000 (reduced by counter-claim to £10,000) due under Sec. 7 of Schedule H. As to the 30,000 shares of the Thames Iron Works, the Government seized upon these shares and attached them. This they had no right to do. At all events, these ought to have been given back when the Government took the line and the arrangement under which this security was seized had fallen through. I will now deal with the question of "actual costs."

[De Villiers, C.J.: The Court won't require you to argue about the actual cost itself, but upon the actual cost there was to be deducted, the amounts already paid to order, and there was further to be taken the 10 per cent. deductions, and they may keep those.]

We must give them the 10 per cent.; that must be deducted for the Mossel Bay line.

[De Villiers, C.J.: Should there not be deducted work which was unnecessarily done which was wrongly done in the first instance, and which had to be altered, actual cost of work done twice and unnecessarily? Is it not open to the Court now to appoint a referee; then the point will arise as to the instructions to be given to him, whether or not he should deduct from actual cost, waste of cost? I should have thought you had waived your right to arbitration by suing the Government now.]

We sued them for actual cost, but the arbitration clause is not interfered with.

[De Villiers, C.J.: I am not sure whether it would not be the better course for each party to nominate an arbitrator, and there should be an umpire between the two. The point is, whether it is a referee, an umpire, or arbitrator, upon what basis he should proceed to arrive at the cost?]

It is important to my client that there should be no unnecessary delay in having this matter definitely settled, and it would probably be difficult to procure three men who are able to deal with a matter of this kind. It would be in the interests of expedition if only one man were appointed.

[De Villiers, C.J.: We want a person with peculiar qualifications; he must be a good engineer and a good accountant.]

My only remaining point is that "actual costs" means actual *bona fide* expenditure. It is impossible at this stage to go into details. The contractor did everything he could to economise, but he gets no benefit from that. If the whole matter were gone into, it would require a most comprehensive investigation, and would show a heavy debit to Hills.

[De Villiers, C.J.: What have you to say as to interest on money expended?]

The London charges on agency and commission were 5 per cent., and that, I submit, is a reasonable charge. These

charges are all included under actual costs, because they may be very necessary, and every business man quite understands them. Even if we do get our actual costs, we shall not get all our money back. £40,000 of it is in the hands of the Government, and £30,000 by way of security. There is no saying when we shall get that back. I would press for the appointment of referees; to go into the details of the whole case would be an interminable task.

[De Villiers, C.J.: It will not be necessary for you, Mr. Schreiner, to address the Court on the question of damages; the Court will hear you on the question of actual cost.

Mr. Schreiner, K.C.: I understand that the two first claims of the declaration fall away. As this action was originally framed, the Government were brought into Court for £120,000 and for £492,565 4s. 7d. They say that the Government ought not to have taken over the line. But if the plaintiffs can prove damages for taking over the line, how can they get damages for loss of profit. (See Hudson on Building Contracts.) Could it be said that the contractor could delay for years some two or three miles on each line and then claim payment, interest, etc.? On Mr. Hill's own showing, the Government should pay him from £8,000 to £9,000 per mile for betterment, and also on his own showing portions of this line could be completed at 4 to 4½ thousands. The plaintiff's contention is that the Court must go by the contractor's vouchers. Were this so, the result would be to give the contractor some £8,000 per mile instead of £5,000 per mile. The Government has power to determine the cost under another procedure. I do not wish to make any appeal, but I must crave the indulgence of the Court. This contract is not a confession contract. If the term "actual costs" had had one constant meaning, it might have fallen under the contract of 1896. Then the Government could have taken possession of the assets of the company and bought them out. Under this contract, however, we have a specific contract for £4,150 and £4,500 respectively; and here I come to the question of "actual costs," viz., extra costs of the permanent way. And here I would ask, how can extra costs be computed as actual costs, if in the contract actual costs are to be estimated according to the schedule. If the materials not provided for in the schedule are supplied them, they can be charged for. "Actual costs" in Sec. 53 must mean the same as in Sec. 88 (sub-section 8). By the Act of 1896, "actual costs" were to be ascertained by the certificate of the engineer, endorsed with a certificate of the approval of Government. I submit that if the term "actual costs" is taken in this sense in one clause, it cannot be taken in a different sense in another clause. In brief, the plaintiff's case is that some of the sub-contractors did their work badly; and that the Government is to pay from a quarter to half a million for this bad work. The concession lines and the contract lines were made under wholly different conditions.

[De Villiers, C.J.: "Actual costs" would mean the same in both cases.]

No; in a concessionary line this term does not mean what it does in a Government line. In this case it is not to be expected that the Government will take over a portion of a line along flats—a line which has been very easily made—and have to pay the same rate for that work which we should have to pay for a difficult line, situated in a district where the cost of labour is greater.

[De Villiers, C.J.: But there is another section as to "actual costs" in the agreement.]

But see Clauses 8 and 5; these words would not be there if every species provided for under the Act had been properly done.

[De Villiers, C.J.: There is another section as to "actual costs" in the agreement.]

But see clauses 8 and 5. The words there would not have been inserted had every species of article been duly provided. If £30,000 worth was badly done, it is contended for the applicant that the Government must pay once for the bad work and again for the good. If in the course of war, damage is done by the enemy, the repairing of that damage is no part of the actual costs.

[De Villiers, C.J.: The term "actual costs" is there. I do not think it means unnecessary costs.]

I read "actual costs" in clause 52 (schedule to Act 19 of 1900) to mean so much of the actual costs of the line

as shall have been actually constructed. Again, it is argued that the Government has taken over a large quantity of material, but what the contract contemplates is, material put into the line. We have given a good equivalent for work done. We allow for contract prices, which are higher than scheduled prices: in fact there is a difference of about £70,000. I am sure that the Government will be prepared to settle this question of actual costs on a basis as reasonable as possible.

De Villiers, C.J.: The claim in this case is two-fold; there is a claim for damages and a claim for actual cost of the work constructed by the plaintiff for the Government. With regard to the claim for damages, I would make this general observation, that it is founded on the allegation that the Government, by divers alleged breaches of agreement, has compelled the plaintiff to carry on the work in such a way that ultimately the Government was forced to take over the work itself. I am quite satisfied, from the evidence in this case, that if the work had not been taken over by the Government so far from the plaintiff having any profit from the work, it would have been a loss to him in the final construction. If this view be correct, then it may be affirmed that there is no loss, no damage whatever proved to have been sustained by the plaintiff in consequence of what the Government has done. That is the general remark which I wish to make upon the different breaches that have been alleged. As to the particular breaches complained of, I have sufficiently indicated my opinion during the course of the argument. Coming then to the question of actual cost, the greater part of the time of the Court has been occupied in a discussion as to what these two words mean, and the Court stated from the commencement that it could not take any other view than that "actual cost" means the cost actually incurred by the contractors in constructing the work, so far as the Government has had the benefit of it. Mr. Schreiner has referred to several sections in the contract in which these words "actual cost" have been used, and in every case where these words are used it is quite clear that they were used as distinct from the scheduled prices or from the value of the work constructed. There is a distinction drawn everywhere between value and actual cost, and nowhere in any of the contracts which have been put in can these words, "actual cost," bear the construction which the Government have attempted to place upon them. In the 7th section of the Somerset East-King William's Town contract, to which reference has been made by Mr. Schreiner, it is provided that the Government shall, within 14 days after approval of this work has been obtained, pay to the contractors the prices in schedule No. 3 annexed the value of the work done on the said line as already certified, or to be certified by their Engineer as to quantities after deducting the amount of subsidies already paid them, and in other portions of these contracts scheduled prices are shown, but nowhere, as I think, do the words "actual cost" bear any different meaning from what is contended for them on behalf of the plaintiff. That being the view of the Court of the interpretation of these words "actual cost," the case becomes very much simplified. It is quite clear from the correspondence that the Government has placed a different construction upon these words, and the Government engineers have failed hitherto to give any certificate of actual cost according to the constructon placed before the Court. They have given certificates for the value of the scheduled prices, but no certificate of actual cost, and, in fact, Mr. Dalton's certificates, which have been put in, do not purport to be certificates of actual cost. Then it is contended that it is a condition precedent to recovering upon these contracts that the plaintiff should produce certificates of engineers of actual cost. Now I quite agree that it is a condition precedent, and if there had been any evidence that the Government was willing to pay upon a certificate of actual cost I should have held that the plaintiff is not entitled to succeed in the present case. It is manifest, however, from the correspondence and all the facts disclosed in the case that the only basis upon which the Government was prepared to pay was the amount of scheduled prices, and not the amount of actual cost. By its conduct, the Government practically prevented the accomplishment of the condition that the plaintiff should produce certificates

of Government engineers in order to obtain payment, and the Government cannot therefore rely upon the non-production of such certificates as a defence to the action. According to *Pothier* (on obligations, section 212): "It is a rule common to all conditions of obligations that they be taken to be accomplished when the debtor, who is obliged under such condition, has prevented its accomplishment *quicumque sub conditione obligatus, curaverit ne conditio existeret nihilominus obligatur.*" That principle was considered by the House of Lords in a case which came from Scotland, and which is of importance because the rule of the Civil law were discussed by one of the Lords of Appeal. The question raised was not one of work done by a contractor, but the principle laid down is applicable to the present case: "By a written contract A. agreed to buy of B. a digging machine if it fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in a fixed time on 'a properly opened up face' at the C. railway cutting. The machine failed at another cutting to excavate the required quantity, and on its being removed to the C. cutting and tried at a face not a 'properly opened-up' one, and breaking down, after a few days' work, A. refused to give it any further trial or to pay the price of the machine." Lord Watson, in his judgment said: "The respondents were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working face provided by the appellant, and that on trial it should excavate a certain amount of clay or other substance within a given time. They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, I am of opinion that, as in a question with him, they must be taken to have fulfilled that condition. The passage cited by Lord Shand from *Bell's Principles* is to the effect that if the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the debtor had done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement.' expresses a doctrine, borrowed from the civil law, which has long been recognised in the law of Scotland, and I think it ought to be applied in the present case." I think that that principle should also be applied to the present case, that the Government by its own act has prevented the fulfilment of that condition precedent; it would have been a nugatory act to insist upon a certificate of the nature which the Court now holds should have been given, and therefore there has been a waiver of this condition precedent, and the plaintiff is entitled to recover, but the plaintiff is entitled to recover only for actual cost of the contract. In my opinion, such actual cost cannot be held to include interest, or goodwill, or wasted expenditure, or any work or material of which the Government has not had the benefit. As an illustration of what I mean by "wasted expenditure," I may repeat the case of a culvert condemned by the engineers. If in consequence of faulty construction of such a culvert it is broken up and a new culvert is constructed, such new culvert forms part of the work taken over, and has to be paid for.

Materials which have been imported, and which appeared on the books of the plaintiff as having been imported, cannot be regarded as part of the actual cost if the Government has not got possession of them. Of course, if they have possession of them, even if they have not actually been put into the line, it is only right that they should then be regarded as part of the actual cost. In order to ascertain the amount of the actual cost it will be necessary to refer the matter to skilled referees. The engineering skill will be provided by two referees, Mr. Tippet and Mr. Roy, and the accounting skill will be provided by Mr. Gibson, who has been, as I understand, accepted by both parties. The Court will dismiss the claim for damages, and refer to Mr. Tippet, Mr. Roy, and Mr. Gibson as special referees, to ascertain the actual cost of the construction of the line taken over by the Government. With regard to the question of costs, that question must stand over. The referees will report to the Court, and

after the Court has received their report it should be in a better position to decide the question of costs.

Buchanan, J., and Maasdorp, J., concurred.

Mr. Schreiner asked that the reference should be made more explicit, and

The Chief Justice then intimated that the judgment of the Court was: "Claim for damages dismissed; referred to Messrs. Tippet, Roy, and Gibson, to ascertain actual cost incurred in the construction of the lines taken over by the Government, including buildings, plant, and material, such cost not to include interest, or goodwill, or wasted expenditure, or any work or material of which Government has not received the benefit, the referees also to ascertain the amount paid by Government on account and the amount of retention money in the hands of the Government. Judgment in terms of the defendant's tender, with costs to date of plea."

Postea (March 17):

Mr. Searle, K.C., called the attention of the Court to the fact that Mr. Gibson, who had been appointed by the Court as referee in this matter, was unable to act. The parties had now agreed, subject to the approval of the Court, that Mr. J. E. P. Close, accountant, should be appointed to act as referee.

Mr. Schreiner, K.C., on behalf of the Government, said he had no objection to raise.

The Court assented to the substitution of Mr. Close's name for that of Mr. Gibson.

Plaintiff's Attorneys: Tredgold, McIntyre and Bisset; Defendant's Attorneys: Reid and Nephew.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

WHITE V. BARNARD. { 1903. Feb. 23rd.

Application was made by Mr. Beninmin, who appeared for the defendant, for a postponement of the hearing until Monday next, in order that witnesses for the defence might be brought to Cape Town from Carnarvon.

Mr. Burton, for the plaintiff, objected.

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The action was for the recovery of certain sheep, which had been grazing on the defendant's land. This was not denied, but the sheep were retained for pasturage fees, which the defendant claimed.

The defendant was allowed to purge his default, and take his chance as the case stood on the roll.

NEL V. LATEGAN.

This was an action for declaration of rights on a certain lease of property on the plaintiff's farm, for which application was made that the defendant should execute a certain lease for a year, and give further security.

Mr. Buchanan (with him Mr. Bisset) appeared for the plaintiff, and Mr. Benjamin for the defendant.

Mr. Benjamin, on behalf of the defendant, said that he had been instructed to submit to judgment in terms of the alternative order of the plaintiff's claim.

Judgment was entered accordingly, with costs of the suit.

CRESSWELL V. VAN DER BYL AND CO.

This was an action brought for recovery of account by F. R. Cresswell against Van der Byl and Co., under an agreement entered into with regard to a certain tender to the Cape Town Town Council.

The declaration set forth that in December, 1900, the Town Council of Cape Town called for certain tenders, and it was agreed that upon the plaintiff rendering certain services and giving certain information the defendant would, if successful in obtaining the tender, pay the plaintiff 2½ per cent. on the goods supplied to the Town Council. The plaintiff fulfilled his part of the agreement, and requested the defendant to show the amount of goods supplied under the tender, and to pay the 2½ per cent. commission. The plea admitted paragraph 2 of the declaration, as regards the agreement between the parties, that, in consideration of services and information supplied by the defendant, the plaintiff would pay him 2½ per cent., but it further stated that it was part of the said agreement that the plaintiff was only to receive the commission in consideration of his supplying the defendants with all the brush-ware required by the Town Council at cost price,

and they denied any further or other consideration. There was a claim in reconvention in respect of an account annexed for £47, for loss and damage through the defendant's failure to supply the brushware.

Sir H. Juta (with him Mr. Russell) for the plaintiff; Mr. Burton for the defendant.

Isra Amond said that he managed the defendant's business during his absence in England. Plaintiffs had refused copies of the tender and invoices of goods supplied to the Town Council. There was no reason why plaintiff should not tender for the brushware contract. It would not pay anyone to keep a large stock of brushes and sell at 2½ per cent. commission.

Cross-examined: Excepting painters' brushes, witness's firm had all the others in stock. The price of brushes increased during the plague.

This closed the evidence for the plaintiff.

Mr. Burton called Mr. Van der Byl, a partner in the firm of Van der Byl and Co., for the defence. Certain representatives of the two firms had settled the preliminaries of the tender. The plaintiff was to receive the 2½ per cent. commission, subject to certain information and to his supplying the brushes at tender price. Defendant would not give 2½ per cent. for information. The total tender amounted to between £500 and £1,000.

Cross-examined: The plaintiff was to receive from £12 10s. to £25 for keeping an unlimited supply of brushes. He never complained of any loss to the defendant.

Albert Smith stated that he had been a commercial traveller in the employ of the plaintiff. Defendant promised plaintiff 2½ per cent. on the whole turnover, on condition that he supplied the brushes at cost price. Witness was constantly nagged about the brushes.

Sir Henry Juta, for the plaintiff, intimated that since the amount had only reached £483, he would accept judgment in claim of reconvention. He asked his lordship to exercise his discretion in the matter of costs.

Judgment was entered for the defendant in convention and the plaintiff in reconvention, the plaintiff to pay the costs.

[Attorney for plaintiff: W. E. Moore & Son: for defendant: Van der Byl and Van der Horst.]

BARBER V. S.A. HOTELS (LIMITED) AND ANOTHER.

This was an action brought by Thos. Wm. Barber, professional billiard player, against the South African Hotels (Limited) and R. J. Welsh, for damages amounting to £500, for breach of lease, false arrest, ejectment, and trespass.

The declaration set forth that the plaintiff rented a billiard-room at the Grand Hotel from the former proprietor, Mr. Cavanagh, on a monthly notice on each side. When the hotel was transferred the conditions remained, but on the 18th October, 1902, the first defendant wrongfully and unlawfully broke the said agreement, and had him falsely placed under arrest. The defendants, in their plea, set forth a twenty-four hours' notice, that the room was not properly conducted, and that the plaintiff had absented himself on several occasions. The defendants had offered to settle the claim for £10, and subject to that tender, they asked that the claim be dismissed.

Mr. Buchanan (with him Mr. Van Zyl) for plaintiff; Mr. Upington (with him Mr. Greer) for defendants.

The plaintiff (sworn) stated that he had a monthly agreement with Mr. Cavanagh. He denied the defendants' allegations, and stated that he was conducted off the premises by a constable, who was sent for by the second defendant. He had suffered severe loss through the ejectment.

Cross-examined: He always ordered any objectionable persons off the premises. He would be surprised to learn that the marker he left in charge on the 17th October, 1902, was very drunk.

George Walker, billiard marker, said that on the night of the 17th October, 1902, two officers, obviously under the influence of drink, smashed a cue, and upon witness asking them to pay for it, they threatened to throw him out of the room. He was dismissed next day.

Evidence was led as to the management of the room.

Postea (February 25): Mr. Buchanan said that since the adjournr-

ment his client had decided to withdraw, and he was prepared to accept judgment in terms of the tender.

Mr. Upington agreed to accept the judgment, with costs after date of tender.

Judgment was entered for the plaintiff in terms of the tender, plaintiff to pay costs subsequent to the tender.

Plaintiff's attorney: G. Trollip: Defendant's attorneys: Scanlen & Syfret.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

MILLER V. COETZEE. { 1903. Feb 25th.

This was an action for damages for breach of promise and seduction.

Mr. Upington appeared for the plaintiff, the defendant being in default.

The plaintiff, Gertrude Miller, stated that she was 21 years of age. She had been acquainted with the defendant Coetzee for the past three years. He was manager of an hotel. She did not know if his parents were well off, nor what he earned. Defendant seduced her in April, 1900. At that time defendant was about 17 years of age. In April, 1901, she was delivered of a still-born child. Defendant was the father of that child. The allegation made in the plea that she was of loose habits was not true. When she had to lie-in, defendant visited her at her request, and he promised to marry her, but said he was too young at that time to do so. About three months after her recovery she again allowed defendant to be intimate with her, and a second child was born on 2nd August, 1902. That child was alive. Previous to the birth of the second child, defendant continued promising he would marry her as soon as he was able, but three days before the birth of the child he refused to marry her. He said he still loved her, but could not tell her why he was unable to marry her. The expenses in connection with the birth of the child now living were £3 3s. She did not have a doctor to attend to her.

The mother and brothers of the plaintiff and other witnesses having given evidence,

Judgment was entered for the plaintiff in £50 damages for seduction and 30s. a month for the maintenance of the child until the age of fifteen years, the defendant to pay costs of suit.

COFEY V. COFEY AND PEPPER.

This was an action for divorce brought by John Cofey, a coloured petty officer in the Navy, against his wife, Sarah Cofey, and for £25 damages against the second defendant.

Mr. Benjamin appeared for the plaintiff, the defendants being in default.

Chas. Wm. Hy. Smith produced a record of the marriage dated April 13, 1892, between John Cofey and Sarah Roberts.

John Cofey, plaintiff, stated that he was a first-class petty officer in the Navy, and that he was married to his wife in April, 1892. There were four children of the marriage. He was compelled to leave his wife in June last on account of her misconduct. Plaintiff witnessed an act of misconduct between the defendants.

A decree of divorce was granted, the plaintiff to have custody of the children, and damages to the amount of £25 against the second defendant, who was also mulcted in the costs of the case.

DU TOIT V. MARAIS. { 1903. Feb. 25th. „ 27th.

Martial Law—Seizure of stock by military—Change of *dominium*.

Plaintiff's farm had been denuded of certain mixed live stock by the military authorities during the subsistence of Martial Law. Plaintiff, having been absent from his farm on lawful business at the time of these operations subsequently followed up the military column and was told by the officer in command thereof that he was at liberty to take back his stock, or, should he not be able to find the full number of his own stock, to take any other in charge of the military in order to make up the full

number. Thereafter the plaintiff found certain of his own stock in the possession of the defendant; these having been similarly handed over to defendant by the military. Defendant admitted to plaintiff that he had more stock than had originally belonged to him; and plaintiff now sued defendant for the return of such of plaintiff's stock as were in defendant's possession, or their value.

Held, *that by the said seizure under martial law no change of* dominium *was effected and that the plaintiff was therefore entitled to judgment as claimed.*

Hendrick Petrus du Toit, a farmer, residing in the Fraserburg district, sued the defendant for £250 damages for the wrongful detention of sheep, the property of the plaintiff.

The declaration set forth that plaintiff and defendant occupied adjoining farms in the Fraserburg district. In May, 1902, the defendant wrongfully received some 360 goats and sheep, the property of the plaintiff. In July he restored 150 sheep and 58 goats, and thereafter 75 more. In August, 1902, the defendant removed 175 sheep and 58 goats from the plaintiff's farm. The plea admitted paragraph 1, but denied the rest of the allegation.

Mr. Burton (with him Mr. Van Zyl) for plaintiff; Sir H. Juta (with him Mr. Bissett) for defendant.

In opening the case for the plaintiff, Mr. Burton said that it would appear that both the defendant and plaintiff had lost some sheep during the existence of martial law in the Fraserburg district. After Major Brock had left the district, the defendant—who had lost some stock—caught the column up, and Major Brock, it would appear, had informed him that if he could not pick out his own sheep to make the number up from any others. The sheep, when plaintiff recovered them, had evidently been freshly marked by the defendant, who claimed that he had got them justifiably, and was entitled to keep them.

Hendrick Petrus du Toit, the plaintiff, stated that the defendant lived on the adjoining farm. He remembered his flock disappearing from his farm last year—on May 21. Major Brock had visited the farm with his column, and witness went after it on May 26. He overtook the column; he did not see his sheep with the column, but he knew they were there. He was detained with the column for a week, but his wife—who had accompanied him—was sent home. He was sent to Fraserburg by the military, and kept there about a month, after which he was sent home. When he reached his farm, he found that some of the sheep were back home; the returned sheep were all his or his family's. A few days after he went to Marais's farm with his son, and asked for his sheep that defendant had got from Major Brock. Defendant said he had been allowed to pick out the sheep by Major Brock, who told him that he could take more than his number if he liked. Plaintiff and his son and one of defendant's servants then picked out their sheep, which he easily recognised by his mark. Plaintiff took 150 sheep and 58 goats, defendant refusing to part with any more, on the ground that they had been given him by Major Brock. Subsequently 75 more of his sheep arrived at his farm. All plaintiff's marks had been altered. Defendant afterwards claimed these 75 sheep, but plaintiff refused to give them up. Defendant, however, insisted on removing 233 sheep and goats. Plaintiff would not sell the sheep to-day under £1 a head; his claim for damages worked out at 16s. a head.

Cross-examined by Mr. Bisset: Of the 1,600 sheep which were taken away, he got back only 435. There was no agreement to exchange sheep. He got no sheep or goats belonging to the defendant. After witness took the 208 sheep and goats from Marais's farm, there would still be about 200 of his sheep in the latter's kraal. He gave no notice to defendant when the 75 sheep strayed into his (plaintiff's) kraal, for he told defendant before that he insisted upon getting his sheep. Plaintiff sent in a claim to the Compensation Commission for the sheep that had been removed.

By the Court: He claimed for 1,200 sheep and goats.

In reply to his lordship, Mr. Bisset said his defence was that in the first place defendant denied that he had ever anything like 360 of the sheep which had previously belonged to plaintiff. After the flocks of sheep were removed by the military they became mixed through no fault of defendant's. There was an agreement to exchange 150 sheep and a certain number of goats. Marais held that Du Toit had got back all his sheep.

The plaintiff's wife, Mrs. Marie Johanna du Toit, stated that she was at the farm when Major Brock's column removed the sheep and goats totalling 1,605. While her husband was away looking for them, 435 sheep and goats were sent back. She did not know why the stock was removed, nor was she aware why a portion was returned. The 435 sheep and goats were brought back by her husbands shepherd, who afterwards returned to the column, and they had not seen him since. There were no strange sheep among these animals.

Joachim Daniel du Toit, plaintiff's sixteen-year-old son, gave corroborative evidence.

This closed the plaintiff's case.

Mr. Bisset then called

Johannus Stephanus Marais, the defendant, who stated that in April and May last Major Brock's column was located about four or five miles from his farm. On May 22 some of defendant's sheep and goats—550 in number—got mixed up with the stock attached to the column. On the following day defendant saw Major Brock on the subject, and obtained permission to select his sheep if he could find them amongst the 4,000 or 5,000 sheep gathered together by the column. Defendant picked out his sheep as far as he could, and as a number jumped over the wall he was informed he could make the number up from the others. He got back 420 of his own, and collected other sheep to make up the total.

Hopley, J.: Did you really think you were acquiring property in sheep like that that did not belong to Brock?

Defendant: I thought they were his, so I took them.

Hopley, J.: It seems to me that you thought wrong.

Proceeding, defendant stated that early in June two of plaintiff's sons came to him about the sheep. On July 3 plaintiff saw him on the same matter, and defendant said that if the former had a right to them he would give him those from the column, but they could not be all plaintiff's, as they came from thousands of others. He gave plaintiff 50 sheep. Plaintiff claimed more than he had a right to. Plaintiff made an appointment for him to get any of his sheep that might happen to be on plaintiff's farm, but when he went for them Marais refused to give them up. In August defendant discovered that 75 of his sheep were missing, and he found them in plaintiff's kraal.

Pieter Andries du Toit, farmer, of Beaufort West, said he was on defendant's farm last April. He heard the parties agree to exchange sheep, as their flocks had been mixed up after they had been returned from Major Brock's column. Plaintiff said he had some of defendant's sheep on his farm, and the latter stated that he had some of the former's sheep on his farm.

By the Court: Marais remarked 75 of the sheep had his mark.

His Lordship: Marais is your cousin?—Yes.

Is he a thief—he stole 75 sheep according to your evidence and ought to be on the Breakwater?—No, I cannot say that.

Further examined, witness stated that Du Toit took away 150 sheep and goats from Marais's place.

Cross-examined: Du Toit claimed from Marais at first between three and four hundred. The plaintiff's family willingly assisted in picking out the 75 sheep bearing defendant's mark, which had got mixed up with Du Toit's.

Frederick Snell, a coloured shepherd, said he was in the employ of Marais in August last. He remembered losing 75 of his master's sheep; they bore defendant's mark when they strayed away, but when they came back they had another mark. He went to Du Toit's farm with the last witness to assist in selecting his master's stock from plaintiff's. He then found that some of his master's sheep had been freshly marked with Du Toit's mark.

Daniel Mills Dyason, an attorney practising at Fraserburg, said that he was consulted by defendant regarding his missing sheep in August last. He was under the impression when he wrote to plaintiff concerning the matter that defendant had a right to retain the sheep given him by Major Brock.

This closed the case for the defence.

After argument, on the facts,

Hopley, J.: This is one of those cases in which, on account of the conflict of evidence and the disturbed state in which the country has been in, it very difficult indeed to make up one's mind to any set of circumstances upon which it is possible to give a judgment about which one feels absolutely safe. The defendant Marais lives in the Fraserburg district. The country in May last was in a disturbed state, and defendant was looked upon by the military as a man they might count among the loyalists. Major Brock's column was operating in the district at the time, and the troops were apparently living on the proceeds of the country. The way in which Major Brock did this was to sweep off the flocks of anyone suspected of being a rebel. He would, apparently, have decided that point on private information and on *prima facie* evidence, such as a man being away from his farm contrary to the martial law regulations. Acting on some such principle as this, early in May last year the column, when passing by plaintiff's farm, swept off the whole of his flock, amounting to something over sixteen hundred mixed stock. They were carried right away, and plaintiff, being away from home, did not immediately follow them up. He returned to his home the following day, and found what had happened. A very few days after he followed the column, and was then detained by the military, probably on the ground that he had broken martial law regulations, or was a suspect. Anyhow he was kept there and was transferred to Frasersburg, being kept in durance for something over a month. Meanwhile, 550 of defendant's flock had by accident been swept off by the column. This was on the 22nd of May, and on the following day defendant followed his stock up to the column, and got leave from the military to take back the full number of his sheep. It is said by plaintiff that Major Brock told him that he could take even more than his own. At any rate, he could make up his number from others with the column. In the arbitrary high-handed manner the military were assuming at that time they were very likely to have said, "Take your animals." When I say "high-handed" I mean in the view of the law, the military thinking that they had become absolute owners of the stock, and were entitled to give them as compensation instead of commandeering notes. However, this is a system which the civil law cannot possibly recognise, nor can we hold for one moment that such proceedings changed the *dominium* of the stock acquired by the military in this way. Stock taken from a suspected rebel still remains his just the same as the stock taken from a loyalist still remains his. There was no legal transaction or forfeiture, or anything at all to make a change in the ownership of stock taken by the military under these circumstances. What were the plaintiff's and what were defendant's still remained theirs. One then has to ask how far animals belonging to Du Toit happened to be in the possession of defendant, and whether there was anything that entitled Du Toit to ask for the return of the stock from Marais. It is certain that a large number of Du Toit's sheep and goats did get mixed up with the 550 Marais got back from Brock. Du Toit went and asked Marais for the sheep. What happened at that interview is not in dispute. Du Toit says Marais admitted that he had 150 more animals than were his property. I do not see how the ownship of the stock was changed from that day to this. I think it was likely that defendant was frightened by the letter, which defendant took him from Dyason, in which Du Toit was threatened with legal proceedings if he did not give the stock up. The defendant then took away 233 head of stock, of which defendant must be taken to have admitted that 208 were plaintiff's. Altogether 220 of plaintiff's sheep and goats were amongst the defendant's. It seems to me as to the latter number plaintiff should have judgment, or their value, which was claimed at sixteen shillings a head. This is not an excessive claim, seeing that defendant admits that he got seventeen to eighteen shillings for some which he sold. The judgment of the Court is that defendant should restore to plaintiff the 220 sheep and goats belonging to him, or their value, at sixteen shillings apiece. Now, as to damages, it seems to me that plaintiff was entitled to some damages, but one feels himself on very difficult ground as to their amount. I think if I fix £5 for the wool which defendant has shorn from the

plaintiff's sheep and £25 for the lambs, that would be meeting the case.

Judgment was accordingly entered for plaintiff for 220 sheep or goats, or their value, with damages to the amount of £30, defendant to pay costs of suit.

[Plaintiff's Attorneys: Van der Byl and Van der Horst; Defendant's Attorneys: Tredgold, McIntyre and Bissett.]

SECOND DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice HOPLEY.]

ADMISSION.

Ex parte BERRANGE. { 1903. Feb. 26th.

Mr. Alexander moved for the admission of John Christopher Berrange as an attorney-at-law and notary public.

The application was granted, and the usual oaths administered.

PROVISIONAL ROLL.

TENNANT V. M. ISAACS.

Mr. Upington, for plaintiff, applied for provisional sentence on two mortgage bonds one for £1,500, and the other for £1,000, with interest.

Mr. Wilkinson, who appeared for defendant, stated that his client was prevented from making payments owing to the fact that certain papers were in the hands of his agent. He asked that the execution of the order be suspended for some time, so that defendant might have an opportunity of settling the questions in dispute and realising on sufficient properties to clear off his indebtedness.

The application was granted, the property specially hypothecated being declared executable, with stay of execution for a month. As two separate summonses had been issued by the same attorneys in this matter, defendant was ordered to pay the cost of one summons only.

DICKESON V. BLOMSON.

Mr. Alexander moved for provisional sentence on a cheque in favour of Messrs. Silberbauer, Wahl and Fuller for £477 5s.

Granted.

SPILHAUS V. HOCK.

Mr. J. E. R. de Villiers moved for the final adjudication of defendant's estate as insolvent.

The order was granted.

JUNKER V. ISAACS.

Mr. Alexander moved for a decree of civil imprisonment on a judgment of the Court for £208 14s. and £7 5s. 9d. taxed costs.

A decree was granted, its application to be suspended for a month.

LOWRY BROS. V. HUGHES AND MCLEOD.

Mr. Buchanan moved for the final adjudication of defendants' estate as insolvent.

Granted.

STEPHEN, FRASER AND CO. V. GOODWRIGHT.

Mr. Benjamin moved for an order confirming a writ of arrest issued on February 19, in default of defendant paying the sum of £130 14s. 6d. A provisional order for the sequestration of defendant's estate had already been granted.

The defendant, Ernest Henry Goodwright, appeared in person, and stated that he had paid his share of the debt, but his partner, who owed the other half, had decamped. Defendant had paid over £400, while his share of the debts was really only £300. He was willing to pay, even now, if given a chance, but his creditors had not given him half a chance, and had sold up his horses and stock at Middelburg.

Mr. Benjamin also moved that defendant be detained in custody pending a meeting of his creditors. Counsel read an affidavit stating that defendant was found on board the steamer Goth, and was arrested under the 8th Rule of Court. He was travelling to Southampton first-class under an assumed name. He denied his identity, and locked him-

self in his cabin, coming out only when the captain threatened to have the door forced open.

Defendant informed the Court that he was still being detained in custody. He had paid his creditors as much as he possibly could. He wanted to get home to see his friends to obtain money; he had good intentions of coming back and paying everything. If he wanted to defraud his creditors he could have sold his property, but this he had not done. His ticket for England was now in possession of the Sheriff, and the only money he now had left after paying for his maintenance while under arrest was 19s.

The Chief Justice remarked that plaintiff's application was an unusual one. The Court thought the passage ticket should be handed over to the Registrar. The order for defendant's arrest would be discharged, but any of his property in the possession of the Sheriff would be retained.

S.A. MUTUAL LIFE V. THERON.

Mr. Jones moved for judgment for £130 10s., interest on a certain mortgage bond.

Granted.

ESTATE FLETCHER V. BOON.

Mr. Percy Jones moved for judgment for £412 on a certain bond.

Granted.

ILLIQUID ROLL.

GUTHRIE AND THERON V. ESTERHUYSEN. { 1903. Feb. 26th.

Mr. Russell moved for judgment under Rule 329d, for £208, balance of amount due on the purchase of cattle.

Granted.

KUPER V. DE RENCK.

Mr. M. C. de Villiers moved under Rule 329d for an order on defendant to transfer certain ground.

Granted.

MONTAGUE, STRAKER AND CO. V. MALLETT.

Mr. Percy Jones moved under Rule 329D for judgment for £379, less £65 paid since, for goods sold and delivered.

Granted.

WATERS V. GILLANDERS.

Mr. Percy Jones moved for judgment under Rule 329d, for £100, money lent.

Granted.

GIRATIE V. GODDESS.

Mr. Burton moved for judgment under Rule 319, for £2,400, balance of purchase price of certain property.

Granted.

KRAMER V. BAGLEY.

Mr. Buchanan moved for judgment under Rule 319, for £382, purchase price of certain potatoes.

Granted.

MCKENZIE AND CO. V. BAGLEY.

Mr. Alexander moved for judgment, under Rule 329d, for £154, balance of account for goods sold and delivered.

Granted.

LAWRENCE AND CO. V. ROSENTHAL

Mr. Rainsford moved, under Rule 329d, for judgment for £113 for goods sold and delivered.

Granted.

J. W. JAGGER AND CO. V. REID.

Mr. Upington moved, under Rule 329d, for judgment for £176 18s. 10d. for goods sold and delivered.

Granted.

BYWATER AND CO. V. DU TOIT.

Mr. Buchanan moved for judgment, under Rule 329d, for £900, purchase price of property at Green Point.

Granted.

LOMBARD, VAN AARDE AND CO. V. DU TOIT.

Mr. Alexander moved for judgment, under Rule 329d, for £126 9s. 1d. for goods sold and delivered.

Granted.

REX V. JACOBS AND PARSONS. { 1903. Feb. 26th.

Obtaining goods by means of false pretences—Fraud.

The prisoner, a coloured person, not being a registered voter, informed a licensed liquor

dealer that he was a registered voter, and thus induced the dealer to sell him two bottles of brandy.

Held, *that as the dealer was not prejudiced by the false statement the prisoner could not be convicted of fraud.*

The accused had been charged with fraud before the Resident Magistrate of Willowmore on the ground that he "did wrongfully and unlawfully, falsely and fraudulently give out and pretend to Petrus F. R. Swanepoel, a barman, at the Royal Hotel, Willowmore, that he, the said Jan Jacobs, was Jan Swaartbooi, a registered voter, and did by means of the false pretences, obtain from the said Petrus F. R. Swanepoel two bottles of Cape brandy, whereas as in truth and in fact the said Jan Jacobs, at the time he so pretended as aforesaid, well knew he was not Jan Swartbooi, a registered voter, and thus the said Jan Jacobs did commit the crime of fraud.

The evidence taken in the Court below proved the facts as stated in the charge-sheet. The accused admitted that he did say his name was Jan Swaartbooi. The Resident Magistrate found him guilty as charged, and imposed a sentence of three months' imprisonment with hard labour.

On the request of His Lordship, the Chief Justice, the point was argued on behalf of the Attorney-General whether the falsehoods told by the prisoner constituted fraud in law.

Mr. H. Jones (for the Crown): In all cases such as this the Attorney-General is guided by *Queen* v. *De Vos* (13 E.D.C., 145). In that case, Barry, J.P., and Solomon, J., both held that forgery had been committed and that the element of prejudice was present. If this is law, it is immaterial whether the false representation was made to the hotel-keeper or to his barman, and the present conviction should stand.

[De Villiers, C.J.: In this case the prisoner was not convicted on account of having taken money. If a fraud was perpetrated on the agent of the hotel-keeper and his agent believed the statement made to him, surely he has not incurred any liability.]

I submit that this case is quite on all fours with *Queen* v. *De Vos*. To make a false document, such as a permit or a certificate, with intent to deceive the officers of the Government, is forgery.

De Villiers, C.J.: Both Parsons and Jacobs were charged with falsely giving out that they were registered voters, and the summons adds that they did by means of false pretences obtain from the bar-keeper in each case a certain quantity of liquor, whereas in truth and in fact the said prisoners at the time well knew that they were not registered voters, and thus the said prisoners did commit the crime of fraud. Wide as the meaning of the term "fraud" or "falsity" is in our law, it does not appear to me to be wide enough to embrace a case like the present. The prisoners were certainly guilty of telling a falsehood, but neither the object nor the effect of the falsehood was to defraud the licensed dealer. The sole object, as well as the sole effect, was to induce the dealer to sell liquor to them at the ordinary prices for which he sold his liquor to others. It is said that the dealer ran the risk of being prosecuted for illicit dealing, but that prejudice to him would be too remote to constitute the basis of a charge of fraud. It would, no doubt, be highly desirable that the law should be altered so as to meet cases of this nature, but until it is so altered the Court should be satisfied to administer the law as it finds it. The convictions must be quashed.

Hopley, J., concurred.

[Appellant's attorneys: Findlay & Tait.]

REHABILITATIONS.

Ex parte SMIT.

Mr. Upington, in moving for the rehabilitation of Stephanus Albertus Smith, said that the estate was voluntarily surrendered on February 17, 1899. The claims totalled £216, and the assets £59 11s. 2d. There was nothing in the trustee's report against the insolvent.

The Court granted the application.

Ex parte WATTS.

Mr. Buchanan moved for the rehabilitation of George Rudolf Watts, whose

estate was surrendered on September 13, 1897. The liabilities were £1,477 2s. 7d. and the assets £1,134 9s. 9d., a dividend being paid of about 16s. in the £.

The application was granted.

TENNANT V. ISAACS.

Mr. Bisset moved for provisional sentence on a mortgage bond of £550, the property specially hypothecated to be declared executable.

Mr. Wilkinson appeared for defendant.

The order was granted, execution to be stayed for a month.

TAYLOR AND CO. V. WATSON AND BUSKE.

Mr. Buchanan moved for a final order of adjudication of defendant's estate as insolvent, the provisional order having been granted on February 13.

The order was granted.

JOHNSON V. R. COCHRANE.

Mr. Bisset moved for provisional sentence, with interest, of £1,815 on a memorandum of sale.

The application was granted.

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

REX V. MEINZ AND ANOTHER. { 1903. Feb. 27th.

Gaol-breaking—Theft of prison clothes.

Buchanan, J. mentioned the above case which had come before him as the judge of the week for review. The prisoners had been convicted by the Resident Magistrate of Walfish Bay on a charge of contravening the Gaol Act, by effecting their escape, and also with theft, and a separate sentence was passed upon them on each count. The defendants left a rather unusual letter behind them, addressed to the Resident Magistrate of Walfish Bay, in which they said that, having again to complain of not having sufficient work, they saw themselves compelled to leave the gaol and strike for the country. They evidently thought they were better out of gaol than in it. They were caught eventually, and brought back again. There was a separate charge against the defendants of stealing a pair of boots, but as these formed part of their prison clothes, there was no reason for splitting the charge. The conviction on the first count and the sentence thereon would be confirmed, and the conviction on the second count and the sentence thereon would be quashed.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

ECKERSLEY V. ECKERSLEY. { 1903. Feb. 27th.

This was a petition for a judicial separation by Mrs. Eckersley, of Claremont, against her husband, Mr. Stephen Eckersley, of Rondebosch.

Mr. C. de Villiers appeared for the applicant.

It was stated in the declaration that the parties were married without community of property on June 5, 1899; there were no children of the marriage. The husband had not contributed anything to his wife's support since the date of their marriage. He was of intemperate habits, and there were constant disturbances in the house, which plaintiff said made life with him intolerable. The parties were now living apart, and de-

fendant had given his consent to a judicial separation.

The Court granted a judicial separation, with costs.

THIRD DIVISION.

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

Ex parte BUFFELS LAND AND MINING CO.

Mr. Benjamin moved for leave to transfer certain property belonging to the above company to certain persons who had been appointed liquidators.

Leave was granted.

FORD V. FORD.

This was an application by Mrs. Ada Ford calling upon defendant to show cause why he should not pay her £30 to enable her to institute proceedings for divorce, and for alimony at the rate of £10 a month.

Mr. Upington, who was for the plaintiff, stated that the parties were married in London in 1896, and there was one child of the marriage. Defendant came out to Cape Town in 1899, and had informed his wife that he would never return to England, whither plaintiff went a year ago. She returned to Cape Town a fortnight since, and finding that her husband had been unfaithful, she desired to obtain a divorce.

Mr. Wilkinson, who appeared for the defendant, said his client denied the allegations of cruelty and adultery. Counsel submitted that plaintiff had deserted her husband, and therefore the Court should refuse her application.

Defendant was ordered to pay £15 towards his wife's expenses in instituting divorce proceedings.

GENERAL MOTIONS.

Ex parte FRANCIS. { 1903. Feb. 27th.

Will — Transfer of property— Presumption as to possibility of issue—Age.

Where the heir to a certain life usufruct on whose lawful issue it was provided that the corpus *of the estate should devolve, asked for an order authorizing the executor to pass transfer to his nephew, the petitioner having no issue and his wife being 70 years of age. The Court refused the application on the ground that on the death of his wife he might remarry and have issue by his second wife.*

This was an application for leave to transfer certain property situate in the division of Albany.

The petition of Thomas George Francis, of Mafeking, shewed:

1. That he annexed to the said petition a true copy of the will of the late Thomas Francis, dated 14th March, 1867.

2. That therefrom it appears that the farm "Longwood," in the division of Albany, and a certain piece of quitrent land being a portion of the location of "Morgan's Party," within the said division of Albany, were bequeathed by the late Thomas Francis on March 14, 1861, to his son James K. Francis, to be held and enjoyed by him during the term of his natural life, and at his decease to devolve upon his eldest son living at the time of his death, and in case there should be no son living, then to his eldest daughter, and in case of there being no lawful issue living at the time of his decease, then the said farm "Longwood" is bequeathed to George Francis, another son of the deceased, during his lifetime, and thereafter upon like conditions as above mentioned.

3. That the said James K. Francis has no lawful issue of his marriage with his wife, who is of the age of 70 years, and is past the age of child-bearing.

4. That the said James K. Francis has waived all his claim, and ceded his right, title, and interest in and to the said farm Longwood, to the petitioner, and the said George Francis and his children have consented to the transfer to the petitioner of the said property, and certain piece of land, being allotment No. 7 in the location of "Morgan's Party," being the remainder of the farm "Littlewood."

5. That petitioner annexes the consent paper signed by the said James R. Williams, and that signed by the said Geo. Francis and his children.

6. That petitioner is the eldest son of the said George Francis.

7. That it will appear from the annexures hereto that all parties interested in the said farms, Longwood and Littlewood, have consented to the transfer to your petitioner of the said property.

Wherefore your petitioner prays for an order authorising the execution of the estate of the late Thomas Francis to transfer to your petitioner, the farm Longwood, mentioned in paragraph 2, and the remainder of the farm Littlewood, set forth in paragraph 4 of this petition, or for alternate relief.

The petition was accompanied by the usual verifying affidavit, and by the consent papers mentioned in the above petition.

Mr. Benjamin moved.

The Court declined to grant any order on the ground that although the wife of James K. Francis was 70 years of age, it was still possible that on her demise he might remarry and have lawful issue.

[Applicant's Attorneys: Dold and Van Breda.]

Ex parte ANDRIES TABATA.

Mr. Upington moved for leave to raise money on mortgage on a farm called Tabata, which in 1887 was the subject of an action before the Resident Magistrate of Queen's Town, when it was decided that Andries Tabata was the heir at law. The Court then expressly ordered that the farm should not be mortgaged. The sum of £2,000 was now sought to be raised on the farm; there was pressing need of the money.

The application was refused, the Court holding that notice should be given to all the parties concerned.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Sir J. BUCHANAN.]

ADMISSIONS.

Ex parte DE VILLIERS. { 1903. Feb. 28th.

Mr. Buchanan moved for the admission of Emil Henri van de Sandt de Villiers as an attorney and notary.

Granted.

Ex parte SAUL.

Mr. Benjamin moved for the admission of Carl Lodewicus Saul as an attorney and notary.

Granted.

Ex parte SHAW.

Mr. Benjamin moved for the admission of Robert Godlonson Shaw as a conveyancer.

Granted.

PROVISIONAL ROLL.

ISAACS V. MARKS.

Mr. Upington moved for provisional sentence for £21, being three months' rent.

Mr. Russell appeared for defendant.

The matter was in respect of the payment of rent of No. 7, Justice-street, Cape Town, which defendant had on a twelve months' lease from plaintiff. The rent was £7 a month, payable every three months in advance. Defendant stated on affidavit that on December 1, 1902, he

paid £21 as three months' rent to Messrs. Litton Bros. and Symons, the agents through whom he had leased the premises. Plaintiff denied that he gave Litton Bros. and Symons authority to collect the rent—only to let the premises.

The Court granted provisional judgment.

ST. LEGER V. ROYTOWSKI AND ANOTHER.

Mr. Gardiner moved for provisional sentence on a mortgage bond for £2,300, with interest at 6 per cent. from March 1 last.

Defendant, who appeared in person, stated that he had paid the money to Mr. Herhold, attorney.

Mr. Gardiner replied that Mr. Herhold was not the plaintiff's attorney.

The Court ordered the case to be adjourned for the purpose of having defendant's statement verified.

Postea (March 12) defendants stated that they would be prepared to pay plaintiff's demand within 14 days. An order was granted as prayed with stay of execution for 14 days.

PALMER V. HADLEY.

Mr. C. W. de Villiers moved for the issue of a writ of arrest against Hadley, who he understood was leaving for Johannesburg. It appeared that defendant borrowed a dog-cart from Palmer and seriously damaged it. He refused to pay the costs of the cart, and an action was now pending. As defendant was leaving for the North the present application was made.

An order was granted directing defendant to give surety for his appearance, in default of which a writ of arrest was to be issued.

WESSELS V. ISAACKS.

Mr. Van Zyl moved for provisional sentence for £100 on a mortgage bond, with 6 per cent. interest from July 1 last.

The application was granted.

RANER V. CAISSE.

Mr. De Waal moved for provisional sentence under a mortgage bond.

Mr. Benjamin, who appeared for defendant, asked that the matter be allowed to stand over for a few days.

Provisional sentence was granted, execution to be stayed for a fortnight.

SUNDRY CREDITORS V. GRAND JUNCTION RAILWAYS.

Mr. Russell asked that this case be allowed to stand over until March 12.

The Court acceded to the application.

GENERAL MOTIONS.

BARNETT V. BARNETT. { 1903. Feb. 28th.

This was an action for divorce.

Mr. Benjamin was for plaintiff, defendant in person.

The declaration set forth that defendant resided in Cape Town. The parties were married in New Zealand on December 14, 1896, and it was alleged that since 1901 the defendant had committed adultery. Plaintiff was in such a state of health that precluded her earning her own livelihood. She asked for a divorce, the return of the sum of £300 which she had advanced to defendant, and £10 a month for maintenance.

Defendant admitted adultery, but denied having received £300 from plaintiff.

Plaintiff stated that for five years after the marriage they lived at Napier, after which defendant went to Greytown, but she did not accompany him. Subsequenly she received a letter from him, in which he informed her that he had gone to South Africa. She followed him, and found him living at Woodstock with a woman named Tait.

Defendant stated that he had absolutely nothing at the present time. He lost his situation through his wife's action. The day she broke into the house she took four guineas from him.

Plaintiff denied this, and said the money was taken by the woman with whom defendant was living.

Henry Solomon having given evidence as to the adultery,

The Court granted a decree of divorce, defendant to pay plaintiff £50.

TOUISSAINT V. TOUISSAINT.

This was an action for divorce.

Mr. Gardiner appeared for the plaintiff, the husband.

Plaintiff stated that there were two children of the marriage. He had caught his wife misconducting herself on several occasions, and had forgiven her. He left her in November last, however, when he found her in bed at midday with another man.

Defendant denied having committed adultery with the man mentioned, but admitted that the baby she had in her arms was not her husband's.

A decree of divorce was granted, plaintiff to have the custody of the children.

REHABILITATIONS.

Ex parte VISSER. { 1903. Feb. 28th.

Mr. Greer applied for the rehabilitation of Johannes Petrus Visser, who was declared a bankrupt in 1890. The report of the trustees was favourable.

Granted.

Ex parte VAN DER SPUY.

Mr. Benjamin applied for the rehabilitation of Jacob Stephanus van der Spuy.

The applicant was declared insolvent on the 11th July, 1898. His assets were £625, and his liabilities, £1,606. He had satisfied all his creditors.

Granted.

Ex parte JOHNSTONE.

Mr. Gardiner moved for the rehabilitation of Richard James Annandale Johnstone, who surrendered his estate in March, 1896, his liabilities being £131 14s. 6d. and assets £58 2s. 3d.

Granted.

Ex parte EWAN.

Mr. Greer moved for the rehabilitation of Robert Ewan.

Granted.

GENERAL MOTIONS.

Ex parte SMITH.

Mr. De Waal moved that a rule *nisi* under the Derelict Lands Act be made absolute.

An order was granted as prayed.

Ex parte LABUSCHAGNE.

Mr. De Waal moved for the appointment of a *curator bonis* of the estate of petitioner's father, who was 78 years of age.

The case was ordered to stand over for proof of notice and consent.

Ex parte BREYTENBACH. { 1903. Feb. 28th.

This was an application for an order confirming the sub-division of certain property of the petitioner.

The petition of Louis Carl B. Breytenbach set forth:

1. That he is a farmer residing in the division of Oudtshoorn, at Paardedrift.

2. The petitioner's minor son, Daniel H. B. Breytenbach, is the registered proprietor of 9-50th parts or shares forming the remaining extent of the said farm Paardedrift, and petitioner is the registered owner of 3-50th shares thereof.

3. That the proprietors of the said ground called a sub-division thereof. Petitoner attended the meeting, and represented himself and his minor son.

4. A division was agreed upon, and after a survey, the shares of petitioner and of he said minor son were demarcated.

5. The said partition is a fair one, and is in the interest of both petitioner and his said minor son.

6. As there is a minor interested, the Registrar of Deeds refuses to pass transfer without an order of Court.

Wherefore petitioner prays for an order confirmng the said sub-division, and ordering the partition transfers to be passed in terms of the survey.

The Master recommended that the petition be granted.

On the motion of Mr. P. Jones, an order was granted in terms of the Master's report.

[Applicant's Attorneys: Fairbridge, Arderne, and Lawton.]

Ex parte VAN DER MESCHT.

This was a similar application. The petition of Johanna Dorothea van der Mescht, widow of the late Jan M. H. van der Mescht, and natural guardian of Petronella J. van der Mescht, one of the minor children of their marriage, set forth that on the death of her late hus-

band his property was divided amongst his children in undefined shares. That the co-owners of the property with the said Petronella J. van der Mescht, then transferred, are now desirous of partitioning the same, and that it would be to the advantage of the said minor that such partition be made. The Master's report was as follows: "I beg to recommend that Mr. Wm. Miller, J.P., of Swanepoel's Poort, in the district of Willowmore, be appointed *curator ad litem* to protect the interests of the minor in the sub-division of the properties, and that when he has lodged his certificate with me that the minor has been awarded the ground to which she is entitled, and that it is of equal value to that awarded to the other proprietors, the mother and natural guardian may be authorised by me to sign the necessary documents to complete the partition and transfer."

On the motion of Mr. H. Jones, the Court granted an order in terms of the Master's report.

[Applicants' attorneys: Findlay and Tait.]

Ex parte VERMAAK.

This was an application for an order to transfer certain property situate within the divisions of Uitenhage and of Humansdorp.

The petition of Johannes Cornelis Vermaak set forth that he and his deceased wife had executed a certain mutual will which was invalid by reason of its not being witnessed. They had, however, executed a valid codicil to the said will. By this codicil the surviving spouse and the children of the marriage were instituted joint heirs of the joint estate, the survivor to enjoy a life usufruct. The petitioner being now too old and infirm to attend to the said farms prayed for an order authorising him to transfer the said property to his four surviving sons.

Mr. Gardiner moved.

The Court refused to grant any order as the children of petitioner were not before the Court.

[Applicant's Attorneys: Dempers and Van Ryneveld.]

Ex parte NOLTE.

This was an application for leave to raise money on a certain mortgage. The petition of Wilhelmina Johanna Nolte (born Olivier) stated:—

1. That she was the surviving spouse and executrix testamentary of the late Jan H. Nolte, of Victoria West.

2. That the said late Jan H. Nolte was the owner of the farm "portion of Jacomynsaar," in the division of Victoria West, and that in 1899 he exchanged the said farm for certain erven known as "Kapoksfontein," in the town of Victoria West, then the property of one Alfred Goldmann

3. That the said Jan H. Nolte had to pay to the said A. Goldmann £200 in order to effect and complete the said exchange.

4. That petitioner's late husband was under the necessity of borrowing the said sum of £200, and that he did so, passing a promissory note therefor.

5. That the said £200 was paid over to Goldmann.

6. That therefore on January 26th petitioner and her said late husband executed a mutual will whereby they bequeathed the said erven "Kapoksfontein" to their children after the death of the survivor.

7. That on January 27th, 1900, petitioner's said late husband died, leaving no money nor any moveable property wherewith to repay the said sum of £200.

8. That the said sum is now demanded from petitioner as executrix of the estate of her late husband, and that there are no funds in the estate to meet the said debt.

9. That petitioner fears that legal proceedings may be instituted against the estate for the recovery of the said sum and that the properties may have to be sold at a loss to realise the amount.

Wherefore petitioner prays for an order authorising her to raise £250 on mortgage of the said property to pay off the debt thereon, together with interest and legal costs.

On the motion of Mr. Russell the Court granted an order as prayed.

[Applicant's Attorney: G. Trollip.]

Ex parte MIEKLEIN.

Mr. Russell applied for an order authorising the Registrar of Deeds to issue a certified copy of a certain mortgage bond, the original having been lost.

The Court granted a rule *nisi* calling upon all persons concerned to show cause on March 12, 1903, why an order should not be granted as prayed.

Postea (March 18th). The rule was made absolute.

Ex parte KOTZE.

Mr. De Waal moved for an order authorising the Master to pay out certain moneys.

A rule was granted calling on all persons concerned to show cause by April 12 why such an order should not be granted.

SUPREME COURT

FIRST DIVISION.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice), the Hon. Sir JOHN BUCHANAN and the Hon. Mr. Justice MAASDORP.]

DE WIT V. LUYT. { 1903. Mar. 2nd.

Buchanan, J., in giving judgment in this case, which was heard on February 16th, said that this was an appeal from a decision of the Resident Magistrate sitting at Riversdale. The case was one in which the plaintiff found that certain of his ostriches had strayed and were found in the defendant's possession. When found the ostriches had been plucked and branded. The Magistrate found that the defendant had acted in *mala fide*, and without going into the merits of the case dismissed it. It did not appear whether the defendant had plucked the feathers or not, so the case was sent back to the Magistrate to ascertain that fact. The Magistrate now said that from the evidence before him he did not believe that the defendant had offered to pluck the birds or offered to give up the feathers to the plaintiff. Upon that finding the appeal would be dismissed.

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

BRAUDE V. BRAUDE. { 1903. Mar. 2nd.

This was an action for account.

The declaration alleged that plaintiff was a feather buyer, carrying on business in the Sutherland district, and the defendant was a feather buyer, of Calvinia. In February, 1901, plaintiff obtained a special permit to buy ostrich feathers in the Sutherland district. In April of the same year plaintiff and defendant met on the farm Grootberg, on the confines of the Sutherland and Calvinia districts, and it was agreed that, inasmuch as plaintiff had the sole right of buying feathers in Sutherland district, they should enter into partnership, defendant to advance certain moneys for the carrying on of the purchase operations. The profits, it was decided, should be shared equally, but no further terms of partnership were agreed upon. Defendant then advanced £100, plaintiff putting in £110, and also other sums, while defendant also advanced various other sums. Plaintiff continued to buy feathers, which were sold in Cape Town and Port Elizabeth in the name of defendant, large profits being made. In July last defendant repudiated the agreement, and refused to render an account. Thereupon plaintiff gave notice to terminate the partnership, and he now desired from defendant an account. He claimed he was entitled to one-half of the profits through the sale of the feathers. The defendant alleged that he had no knowledge of plaintiff having a special permit to buy feathers. He admitted an agreement was made in April, 1901, but he maintained that the agreement was that plaintiff should purchase feathers in the Sutherland district, and that he should remunerate plaintiff for his services at a rate to be subsequently agreed upon. In June it was agreed that defendant should pay plaintiff £10 a month, £5 a month for board and lodging, and all reasonable expenses. Defendant denied any partnership, and said he had duly paid plaintiff his remuneration and expenses. In reconvention, defendant claimed the proceeds of a promissory note made by plaintiff, who, however, claimed to set that off against the account due by defendant to him. The whole point was whether there was a partnership or not.

Sir H. Juta, K.C. (with him Mr. Upington), for plaintiff; Mr. Gardiner (with him Mr. Alexander), for defendant.

Sir Henry Juta called

Maurice Braude, the plaintiff, who stated that he was the only person who received a permit from the Com-

mandant to buy feathers in the Sutherland district. In April last he met the defendant—his cousin—and they entered into a partnership, agreeing that the profits should be equally divided. Plaintiff paid £657 for the first parcel of feathers, which was sent to Cape Town in defendant's name. The second parcel cost £447; the third parcel, £412 10s.; the fourth parcel cost £492; the fifth, £407 10s. Plaintiff paid for the buyer's licence of £5 a year out of his own money. A man named Lavine wanted witness and his cousin to enter a feather ring to raise the price of feathers, but they refused.

Cross-examined by Mr. Gardiner: He was a spy for the British Government, and took out a licence to sell feathers, so that he should not be suspected by the farmers. He was buying without a licence in 1897.

[Hopley, J.: That is a criminal offence.]

He was well off when he met defendant; he had horses, a cart, and £350. The Government offered him £1 a day to act as a spy. He never told anybody he was buying for defendant, who had been in partnership with five different persons, and quarrelled with them all.

John Henry Ulyett, a speculator, said he was in the Intelligence Department in the Sutherland district, where he met the two parties concerned in the case. On one occasion Joseph Braude complained to him of the high price that plaintiff had paid for certain feathers, and said that he would not sell them on account of the partnership, but on his cousin's sole account.

Cross-examined: He was not buying feathers with plaintiff now, and had never done so.

Amos Brumawitz, formerly a trooper in the Sutherland District Troops, said he met the parties in the Sutherland district. He heard defendant use similar words regarding the partnership account as those testified to by the previous witness.

Sir H. Juta closed his case.

Mr. Gardiner called

Joseph Braude, the defendant, who denied that he ever entered into partnership with the plaintiff. They met at the farm Grooteberg, and he engaged his cousin to purchase feathers for him, and for this purpose advanced him £100 in £5 bank notes. Plaintiff asked him to have one of the notes changed, as he desired to buy groceries for his own use; witness told him to get the note changed himself, and this plaintiff did. His cousin said he had no money of his own, and witness agreed to give him £10 per month to forward to his wife in America, £5 per month for board and lodgings, and pocket-money besides. Plaintiff bought ostrich feathers for defendant, giving the farmers a note stating the amount for which they had been purchased, when the farmers took these notes to witness he paid them for the produce. Witness paid for all the feathers, plaintiff never advancing any money for them. Defendant never informed anyone that he was in partnership with plaintiff. Witness invariably forwarded the feathers to Cape Town for sale in his own name. Witness put in a promissory note which he had made out.

Hopley, J., remarked that the note was not signed. There was, he added, a heavy penalty for this offence against the stamp laws.

Sir Henry Juta believed defendant was liable to a fine not exceeding £20.

Hopley, J.: I will adjourn the matter of the fine for the present.

Cross-examined by Sir Henry Juta, defendant admitted that he had no books in which he entered his accounts; he had one book, but plaintiff stole it from his bedroom. Witness never had receipts for sums he paid out; he entered these amounts in a note-book.

Re-examined: His account book was stolen when his bedroom was broken into last July.

Hopley, J., fined defendant £3 for not stamping the promissory note, remarking that the country was poor, and had to live out of stamp duties, and so forth.

Carl Augustyn said he remembered in April, 1901, the two Braudies visiting his farm Grooteberg. On that occasion he saw Maurice give Joseph £100, and plaintiff asked defendant for £5 with which to purchase groceries.

Jacobus Johannes Cloete, a farmer, of the Sutherland district, stated that defendant wrote to him stating that plaintiff would buy feathers, and he (defendant) would pay for them. Witness sold feathers to plaintiff, and received payment for them from defendant.

Stephanus Coetzee alleged that he sold feathers to plaintiff, who said his cousin would pay for them.

Cross-examined: Witness sold the feathers on a promissory note signed by M. Braude.

Bismarck von Moltke Louw, attorney, of Sutherland, stated that he was defendant's attorney, and first heard of the alleged partnership between the parties in July last, when plaintiff asked him for £130 to pay for some feathers. Witness told plaintiff that he could not give the money without defendant's permission; plaintiff replied that he was defendant's partner.

Mr. Alexander read the evidence, taken on commission, of the Cape Town produce merchant who sold the feathers, and who stated that he disposed of them on account of defendant, and he had not been informed that a partnership existed between the two Braudes.

This closed defendant's case.

After argument on the facts,

Hopley, J., said: This is one of those cases—of which we have unfortunately a good many—of people giving absolutely contrary accounts, and one of whom must knowingly have spoken that which is not true. It would have been very much pleasanter to the Court to have had the assistance of a jury to try the case. But as one has not got such assistance, he has to face the difficulties of a position like this time after time, and do the best he can according to his lights. Here plaintiff claims a partnership, and defendant denies it. It might be said on the one hand that plaintiff might come with a trumped-up story, and has everything to gain; but on the other hand, it could be said that it was easy for defendant to deny the partnership. There is no *a priori* reason why the Court should believe one more than another. Proceeding to review the evidence in detail, His Lordship said he thought the likelihood was very much greater in favour of a partnership having been entered into than the loose, unbusiness-like arrangements which had been suggested on behalf the the defendant. His Lordship thought there was a partnership, and ordered judgment to be entered for plaintiff, defendant to pay the costs of the action, and further ordered the books to be referred to a chartered accountant (Mr. Maynard Nash), for the purpose of ascertaining what amount was due under the partnership to plaintiff. Defendant to pay costs of reference. Judgment was entered for defendant in reconvention.

[Plaintiff's Attorneys: Walker and Jacobsohn; Defendant's Attorneys: Godlonton and Low.]

SUPREME COURT

FIRST DIVISION:

[Before the Chief Justice (the Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

LITTLEJOHN v. KINGSWELL. { 1903. Mar. 3rd

Injuria—Attempt on the chastity of a woman—Damages.

In an action for damages against the defendant for having entered the bedroom of a young unmarried woman, with criminal intent; it was found as a fact that the defendant had entered the room without knowledge of the circumstance that it was occupied by the plaintiff.

Held, *that the defendant was not liable.*

This was an action for damages for trespass.

Plaintiff alleged that defendant broke into the bedroom she was occupying at the Mount Nelson Hotel on February 14, 1902, and stayed for some time just inside the room, and thereupon plaintiff claimed £500 damages. The defendant's allegation was that he did not break into the room, but that he found the doors between his room and plaintiff's partially open.

Mr. Rowson for plaintiff; Mr. Searle, K.C. (with him Mr. Close) for defendant.

Miss Agnes Littlejohn, the plaintiff, stated that about the middle of February, 1902, she was staying at the Mount Nelson Hotel. She occupied room No. 88, or 89, on the third floor. The morning before she left her baggage was removed to the adjoining room, because it was a smaller one. The rooms were connected by two doors—one on either side of the wall. On the night of February 14 she retired about 10.30, and she saw then that the doors connecting the two rooms were fastened, she could swear that the door in her room was locked. After she retired she heard a slight knocking; she thought it was at the door leading to the corridor. She asked, "Who is there; what do you want?" She received no reply, although she called out two or three times. There was a couch against the door leading into the adjoining room, which door could not have been opened without the couch being removed. As she received no answer she concluded the knocking must have been at the door of the next room opening into the corridor. In a minute or two she heard some more knocking, or a slight rattling; she thought it was someone moving about. After a few minutes she heard a voice crying, "Miss Littlejohn, Miss Littlejohn." She was fully awake at the time. She thought the voice came from the corridor, but on looking around she saw defendant in the room; he told her who he was. He said, "You know who I am—I am the editor of 'The Owl.' Don't be a fool, don't make a noise." He repeated that several times. He must have been standing there several minutes. I came forward and touched the electric bell, which, however, was broken. When he saw this he went off, and I ran along the corridor to the servants' room and asked the maids to help me; I was very angry. While I was speaking to Maggie Young, one of the maids, the defendant passed along the corridor and said, "You fool, why did you make such a noise?" I replied: "You scoundrel, you dragged me through the muck of your dirty little paper a year ago, but I'll make you smart for it." I rang the bell in the lavatory, and the night foreman and the waiter arrived on the scene. They went back with me to my room, and they saw that the furniture was not in the condition in which it was when I went to bed. I had only spoken to defendant once before; he had put several things in his paper about incidents that had happened at Devonshire Hill, and he sent me the "Owl" cake. In May there was another paragraph in defendant's paper about me, and I felt very much annoyed about the matter. Subsequently I received a letter from defendant, in which he apologised to me for having opened the door.

Cross-examined: I issued two summonses, the first on April 26th, in which I claimed £500 damages by reason of the defendant forcibly entering with criminal intent my room. I did not prosecute that action. In the following September I issued the other summons.

Mr. Searle: Do you suggest any criminal intent in this matter at all?

Plaintiff: What do you suppose a man breaks into a woman's bedroom for at midnight? It is criminal to break into a place where you are not supposed to go.

Cross-examination continued: I met defendant in May of the previous year. Naturally I was annoyed at being presented with the "Owl" cake. On May 10 last there was a reference in the "Owl" to which I took exception, and in consequence I went to see defendant, but I was neither angry nor excited on that occasion.

Mr. Searle: Did you take a sjambok with you?—Plaintiff: That is an absolute lie.

Neither a stick nor a sjambok?—Neither.

Replying to further questions, plaintiff said she had a silver-mounted walking-stick; she could not swear that she never went to defendant's office with it. Proceedings were taken against her by her brother in August for ejectment from his house Devonshire Hill, but she did not see defendant in regard to a report of that case. The key was in the door of her bedroom at the Mount Nelson on the night in question; both the doors were locked, and the keys were on the inside. She did not examine the lock, but she saw the key the next morning. She did not see a soldier named Gray standing near the lavatory when she rang the bell.

Plaintiff observed that if she had kith or kin to stand by her, she would not have brought that case; she would then have passed it over like any other insult. She had brought the case to clear her character.

Re-examined: She had never owned a sjambok in her life.

William Edward Moore, who at one time acted for the plaintiff in the case, deposed to receiving a letter from defendant apologising for having entered her room.

Castille Ogier, manager of the Mount Nelson Hotel, stated that on the morning after the occurrence he examined the door and lock of Miss Littlejohn's room, neither of which were broken.

[De Villiers, C.J.: How do you account for the defendant going into the room?]—If the door was locked, no one could get in without the key. No.

[Then defendant must be mistaken when she says that the door was locked?]—Yes.

There was no sign of breakage?—No.

He could not have gone in with a false key, because the key was in the door?—Miss Littlejohn said the key was in the door.

Further examined, witness said the doors were usually kept locked; they were good locks. The bedroom door the next morning was absolutely intact. The key Miss Littlejohn showed him was a little twisted, but the lock was absolutely intact. They had dozens of keys, however, which were twisted in a similar fashion to the one produced. Defendant did not sleep in the hotel that night; witness presumed that he did not care to stay after the occurrence.

Cross-examined: The two rooms were usually let together. Defendant had previously stayed at the hotel.

Maggie Young, chambermaid at the Mount Nelson Hotel, deposed that on the night in question the plaintiff came to her room in a very excited state. Witness told her to ring for the night porter; she did not go into plaintiff's room, which was not under her charge.

Thomas George Wilson, night fireman at the Mount Nelson Hotel, stated that on the night referred to he was summoned by the ringing of bells. When he went to the corridor on the third floor, plaintiff, who was in her room, came to the door and made a statement to him. He replied that the night porter would be there in a minute. He thought the door connecting the two rooms was open about 6 inches, but he did not notice the position of the sofa.

Louis Ogier, waiter at the Mount Nelson Hotel, deposed that he heard the bell ring on the night of February 14, 1902, and saw the plaintiff, who made a communication to him. He did not go into her bedroom.

This closed the plaintiff's case.

Mr. Searle then called

George Herbert Kingswell, the defendant, who stated that he was proprietor and editor of the "Owl," editor of the weekly edition of the "Cape Times," and the Cape representative of the London "Daily Express." Prior to February 14, 1902, he had visited the Mount Nelson Hotel from time to time, and sometimes stayed the night there. He generally stayed on the second floor. There was a number of rooms leading into sitting rooms. On the night in question he was dining with a gentleman at the Mount Nelson, and after dinner, he engaged a room for the night, and was given a room on the third floor. He went up to his apartment about 11.30, and switched on the electric light. He looked at the doors; the one on his side of the wall was open, and the other was open about half an inch. He saw there was a light in the other room, and he opened the door very slightly; he thought the connecting room was a sitting-room. He opened the door partially, and just looked in. He saw a woman sitting on the bed; before that he had not the slightest idea that she or anyone else had the room. He had not seen the plaintiff in the hotel before that. Plaintiff looked up and said: "Who are you? What do you want?" She was in her dressing-gown. Witness replied, "I beg your pardon, I thought this was a sitting-room." Plaintiff jumped up and said: "Who are you?" Witness replied: "My name is Kingswell." She responded: "I know you; what do you want here?" He explained that he had made a mistake, and she came up to the door, and again said, "What do

you want?" He did not want to slam the door in her face, so he asked her why she had not locked the door. She observed that she would make him pay for it. He then closed his own door and put on his coat and went into the corridor, where he saw the plaintiff, who said, "I am rousing the house on it." He replied that that was very absurd, as he opened her door thinking it was a sitting-room. She answered: "You did me a shot in the eye once; I will make you pay for it." This conversation took place outside the lavatory door, and a man named Grey was standing near. Witness had kept Grey here from April to the end of August to give evidence, but Grey then left and went to Western Australia, whither witness had sent a commission to get his evidence, but it had not been able to find him. Witness left the hotel that night. He had met plaintiff four times previously in connection with the awarding of the "Owl" cake to her. She first saw him in February, 1901, when she came to his office and asked him what he meant by sending her the cake. She lost her temper, and in the end he ordered her out of the office, as she became abusive. The next time she called was about May 11; she had a stick in her hand, and said, "I have a good mind to put this across your shoulders, you damned hound." She was very excited, and he again ordered her out of his office. In the following August, she again came to his office, and asked him to insert in the weekly "Times" a long statement about the ejectment case, and as he refused, she became abusive. At the Mount Nelson he only put his head and shoulder into her room; he was not half a minute in the room. It was absolutely false that he broke the door open and pushed away the furniture.

He had no criminal or wrong intent against plaintiff or anyone else.

Cross-examined: He left the hotel immediately after the occurrence and proceeded to the City Club, as naturally he did not desire to occupy a room near the plaintiff's.

Charles Richard Goodspeed, works manager of the "Cape Times," said that he saw plaintiff at the office of that paper in St. George's-street, several times. On one occasion, she was in a very excited condition, and she asked for Mr. Kingswell; she had a stick or a sjambok in her hand. When she came downstairs, she informed a lady who was waiting for her that defendant was out, and she made use of a very strong expression regarding him.

The evidence of Lieutenant Cladden, formerly of an Australian troop of irregulars, taken on commission, was that he was staying at the Mount Nelson Hotel on the night in question, and that while he was in one of the lavatories he overheard voices. He heard a female speaking with a decided Scotch accent, and saying that she would rouse the whole hotel. He heard a man—whom he afterwards recognised as the defendant—say, "What do you want to do that for; I looked into your room by mistake." The female replied, "You know you did me a shot in the eye once; now I will do you one."

Mr. Rowson, addressing the Court for the plaintiff, said that this was an action for trespass, inasmuch as the defendant was alleged to have entered the plaintiff's room at the Mount Nelson Hotel on or about February 14, 1902. That entry was effected, and was placed beyond doubt by the defendant's own admissions. He wrote a letter saying, "I sincerely apologise for the serious blunder I made last night in entering your bedroom at the Mount Nelson." He did not say "opening the door," but "entering." He also wrote a letter to Messrs. W. E. Moore and Son, in which he said, "I apologise to Miss Littlejohn for having opened the door of her bedroom at the Mount Nelson Hotel." If a man admitted having opened a door, if he admitted having entered a room, how was it possible to go behind the very best evidence that they could have, viz., the defendant's own written admission. If their Lordships agreed with him in that view, then the question, he thought, was, what was the amount of damages. This was not a mere action for trespass. It was an *actio injuriæ*. There was no more serious affront that a man could put upon a woman short of assault upon her person than to enter her bedroom. There was a great conflict in the evidence. The defendant said that the door entering his room was left wide open, and that the door on the other side was partly open. What motives would possibly in-

duce a woman to leave her bedroom door partly open at an hotel? He submitted only two—either that it was open for the purpose of solicitation, or it must be for the purpose of entrapping the man into a damaging position, and afterwards bringing blackmail against him. Did the subsequent events as admitted by the defendant himself bear out these suppositions? He submitted not. He contended that the subsequent conduct of the defendant in leaving the hotel was not the conduct of a man with a clear and clean conscience. A man did not wander about hotels at night and enter rooms occupied by ladies for any good purpose. The defendant had displayed a certain amount of *animus* against the plaintiff by various little paragraphs which had appeared in his paper. Counsel contended that his client was entitled to substantial and exemplary damages in consequence of this *injuria*, and that the claim was an exceedingly modest one.

Mr. Searle was not called upon.

De Villiers, C.J.: It is not necessary for Mr. Searle to address the Court on behalf of the defendant. I quite agree with the learned counsel for the plaintiff that if the defendant had intentionally and wilfully entered the bedroom of the plaintiff at night while she was in bed with the object of making an attempt on her chastity it would be an injury, for which he would be liable in very heavy damages. The mere fact, however, that he entered her bedroom is not sufficient, for if it were done by mistake, without any improper intention, he could not be held liable. In the present case counsel for the plaintiff relies mainly upon the letters written by the defendant, and he contends that these letters contain a clear admission of guilt on his part. I do not so read them. There is an admission on his part of having entered the room, but in the first letter which he wrote he spoke of it as a "blunder," and in the second he spoke of it as a "mistake," clearly showing that there was no admission that it was a wilful or intentional act on his part, but implying that it was a mistake which he made on the night in question. If it were a mistake, if without any intention of entering a room which was occupied by another person, he opened the door or looked in, that would not be trespass; there must be something wilful in the conduct of the person for the purpose, at all events, of holding him liable, and a mere mistake in entering a room would not render him liable. The plaintiff in her evidence states that there are double doors opening between the room occupied by the defendant and the room occupied by herself, and she states that the door at the side of her own room had been locked by her, and was locked at the time this occurred, and she states, moreover, that there was a couch against the door, and near this was some luggage which would help to prevent the door from being opened. She is positive that this door was locked. The manager states that he was roused by this occurrence, and that on going to this door, he found a key in the plaintiff's hand, that the door was slightly open, but it was intact. Now it would have been wholly impossible for the defendant to have entered this room without either a false key or breaking it open, if it were locked; but he could not have used a false key, because, according to the plaintiff's statement, the key was in the door, and therefore the only alternative, and really the alternative which was relied upon, was that the defendant broke open the door. That is wholly inconsistent with what the manager says about the state of the door, and the only conclusion that I can come to is that the plaintiff was wholly mistaken in stating that the door had been locked by her. That statement is wholly inconsistent with the other admitted facts of the case, and she was mistaken in such an important point, it is quite possible that she may also be mistaken in other incidents One cannot help sympathising with a lady in such circumstances; it is an awkward and unpleasant circumstance for her that any gentleman should enter or even put his head into her bedroom, and I can quite understand that there would be considerable excitement, and her imagination would probably magnify the circumstances to a considerable extent, and undoubtedly the plaintiff in this present case appears to have altogether magnified all the circumstances connected with the occurrence. It seems to me quite consistent with all the facts of the case that the conduct of the defendant is perfectly innocent. He made a mistake, and it seems to me not such a very extraordi-

nary mistake either. He occupied a room ,and near that room there was a door leading to another room. If he is right in saying that that door was slightly open, and there was a light on the other side, it does not seem to me an extraordinary thing that he should open that door for the purpose of seeing what there was on the other side, and it is quite posible he may have supposed there was a sitting-room on the other side. It would have been a perfectly innocent act, and a mistake for which he would not have been criminally or civilly liable. The only circumstance of the case which does lend itself to suspicion is the fact that the defendant left the hotel the same night, and counsel for the plaintiff has properly commented on it, but even that circumstance appears to me quite capable of explanation. The defendant had had previous unpleasantness with the plaintiff, and here I may remark that if the suggestion is that his object was to make improper overtures to the plaintiff, it does seem to me unlikely that he should select the object of his overtures a lady with whom he had hitherto had such unpleasant relations. It seems on the face of it somewhat unusual. However, let that pass. The point the plaintiff relied upon is that the defendant left the hotel that night. Well, if he suspected that the incident might be used against him, and if he saw this lady was in a somewhat excited state, one can quite imagine that it would not be pleasant for him to remain in such immediate neighbourhood to the plaintiff. If he were to occupy the next room to the plaintiff, he might fear that there would further trouble during the night, and might honestly believe that it would be far better for him to leave the hotel than to expose himself to the possibility of a fresh occurrence. I think myself that it would have been wiser for the defendant to have remained in his room that night, but I do not consider that his action necessarily argues a guilty conscience on his part. For these reasons, I am of opinion that, much as one sympathises with the plaintiff for the fright which she had and for the excitement to which she was subjected, she is not entitled to succeed. As I am of opinion that there was no improper conduct on his part, I think that the judgment of the Court should be for the defendant, with costs.

Judgment was entered accordingly.

[Plaintiff's Attorney, W. G. Coulton; Defendant's Attorneys, Tredgold, McIntyre and Bisset.]

SIEBERT V. KESSLER AND OTHERS. { 1903. March 3rd.

This was a claim for work done.

Mr. Wilkinson said that he appeared for the defendant, but the plaintiff was not present or represented.

[De Villiers, C.J.: What is the plea?]

The action was for £32, price of work and labour, and a quantity of material. The defendants admitted that the work and labour was done for them, and admitted the amount claimed, but they said they claimed two sums on account of this, one of £15 15s., and the other of £9. The plaintiff denied this. The defendants had tendered the balance.

[De Villiers, C.J.: You tender costs to date of tender?]

Before the action was brought, the amount was tendered to the plaintiff.

[De Villiers, C.J.: There was no order made in the other Court when this case was mentioned?]

No.

[De Villiers, C.J.: You may take judgmetn for the plaintiff in terms of the tender, with costs up to date of tender, the plaintiff to pay the costs subsequently.]

With regard to the date of tender, the tender was made before the action was brought.

[De Villiers, C.J.: Then there will be no costs; what is the date of tender?]

I have not the date of tender. These people are very illiterate, and they neither read nor write English.

[De Villiers, C.J.: Very well, then, you may take judgment in that form.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

BLAKE V. WARREN. { 1903. Mar. 3rd.

This was an action for payment for work done in connection with certain six platelayers' cottages on the Moorreesburg line. The plaintiff had a sub-contract from the contractor, Mr. Warren, to build these cottages, and after he had built six of them, the Government engineer, who had re-

peatedly found fault with the work, and complained of its quality, and so on, summarily dismissed him. He condemned the last two cottages. The contractor, Mr. Warren, proceeded to have these cottages repaired and put in order at his own expense. When the case was started, it was quite impossible for him to say whether the work would be done within the amount of the sub-contract or not, and that was why he simply denied liability. Within the last few weeks the work had been completed, and that morning only, Mr. Warren had received from the Government a note to say that the cottages had been passed. That meant that the work had now been done to the satisfaction of the Government engineers. The defendant was now in a position to allow the plaintiff on the original contract price the money tendered.

Mr. Burton for plaintiff; Sir H. Juta, K.C., for defendant.

Sir H. Juta said that in justice to the contractors in regard to the two cottages which the Government engineer condemned, he should add that those two cottages were immediately taken and occupied by the Government for the purpose for which they were built.

Judgment was given by consent for £450 and costs, the plaintiff being allowed his witnesses's expenses.

SUPREME COURT

FIRST DIVISION.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

VENTER V. VENTER. { 1903. March 4th.

This was an action by Hermanus Venter for the dissolution of his marriage on the ground of his wife's adultery.

The declaration stated that the the petitioner was 82 years of age, and resided at Klipfontein, in the district of Philip's Town. He had been thrice married. He married the respondent in the division of Colesberg in 1883 in community of property, and there were six children of the present marriage. On divers dates between 1897 and 1901 at Philip's Town, it was alleged the respondent committed adultery with a hawker named Clotton, to whom she had given birth to two children.

Mr. Burton appeared for the plaintiff, the defendant was in default.

Mr. Burton said that the plea admitted the whole of the declaration from beginning to end, and the petitioner sought a decree of divorce, with custody of the six children and forfeiture by the respondent of the benefits of marriage on account of such adultery. The plaintiff in his declaration said that he was desirous of providing for the defendant, and he undertook to pay all the costs of the action, both hers and his own, and in addition, to give her £100 sterling, and to allow her to retain the place or farm called Kraaifontein, together with 250 Merino sheep, certain cattle, furniture, and so forth.

The Court granted a decree of divorce, with custody of the children of the marriage to the plaintiff, and forfeiture by the defendant of the benefits accruing from the marriage, further conditions being incorporated in the judgment in terms of the plaintiff's proposal to provide for the defendant

WHITE V. BARNARD.

This was an action brought by Daniel White, farmer, late of Klipkloof, in the district of Williston, against Frank Barnard, also a farmer, to recover the possession of 300 sheep, or their value, £300, and £100 damages for unlawful detention and use of the sheep.

The declaration stated that last year the plaintiff joined the forces of the enemy. In January, 1902, the defendant had been compelled to leave his farm. In June plaintiff had his sheep, 300 in number, removed to the defendant's farm, and the defendant returned to his farm later on and took possession of the sheep, and now refused to give them up. Plaintiff tendered three guineas for the grazing. The defendant said that he was entitled to £50 in respect to the hiring, grazing, and dipping of the sheep, and that he was willing and tendered to give up such of the sheep as were still alive,

and an account of the shearing on payment of £50. Defendant had also filed a counter-claim for £100 damages for trespass, and £50 for grazing. On the claim in reconvention, White admitted that he joined the Republican forces, but he denied that he had any part or lot in the damage which was done to defendant's property.

The Chief Justice: Has he been punished for going into rebellion?

Mr. Burton (with him Mr. Van Zyl), appeared for the plaintiff, and Mr. Gardiner for the defendant.

Mr. Burton: Oh yes, he surrendered under the Proclamation, and he has suffered the punishment. He has been disfranchised for life. There was good veld on the defendant's farm at a time when the veld in the neighbourhood was bad. Damage was done to the defendant's farm. His house appeared to have been entered, and destruction was wrought to his house and his furniture. The plaintiff said that the damage to the property was not done by himself or the commando that he was associated with. The damage was done, practically all of it, by a commando under Commandant Van Reenan.

The Chief Justice: If there is a considerable number of people engaged in an unlawful act of trespass every one is liable.

Mr. Burton: Broadly stated, as a proposition of law that is so, but the question is whether that proposition applies to such circumstances as these. These were acts of war; the plaintiff had joined the Republican forces, and they were acting within their rights as belligerents.

[De Villiers, C.J.: But he was a citizen of this colony, the rights of war would apply to the enemy, but not to the citizens of this country. I understood that the plaintiff was connected with a rebel commando.]

I did not say he joined a purely rebel commando, but that he joined the Republican forces. He was detained three months in gaol after his surrender, and since his release he has applied to the defendant for his sheep.

Maasdorp, J.: Would you justify his sending his sheep on to defendant's farm because he was told to do so by the commandant?

Mr. Burton: I would not go so far as to say that: so far as the plaintiff was concerned, it was not a trespass.

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The plaintiff, being called, said that when he was residing at Klipkloof in the district of Williston, in February of last year, he joined a force under Londt, composed of about forty men. Londt, who was a rebel, was field cornet. He left about 330 sheep behind. In company with the men of this commando he went on the defendant's farm, Kleinvlei, about the end of March. Londt's was not the first commando to go there; Van Reenan's commando, of a little over 100, was already there. They remained there for some time. Witness was never connected with Van Reenan's force. They stayed there off and on until June, but they moved about from time to time. In June the whole of Londt's force joined Pienaar's commando, but still remained on the defendant's property. Pienaar was a Free Stater. While he was in Pienaar's commando they did no damage, except that Commandants Pienaar and Londt had some sheep, probably 70, slaughtered, the property of the defendant. Witness took no part in any damage that was done. When they got there damage had been committed. Van Reenan's men had measles, and the house was being used as a hospital. He did not see any damage done. They heard about the declaration of peace about June 13 or 14, and they surrendered at Kenhardt on the 24th. He took his sheep to the defendant's farm on the 11th June on the suggestion of the field cornet, Londt, to whom the orders were given by Pienaar. His sheep had previously been on the farm of a man named Simpson. He hired a "boy" to look after the sheep, and arranged to pay him on his return. They were detained in the camp from the 24th June to the 2nd September after surrendering. On his release he went to the defendant's farm to claim his sheep at Van Wyk's Vlei on the 11th September. Plaintiff told defendant he had heard that he (the defendant) had taken his sheep, and he offered him £3 3s. for the grazing, at the rate of 7s. per month per 100 sheep, which was more than the recognised rate, the Government rate being 2s. 6d. per month per 100 sheep. The defendant said he would not give up the sheep, and that there was the Magistrate's Court and there was the Supreme Court. The defendant added, "You have slaughtered my sheep, and I will take yours instead." Witness had left 300 sheep on the defendant's farm, and the flock were valued at

£300. In the correspondence, defendant's attorney said he had commandeered his shepherd, but witness denied that. The plaintiff's sheep were being looked after by some other coloured people, and not the "boy" witness hired.

Cross-examined by Mr. Gardiner: The veld was bad at Klipkloof, but he did not think that if they had left the sheep they would have died. He did not know that certain of his sheep had died while in Mr. Barnard's possession. He denied that they had orders to destroy everything, "as Barnard was a khaki," or that he cut the silk in front of the piano and broke the strings. He was not a corporal when he was in the commando; he did not send out scouts, but he was sent out. Pienaar's commando was mostly composed of Free Staters and Transvaalers. Defendant did not say he would give up the sheep if witness would pay him reasonable damage for the trespass.

In reply to Maasdorp, J., witness said he did not know that anyone had taken sheep to the defendant's farm besides himself.

In reply to De Villiers, C.J., witness said he had not a farm now, and he was without parents. If he got the sheep he would hire them out at Van Wyk's Vlei.

A farmer named Wilhelm Voss, of the Carnarvon district, said that he also joined Londt's commando. He saw Van Reenan's men bring out the piano and play upon it, but he did not see any damage done. Londt's and Van Reenan's commandos were followed by Pienaar's commando of about forty men. Van Reenan was a rebel, and Pienaar was a Free Stater. A short time before Pienaar came, Frazer was there with a commando from the Transvaal. He saw plaintiff's sheep there; he could not speak as to the shepherd.

The defendant said he lived in the district of Carnarvon. He left his farm in January, 1902, and he was afterwards joined by his wife, who gave him a report as to what had happened at the farm, and he, therefore, did not return. He left a flock of over 1,200 goats and sheep on the farm, as well as six trek oxen and his furniture and clothing. He returned on June 24. He found that about 400 had gone, and there were only 150 lambs, whereas there should have been 400 to 500. He found 371 sheep running in a flock, some of which, probably about 100, belonged to his man, Juister. He did not know how many of the sheep belonged to Whyte. He agreed to hand over the sheep identified by White on payment of damage. At the interview in September with White, the latter asked him about his sheep, and he told the plaintiff that he would give him his sheep if he paid the damage that had been done. Plaintiff's sheep were not in good condition. Witness had not returned to his farm because his house was destroyed. The sheep were mixed with his own, and were looked after by his man. The sheep were dying off through poverty. Seven of the plaintiff's sheep died when he dipped them. A number of the sheep when he found them were worth very little, and now he estimated their value at 15s. each. Everything was destroyed at his farm, including a piano and a pump, the latter of which had cost £38. The doors were broken, and the windows and sashes destroyed. At least £50 damage was done to his house. All the oxen had gone, valued at £90, and 400 sheep had all gone, which he valued at 20s. a head.

[By De Villiers, C.J.: He had claimed £1,150 from the Compensation Commission, but he had not yet received anything.]

The claim you now put in includes all these damages which you now speak of?

Witness: Yes, with the exception of a few items that the Commission would not entertain, indirect losses amounting to about £50.

Cross-examined by Mr. Burton: The plaintiff's sheep suffered from scab. He mixed his own sheep with them because he had only one herd. He claimed £500 for damage to his furniture. He left his farm by donkey cart. All he got out of the furniture were a table and bedstead valued at £12; chairs had been removed. The piano was in the stable, with the strings broken, and the case broken at the back.

Defendant's herd said that the commando with which White was connected was the first to visit the farm. Witness looked after sheep. White's flock were lean and scabby. He saw the Boers smash up things under White's orders.

Cross-examined: White gave the orders about scouting. The furniture was broken by the commando when they left the house. The pots were carried away.

Plaintiff asked him to look after his sheep, but he did not make any promise of pay.

Piet Boardman, a servant of the defendant, coroborated the evidence of the last witness as to the visit of the commandoes and the damage of property. Cross-examined by Mr. Burton: Some of the sheep were slaughtered under the orders of White. White was the only man who gave orders in the commando. Re-examined: White and Van Reenan were not on the farm together.

Hertz Stephanus Maritz, who had been overseer of the defendant's farm since the declaration of peace, said that certain sheep had been pointed out by the defendant and the "boys" as not belonging to Mr. Barnard. These sheep were in a poor and diseased state, and about 100 had died. He saw plaintiff near Van Wyk's Vlei about April last year, with six other men. White told him he was corporal. Cross-examined by Mr. Burton: He could not say how many of White's sheep died between July and September. Some of Mr. Barnard's sheep had died as well as plaintiff's.

The witness Voss, re-called, said, in answer to the Chief Justice, that the plaintiff was a private while they were on commando, but he afterwards became a corporal when they were laying down arms. He was not in the same company as White when they were in the field.

After counsel had been heard in argument on the facts.

The Bench conferred for some time in private, and then asked whether it would be possible to get evidence as to whether Van Reenen's or Londt's commando went to the farm first.

Mr. Gardiner said it had been suggested to him that perhaps the commandant, who was at Carnarvon at that time, and who was now in Cape Town, might be able to help the Court.

Mr. Burton said he could also call a brother of the witness Voss, but he supposed that his evidence would not be regarded as any more independent than that of the man who had been called. The best witness, of course, would be Van Reenan, but he had gone over the border into German South-West African territory.

After further consultation, De Villiers, C.J., said that the case would stand over for the present, and the parties might perhaps be able to produce evidence of an independent character as to whether Van Reenan's or Londt's force went to the defendant's farm first. The Court would take time to consider the decision, and if the parties could bring such evidence as had been described then the case might be mentioned in the meantime.

Postea, March 10th.

Mr. Gardiner applied for stay of execution of the above judgment; but as no notice of this application had been given it was refused.

De Villiers, C.J.: In this case the Court took time to consider its judgment so as to enable either party to produce further evidence as to what took place on the defendant's farm after the plaintiff had come upon it, and more particularly the Court required further evidence as to whether Van Reenen's commando came there first or the commando of which the plaintiff had been part. No such evidence has been tendered, and now upon the claim in reconvention the Court is left in a state of extreme doubt as to whether the plaintiff did occasion any part of the damage which was done to this property. The plaintiff and his witness swear positively that no damage was done by them, but two coloured witness called on behalf of the defendant ascribed the greater part of the damage to the plaintiff. There was a conflict of the evidence in this way as to whether Van Reenen's commando had been there before, and upon this point, as I said before, there is really no evidence forthcoming. It lies upon the defendant, who makes this claim in reconvention, to prove his case, and as he has not clearly proved it the only course open to the Court on the claim in reconvention is to give absolution from the instance thereon, leaving it then to the defendant to proceed afresh, and bring his action afresh if he can bring direct evidence on the point. As to the claim in convention, that is a claim for 300 sheep or their value, which had been retained by the defendant. Now, the fact that these sheep were brought upon the place is admitted, and the detention is also admitted. The only question is, what was the number of sheep that were on the farm after the defendant returned there? There were 300 left there, but out of those 300, according to witnesses for the defendant, about 100 died, some dying after the

defendant had taken occupation. In the opinion of the Court value of all the sheep that have died ought to be deducted, and as 100 are said to have died there will be the value of 200 sheep to be allowed for. The plaintiff assessed the value of these sheep at £1 each, but in view of the condition in which they were the Court is not satisfied that that is a fair value. We think 15s. a head would more fairly and more nearly represent the value of the sheep. That would make £150, the value of the 200 sheep. But, on the other hand, the plaintiff admits that some amount is due to the defendant for the grazing of the sheep, and he tenders £3 3s. In the opinion of the Court the tender is wholly insufficient, and defendant claims £50. That seems a somewhat high claim, but, seeing that the sheep came upon the defendant's farm by virtue of a trespass on the plaintiff's part, the Court will assess the grazing money at the highest possible rate, and that rate, according to the defendant's assessment, is £50, which will, therefore, be deducted from the £150, and judgment will be given for the plaintiff for £100 with costs. As to the claim in reconvention, there will be absolution from the instance.

[Plaintiff's Attorneys: Van der Byl and Van der Horst; Defendant's Attorneys: Van Zyl and Buissinné.]

SECOND DIVISION.

[Before the Hon. Sir JOHN BUCHANAN.]

DE WIT v. ESTATE DE WIT. { 1903. Mar. 4th.

Will—Witnesses—Evidence.

Where it was sought to set aside a will which ex facie *appeared to have been regularly executed, but which the plaintiff alleged had not been signed by the witnesses in the presence of the testator: the Court held that as the onus of proving his contention was upon the plaintiff and that the evidence of his two witnesses (the witnesses to the will) was unsatisfactory, judgment must be given for the defendants.*

This was an action to set aside a certain will. The plaintiffs were Jurie J. H. de Wit, Jan D. de Wit, jun., Cornelis J. G. Nortier, married to Martha M. M. de Wit, and Pieter M. du Toit, married to Sarah S. de Wit. The defendants were Susanna H. de Wit (born Uys) and Jacobus F. van Wyk, executors testamentary of the late Jan D. de Wit, sen.

The plaintiffs' declaration was as follows:—

1. The first plaintiff is a son, the second plaintiff is a grandson, and the third and fourth plaintiffs are the husbands of two grand-daughters of the late Jan D. de Wet, sen., in his lifetime residing in the district of Riversdale, where he died on or about May 29th, 1902.

2. The defendant (Susanna H. de Wit) is the widow of the late Jan D. de Wit, sen., and she and the second defendant, Jacobus F. van Wyk, hold letters of administration as executors testamentary of his estate from the Master of this Court.

3. The said letters of administration were granted on the faith of a certain document filed in the Master's office on May 28, 1902, purporting to be the last will and testament of the late Jan D. de Wit, sen, wherein the defendants are named as executors thereof.

4. The said document purports to be signed by the late Jan D. de Wit, sen., and the first defendant in the presence of two witnesses, L. J. E. Mostert and W. J. Pentz, but in truth and in fact the said late Jan D. de Wit, sen., did not in the presence of them or either of them either sign or acknowledge his signature to the said document as by law required; nor did they, or either of them, sign in his presence.

5. By reason of the premises the said document is null and void as the last will and testament of the said late Jan D. de Wit, sen.

Wherefore the plaintiffs pray for: (a) An order declaring the said document to be null and void as the last will and testament of the late Jan D. de Wit, sen., and setting aside the appointment of the defendants as executors testamentary thereunder.

(*b*) An order authorising the appointment of an executor, or executors dative to liquidate and administer the estate.

(*c*) Other relief.

(*d*) Costs of suit.

To this declaration the defendants pleaded as follows:

1. Paragraphs 1 and 2 are admitted.

2. The defendants deny paragraph 3, and say that letters of administration were granted on May 30, 1902, in virtue of a will dated August 9, 1899, filed in the Master's Office on May 28, 1902, wherein the defendants are named the executors thereof.

3. The defendants say that the said will is the valid and legal last will and testament of the said late Jan D. de Wit, senr., and they deny the allegations in paragraphs 4 and 5.

Wherefore they pray that the plaintiff's claim may be dismssed with costs.

The plaintiffs' replication was as follows:

1. The plaintiffs admit that the document referred to in paragraph 2 of the plea, which is the document referred to in paragraph 3 of the declaration, was filed on May 28, 1902, in the Master's Office, and not on October 17, 1902, as alleged in the decelaration, and that it bears date August 9, 1899.

2. Save as aforesaid, and save in so far as any of the allegations in the declaration are admitted in the plea, the plaintiffs deny all allegations of fact and conclusions of law in the plea, join issue therein with the defendants, and again as before pray for judgment with costs.

Mr. Benjamin (with him Mr. C. W. de Villiers) for the plaintiff; Sir H. Juta, K.C. (with him Mr. J. E. de Villiers) for the defendant.

Sir Henry Juta observed that, as far as the plaintiffs were concerned, the discussion that day was academic; another will, dated May, 1899, had been filed.

Mr. Benjamin said that point did not affect the present case. The will of May, 1899, had only just been filed, and after the present action was commenced.

Mr. Benjamin called

Lewis Johannes Edward Mostert, who stated that he lived on the adjoining farm to deceased's; witness was a bywoner of his. Mrs. De Wit asked him to witness the will. He went into the dining-room with Mrs. De Wit, and at her request he signed the will. They were the only two in the room at the time. Mr. De Wit was not in the room, nor did he speak to witness concerning the matter. Witness left the house by the back door, and proceeded to Mr. De Wit's bedroom, which was an outside room.

Cross-examined: He went to ask deceased for peas to plant; witness did not tell him that he had just signed his will. The "old man" did not speak about it. Witness could not remember the date, neither the year nor the month. He had an idea that it was about August, or the middle of the year.

By the Court: He did not know that he was going to witness the will when he went to the house.

Cross-examination continued: Deceased's daughter was sent by her mother to fetch Pentz, the other witness to the will. Mrs. De Wit did not sign the document. He subsequently told one Cronje that he had witnessed the will, but denied that he informed anyone that Cronje was sitting in the room at the time. He did not speak to Pentz about the matter until after the death of deceased.

[Buchanan, J: How came you to witness a signature which you never saw —you said there were no names on the will when you signed?]

Mrs. de Wit showed me the line on which I had to sign.

Wouter Jacob Pentz stated that he lived at deceased's farm. He was sent for by Mrs. De Wit, and went into the dining-room, where he found Mrs. De Wit and Mostert. The latter had a pen in his hand, and the former simply asked witness to sign his name, which he did. He did not see deceased.

Cross-examined: He could not remember the year nor the month this took place, nor whether it was winter or summer, or morning or afternoon. He was now eighteen years of age, but could not say what his age was when he signed the will. Witness signed twice. He did not notice whether the document was written or printed; he did not see any other signatures on the will at the time, but he did not take particular notice. In answer to the next question, witness said Mostert's signature was on the will before he (Pentz) signed.

Mr. Benjamin closed his case.

Sir Henry Juta called

Mrs. Susannah de Wit, one of the defendants, who stated that two wills were made, and both were signed by her husband in his sick-room. She gave the will to her husband, and also read it to him. She sent for Mostert and Pentz; her husband and herself were sitting in the dining-room when her

daughter Nellie went for the two witnesses. She and her husband both told the witnesses what they had to do. She believed Pentz was about 15 or 16 when he witnessed the will.

Cross-examined: She agreed very well with her husband, but she was not on very good terms with her stepson Jurie, the plaintiff. Under the will in dispute, plaintiff lost about £40. Their legal adviser was Mr. Reitz, but she did not like him, and when the will was altered, she sent for Mr. Hauptfleisch. Both she and her husband wanted the will to be altered. She could not understand what Pentz and Mostert meant when they stated that deceased was not in the room when the will was signed, unless they had been talked over by someone. The will arrived by post, and she had it signed the same day. The date was filled in by someone else, it having been omitted when the will was signed. Her husband signed the will willingly, but hurriedly.

By the Court: She pointed out to witnesses where they had to sign; there was no professional man present.

Petronella Marie Cronje, the daughter of the previous witness, deposed that she remembered the will being signed; there were present her father and mother and Pentz and Mostert. Her parents requested her to call Pentz. Her father signed first, then her mother, and then the two witnesses. She believed the date was entered in the will.

Charles Alfred Hauptfleisch stated that he was an attorney; he drew up the will in question on instructions received, and sent it by post to the farm.

Cross-examined: He had destroyed the memo. of instructions sent him; the instructions were unsigned.

Re-examined: The instructions were brought him by Van Wyk, one of the executors.

Mrs. Anna de Wit, wife of Jacobus Francois de Wit, stated that deceased was her husband's brother. The witness Pentz was her nephew, and she remembered seeing him at Riversdale last August. He came to see her, and she asked him if he signed deceased's will. He replied that he did not know, and it was so long ago that he did not remember whether deceased was present or not.

Cross-examined: She was perfectly certain this was in August.

Jacobus Cronje, a farmer of the Riversdale district, and husband of Petronella Cronje, stated that he knew Mostert, and remembered speaking to him about this action. He was not sure of the month, but it was last year. He asked Mostert if he had been to his (witness's) mother-in-law, and witness replied that he had no time. Subsequently Mostert told him that he had witnessed the will at deceased's request.

Sir Henry Juta read a letter from plaintiff's attorneys to defendant's attorneys, dated November 6, 1902, stating that a search had resulted in the discovery of an earlier will, apparently properly executed. This had led to complications, and compelled them to wait further instructions before filling the declaration.

Mr. Benjamin having addressed the Court,

Sir H. Juta was not called upon. The Court gave judgment for the defendants.

Buchanan, J.: This is an action to set aside a will filed with the Master and under which letters of administration were issued to defendants, made by the late John Daniel de Wit, and his surviving spouse, on August 9, 1899, upon the ground that the testator did not in the presence of witnesses sign or acknowledge his signature to the said document. The document has been produced, and is on the face of it in due and regular form. It has not been attempted to deny that it is signed by the testator, the only ground on which it sought to set aside the will is that testator did not sign or acknowledge his signature in the presence of witnesses. It is alleged that there were six persons present when the will was signed - Mr. and Mrs. De Wit, Mrs. Cronje, the two Mosterts, and Pentz. One of the Mosterts has since died, and Mr. De Wit has also since died. Mostert and Pentz have been called for the plaintiff, and Mrs. De Wit and Cronje have given evidence for the defendants. From the evidence of some of the parties it is clear they had considerable knowledge as to how wills should be executed: and the requirements of the law, they allege, were carefully complied with. If the evidence of Mrs. W. de Wit and Mrs. Cronje is to be believed, the whole of the parties signed the document at the same time, in the same room, and in the presence of each other. We have, therefore, a docu-

ment in due form and executed; we have the evidence of these two persons that it was so executed. Against this we have the evidence of the two witnesses, Mostert and Pentz, and I must say their evidence was given in such a vague and uncertain manner and in such a way that it does not in my opinion carry credence with it. Mostert tells us he was sent for, and he came in, not knowing what he was wanted for; and that when he went into the dining-room, Mrs. De Wit was the only person in the room at the time he signed the will. Then he states that he went to the room of Mr. De Wit, the testator, and that in the course of his conversation he never referred to the fact that he (Pentz) had signed De Wit's will as a witness. Pentz said he did not know what he was signing; how he knows, if that is the case, that it was De Wit's will he was signing, seems difficult to understand. Now these two witnesses (Pentz and Mostert) have been called upon to decry the document produced, and also to flatly contradict the other witnesses, who also stated that they were present, and that everything was done in order. The onus is upon the plaintiffs to establish their contention, but in cases where the testator is dead, I think the Court ought to be exceedingly chary in accepting statements made by witnesses such as those called by the plaintiff. Several wills have been made by Mr. and Mrs. De Wit; it is true one set was drawn up by one set of attorneys, while the last will was drawn up by another attorney. It is evident there was some very good reason which induced Mrs. De Wit not to have her old attorneys to draw up the will in question. The way in which that document was drawn up was perfectly open and above board. It was sent to Mr. Hauptfleisch with instructions for him to make certain alterations; but the two wills follow very largely on the same lines. Hauptfleisch, who was an attorney and notary public, drew up this will; he sent it out to the testator's farm; it was not approved of, and a fresh copy was sent, and the signatures on it are all genuine and proper signatures. The witnesses were all people about the farm, and if there had been any attempt or desire to defraud, these persons who could have disclosed the attempt would not have been called in. Then it must be remembered that Mrs. De Wit does not reap any more benefit under this third will than under the others. The will when drafted by Mr. Hauptfleisch contained a blank after the word "August"; this was overlooked at the time, but was afterwards filled in by Van Wyk, who put in the word "nine" before "August." This is very objectionable and improper, but it does not in any way invalidate the will. The evidence of the two witnesses called for the plaintiff is not of that clear, precise, and explicit character which would have justified the Court in upsetting the will. The Court holds that the will was properly executed, and judgment must be given for the defendants, with costs.

Mr. Benjamin submitted that the costs should come out of the estate.

His Lordship said that costs would have to follow the judgment.

Judgment was accordingly entered for defendants, with costs.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset. Defendants' Attorneys: Walker and Jacobsohn.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.

THOMAS v. THOMAS. { 1903. March 5th.

Mr. Upington applied in this matter for leave to take certain evidence on commission. The plaintiff, he said, had obtained leave to sue by edictal citation for damages on the ground of his wife's adultery. A certain Mr. and Mrs. Patrick Ballister went to England in January by the steamship Scot, and the boat reached Southampton on or about January 24. On her outward journey again she called at Cape Town on February 24, and at that time certain evidence was obtained from certain members of the crew as to the defendant's conduct with the said Ballaster, with whom she travelled to England as his wife. The Scot would again call at Cape Town on her homeward journey,

and was due to leave this port on the 11th inst., and counsel applied for a commission to take the evidence of the members of the crew in question, and suggested that Mr. Gardiner should be appointed for that purpose.

Order granted as prayed.

THE CAPE DIVISIONAL COUNCIL v. THE COLONIAL GOVERNMENT. { 1903. March 5th. „ 9th.

Expropriation of land—Railway acts—Siding—Main Road—Divisional Council—Interdict.

The Government on purchasing the Wellington line of railway under Act 15 of 1872 from the company which constructed it under Act 20 of 1857 acquired no greater rights than it could itself have conferred on the company. Such company acquired no right under the Act of 1857 to expropriate land for the purpose of making a siding near Cape Town for the conveyance of stores required for workshops erected for the manufacture and repair of carriages, engines and trucks for use on the railway system beyond Wellington.

The Divisional Council held entitled to an interdict restraining the Commissioner of Public Works from constructing such siding across a main road.

This was an action brought by the Cape Divisional Council against the Colonial Government for the removal of certain lines of rails laid by the defendants across the Cape Town-Maitland main road and the stoppage of engines from going over the said road.

The declaration was as follows:—

1. The plaintiff is the Cape Divisional Council. The defendant is the Minister of Railways of the Colonial Government and the proper party to be sued.

2. The Colonial Government is the owner of the railway running from Cape Town to Salt River Junction, whence the main line of railway, also the property of the said Government, runs inland, via Maitland, parallel for some distance with the road hereinafter mentioned.

3. A duly proclaimed public main road of the Colony and vested in the plaintiff runs over the first-mentioned line of railway at Salt River Junction by means of an overhead bridge, and then runs inland via Maitland parallel for some distance with the aforesaid main line of railway.

4. In or about the month of November, 1900, the defendant wrongfully and unlawfully laid two lines of rail across the aforesaid public main road for the purpose of running his engines from the said main line into some sheds on the other side of the main line, and does so run his engines, and by means of the said lines and engines the defendant wrongfully and unlawfully blocked and impeded and does continue to block and impede the public traffic along the said public road.

5. The said main line has been further wrongfully and unlawfully so laid at the foot of the said overhead bridge that the public lawfully using the said road over the said bridge and thence on towards Maitland by vehicles and animals are in constant and imminent danger of life and limb by reason of the said engines crossing the said public road.

6. The defendant, though requested so to do, refuses to remove the said rails and to stop running the said engines thereover and claims the right to keep the said rails there and run the said engines as aforesaid.

Wherefore the plaintiff prays: (a) For an order directing the defendant to remove the said two lines of rail and to cease running the said engines thereover; (b) alternative relief; (c) cost of suit, including the costs of a motion between the same parties heard in this Honourable Court on November 27, 1902.

The defendant's plea admitted that the acts were done, but denied that the acts were done wrongfully or unlawfully, that the traffic was impeded, or that there was any danger to the public, and said that the acts complained of were necessary for the construction and working of the railways referred to in the declaration, of which the lines complained of formed part.

The replication was general.

Sir H. Juta, K.C. (with him Mr. Bisset), for the plaintiffs; Mr.

Schreiner, K.C. (with him Mr. Evans), for defendants.

Sir Henry Juta said that the matter was before their lordships some time ago by way of interdict proceedings, but now, he thought, they were able to lay before the Court a document which had never previously been laid before their lordships. As their lordships would remember, it was by Act 20 of 1857, that this line came into being; it was not an act which gave any power to any company to construct a line, it was an Act which set forth that it should be lawful for the Governor of the Colony for the time being to make and conclude with any joint stock company a contract for the construction and working of the railway on certain conditions as to the interest to be borne by the capital, and the restriction of the cost to a sum not exceeding £500,000. There was a contract, said Sir Henry, entered into between the Governor and the company, the original document could not be found anywhere, nor could the plans which were annexed thereto.

[Buchanan, J.: Those papers were supposed to be burned.]

It may be that is the explanation. According to the contract, a line of railway had to be staked out in accordance with the plans, and it was impossible to find those plans, but they had the contract, that had been found, though they could not find the original. There was only one copy, which was presented as a Parliamentary paper to the Houses of Parliament, which was available, and he proposed to put that in. According to that contract, a line of railway had to be built; it had to be concluded within three years, and the cost had to be estimated and fixed, because there was a guarantee to be paid upon it. There were certain sections which had an important bearing upon the the matter. For instance, what was meant by the line of railway as stated in section 4? The company were allowed to take certain lands, whatever land they wanted for terminal purposes had to be transferred to them, and the land which the company might take was stated as to amount in article 16. The land so conveyed or so vested in the company should be sufficient for a double line of railway, and the works connected therewith, sidings from out and passing places on the terminal and intermediate stations, and also for the terminal and other stations on the railway. There were several other sections to show that this contract was final. Then, by Act 15 of 1872, the Government bought this railway, which was known as the Cape Town-Wellington railway. The Government now proposed to run a line of railway of two rails from the main line across the public road, the Maitland road, on to some property which now belonged to them, and by means of which they were carrying stores to their Salt River depot. The plaintiff Council complained that, inasmuch as the Government had no further rights than the company had at the time, that the contract was completely and finally fixed, they had no right now to run these lines over this public road.

[Buchanan, J.: What you say is that this was a new line outside the other line?]

Yes, a new line outside the contract.

[De Villiers, C. J.: They could not appropriate these sidings to the Wynberg line?]

No, they are not part of the Wynberg line.

Alexander Shand, engineer to the Divisional Council, said that in 1900 proposals were made by the Government to the Divisional Council with regard to the crossing in question, but the meetings and correspondence did not end in a satisfactory result. The main road from Cape Town to Maitland passed over an overhead bridge at Salt River Station. He had prepared a plan showing the gradient of the bridge, with the two lines of rails laid by the Government. On one portion of the bridge, coming down towards Maitland, the gradient was 1 in 19.5, but then it eased off a bit to 1 in 48. At the foot it became level; that was where the lines were placed. According to the plan, the lines of rails which had been laid ran into the loco. sheds. On the eastern side of the sheds there was a line known as the Milnerton line, from which was a line running to the sheds, so that any goods which the Government brought from Cape Town to the sheds could be carried by that line without crossing the main road. As an engineer, he considered the placing of these lines across the foot of the bridge very dangerous to traffic, besides which, they

would cause an obstruction. On either side of the bridge they could not see engines approaching which were about to cross the main road.

Cross-examined by Mr. Schreiner: He showed on his plan an inclination of one in 48 to the crossing; he had taken it down to the railway crossing for the last 60 feet.

[Buchanan, J.: What is the distance for the one in 48 portion?]

170 feet. There was very litt'e difference in the lower 20 yards portion. The rails crossed at the foot of the general gradient; not exactly at the foot of the bridge. He had stood and watched the traffic when a train brought goods into the stores yard. He had seen a train cross from the main line too slowly. He would not deny that it would cross at four miles. He noticed a man with a flag, but he did not see that the train held up before it crossed the road, and waited till the signal was given. Vehicles heavily laden coming down the incline would be endangered if there was a train blocking the road. He had been a railway engineer for seven years, but he did not know the regulations for railway traffic in this country over level crossings. He referred to the crown of the bridge, when he said they could not see any of the engines approaching. There were swing gates across the rails; there was no swing gate across the road. He should say that a swing gate across the road would be no assistance to traffic, but rather a great inconvenience.

Re-examined by Sir H. Juta: The road was narrowest at the point of the crossing; there was not sufficient room for a team to turn.

Sir H. Juta: You were asked about the regulations as to railway traffic; are you aware that people are run over almost every week, regulations notwithstanding?

Oh, yes; we see cases in the daily paper repeatedly.

Henry van der Westhuysen, secretary of the Council, said that he had known the district for about twenty-five years, and he remembered the time when there were very few buildings at the side of the station where the depot now stood; in fact, it was practically open ground then. He certainly thought the crossing was dangerous, but he admitted that he had not watched trains go over the crossing. He knew the road thoroughly well, and that it was traversed by very heavy traffic. It was on account of the heavy traffic that the overhead bridge was built.

Cross-examined by Mr. Schreiner: The overhead bridge was erected over many lines, carrying the suburban and main line traffic. He had not taken any figures as to the trains over that crossing between November and now.

Robert Starke, farmer, Koeberg, a member of the Council, said he knew the station at Salt River so far back as 1862; it was on the opposite side of the present station. The Government had gradually put more buildings there. In 1862 there were very few buildings on the side of the old station, and the whole place was now covered with all kinds of buildings. He constantly used that road. He thought it was most dangerous that there should be a railway crossing at the bottom of the bridge. From the summit of the bridge they could not see the crossing. He was acquainted with the negotiations between the Council and the Government.

Cross-examined by Mr. Schreiner: He had not seen trains cross this line, but he had seen them in the yard off-loading. They could not see an engine when it was close to the crossing. He was afraid his children might meet with an accident there.

John McGregor, Mayor of Maitland, said that the land between the main line and the road over which the crossing was made, was private property up to ten years ago. He spoke as to the increase of the Government works. He agreed that the bridge was dangerous. He objected at the time to the crossing being constructed there.

Sir H. Juta handed in the correspondence which had taken place between the parties with regard to the crossing.

For the defence, Mr. Schreiner called Frederick Law Dwyer, resident engineer of the Western system, Cape Government Railways. He said that the siding was constructed under his instructions. He was satisfied that for the working of the depot the crossing was necessary. The road was frequently blocked by Government traffic, and the Chief Storekeeper asked for special accommodation. This crossing to the stores yard was requisite for the working of the Western system.

[By De Villiers, C. J.: They did not want the crossing for shunting purposes, but only for carrying stores.]

Cross-examined by Sir Henry Juta: He had known the station for 27 years, and he was acquainted with the extensions that had taken place. If they were simply running from Cape Town to Wellington, they would not want so many stores, and they would not require this level crossing. Salt River was the depot for the whole of the Western system, in fact for the running of trains right up to Rhodesia and the North.

[By Buchanan, J.: They used the crossing about twice a day.]

[By De Villiers, C. J.: It would not be impossible to erect another bridge, but the cost would be very great; the present bridge cost £20,000. They would not require so large a bridge.]

Sir H. Juta said that the Divisional Council had another scheme of bringing a line parallel with the present line and bringing it under the bridge.

Mr. Schreiner said that the outlay entailed by building another bridge would be out of proportion to the advantages that would accrue.

[De Villiers, C. J.: If the depot had been confined to the Cape Town-Wellington line, this crossing would not have been necessary?]

Witness: No.

James Powis Shannon, district engineer of the Cape Government Railways, also spoke to the need of the crossing for the working of the railways; it was used, he said, for bringing stores from the Docks to the railway store yard. He could not see that it could be done by using the Milnerton line; there was always great difficulty in getting through the loco. yard in passing the traverser, which was kept very busy all the day through. The gradient of the bridge was one in 70 just before it crossed the road. There was no difficulty in pulling up a train travelling at four miles an hour until it was signalled to go over the crossing.

Louis Henry Cochrane, district engineer of the No. 1 Western system (predecessor of the last witness), said that during his term of office strong representations were made by the storekeeper for this crossing. The gradient of the bridge for the last sixty feet before it reached the crossing was one in 88, and then the road became practically level.

Cross-examined by Sir H. Juta: They wanted this crossing permanently.

Re-examined by Mr. Schreiner: They put guard-rails at the crossing to prevent vehicles from skidding.

[Buchanan, J.: I see in one of your letters you say that this crossing may not be required above once in every two or three weeks?]

Yes; but that was in 1891.

[Buchanan, J.: And it is now twice a day.]

Mr. Sinclair, chief railway storekeeper, said the siding was a necessity in order that proper access should be had to the stores. Before the siding was constructed, there were very great delays. With the three methods previously in existence, it was practically impossible to work.

Mr. Dwyer (recalled) stated in reply to Sir Henry Juta that a road could be brought around the sheds, but not to the same position at the far end. There was, however, ground upon which the stores could be put.

By Mr. Schreiner: To carry out this would mean using the ground which was intended for an extension of the locomotive sheds towards the sea.

Sir H. Juta, K.C. (for the plaintiff Council): By Act 40 of 1889, section 141, the Divisional Council not only possesses the right, but has the duty imposed on it of superintending and preserving all main and divisional roads within its own division. It has, therefore, a clear right to come into Court and object to any encroachment upon any of these roads, or to anything which may interfere with the traffic on them. It is, in fact, in this respect, the guardian of the rights of the public over these roads, and this would seem at one time to have frankly admitted by the defendants; for long before laying down the sidings which we now complain of they approached the Council, and requested permission to do so. It was only after that permission had been definitely refused that they took up the position, that the Government has a common law right to expropriate land for purposes of public utility. Granting for the sake of argument that the Government may so expropriate land for the purpose of making a public road, or even a Government railway, does it follow that they could use the property

of the Divisional Council for workshops, stores, etc., and crossings to give access to these, when such workshops, etc., are not necessary for any local requirements, but for general railway purposes. It must be remembered that the line from Cape Town to Wellington was originally made by a private company, which had no running powers beyond Wellington. By Act 15 of 1872, the Governor was authorised to purchase the railway, and was on such purchase "vested with the same rights, powers, and privileges as to working the said railway as theretofore the company was vested with, and that the Government should be in the like position in all respects as if the said railway were a railway belonging to a company, and the said Government were a board of directors of the said railway." It is then quite clear that by purchasing this line the Government acquired no rights which the original company did not possess; hence even if they have a right to expropriate land adjoining this line for purposes connected with the working of the line itself from Cape Town to Wellington, they certainly cannot take land for purposes connected with the working of the line far beyond Wellington, and, in fact, right up to Bulawayo.

Mr. Schreiner, K.C.: I quite admit that as regards this line the Government is in the same position as a private company. But the law has never said precisely how a railway should cross a road. Section 30 of Act 19 of 1861 was the only piece of general legislation on the subject till the passing of Act 16 of 1889, which is even more elastic. Then we have Act 31 of 1896, which makes very little change in respect of this matter. This is a "siding" within the meaning of the Act As to the power of the State at common law to expropriate, see *Grotius* (2, 32, 7) and *Voet* (1, 4, 7). The English cases all show that a court will not readily grant an injunction against a railway company. *Garrett on Nuisances* (page 72). We have no law to restrain a railway from making a level crossing. These may be made anywhere under certain conditions. Refer also to *Mew's Digest* (Vol. 11. 1,411 and 1,413). The Divisional Council has merely a servitude—a right of way across the line. This siding has been established by Government for the purpose of relieving traffic on the main line, and the Court will never grant an interdict unless the plaintiffs can prove (1) that irreparable damage will result to them from this action of the Government; (2) that they have a clear right to the property in question. As to expropriation, the Court can always protect the rights of the private owner if the expropriation is *mala fide*. *Logan* v. *Colonial Government* (11 Sheil, 114). Our whole contention is that we are allowed to take land for railway purposes, and this siding, which is for the use of the whole Western Sytem is certainly for railway purposes.

[De Villiers, C.J.: Suppose the Government had never taken the Wellington line over from the company, could the company have used these crossings?]

I would hardly say that: under Act 20 of 1857 the line crossings would hardly have been necessary. The present case is not on all fours with the case of *The L. and S.A. Exploration Co.* v. *Kimberley Divisional Council and another* (4 H.C. 278 and 5 Juta, 143). Here the Divisional Council show no grievance. See also *Sevenoaks Railway* v. *L.C. and D. Railway* (11 Ch. D. 625) and *Dartford Council* v. *Bexley Heath Railway* (H.L. 1898, 210).

Sir H. Juta (in reply): Parliament will probably sit within the next two months, and then the whole question of danger to the public arising from these level crossings can be gone into. It has been argued for the Government that because they own land on each side of a road they are at liberty to run level crossings across the road. The full rights of the *princeps* of the Roman Law authorities is claimed for the Government, but surely, with us, the *princeps* is the legislature. The Crown, *qua* Crown cannot go all over the country and take land wherever it pleases. This so-called siding is not for the use of the Wellington line, but is a mere depot for the construction of rolling stock, stores, etc. In fact the place is not a siding in the ordinary acceptation of the term. The Acts of 1857 and of 1872 give the Government all the powers in respect of this line originally possessed by the Company, but nothing more.

Cur. Adv. Vult.

Postea (March 9).

De Villiers, C.J.: In December last the Cape Divisional Council applied to the Court for an interdict restraining the Commissioner of Public Works from

maintaining a so-called siding or line of rails which he had caused to be laid across the main road at Maitland. The ground of the application was that the construction of the siding was not within the powers of the company which had originally been authorised to construct the line of railway from Cape Town to Wellington, but the evidence as to the real nature and object of the siding was so meagre that the Court did not feel justified in granting the interdict on motion. The Council has now proceeded by action and the Court is in a position, upon the fuller evidence presented to it by both sides, to pronounce a final judgment between the parties. The evidence shows that the siding branches off from the main line east of the Salt River junction, and leads to extensive workshops erected north-west of the junction. These workshops, according to the evidence of the Resident Engineer of the Western system of Cape Government Railways, constitute a depot for the whole of the Western system, including even the Rhodesian Railways, where carriages are built and engines and trucks are repaired. "If," he said, in cross-examination, "we were only running a railway to Wellington, all the stores which we now have would not be required, and consequently we would not want the crossing over the main road now in question." And in answer to the Court, he said: "The new siding in question is urgently required by the great increase of traffic. If the line had been confined to the Wellington railway it would never have been required." Upon this state of facts the question arises whether the defendant, in his capacity as Commissioner, had any authority to order the construction of the siding over the main road without the consent of the plaintiff Council. The defendant himself seems at first to have thought that such consent was necessary, as a formal application for leave was made, and it was only after a long correspondence ending in a refusal on the part of the Council to give an unconditional consent that the work was commenced without such consent. In support of the defendant's course of action, his counsel places some reliance upon the common law, according to which, he contends, the Government, as representing the princeps of the Roman law, has a general right of expropriating land for public purposes of utility, and in support of this contention he has cited the case of *Cape Town Council* v. *Commissioner of Public Works* (Foord's Rep., 21). In that case, however, the Court by no means held that the rights of the princeps under the Roman law as defined by *Voet* (1, 4, 7) are now vested in the Crown, but the Court expressly confined those rights to the exercise of such powers as were absolutely necessary to enable the Crown to construct works which had been authorised by the Legislature. The case was one in which the right of the Commissioner to expropriate land for the purpose of a railway authorised by Act 19 of 1874 was in question, but the question as to the rights of the Crown in the matter arose out of the construction to be placed on the 12th section of Act No. 9 of 1858, which authorises the Governor to expropriate land for the purpose of making such roads as were authorised under that Act. There is a wide distinction between main roads which exist for the free use of the public and railways which constitute a commercial undertaking bringing in a large revenue to the Government, but even if no such distinction existed I am clearly of opinion that the defendant had no authority, as representing the Government, to exercise for railway purposes any rights over land situated between Cape Town and Wellington except such rights as were conferred by Act 20 of 1857 and Act 15 of 1872. By the 11th section of the former Act the powers of the Central-road Board in regard to taking or acquiring lands and materials necessary for the making or repairing of main roads were bestowed on whatever company should contract for the making of the Wellington railway, and by the second section of the later Act the rights of such company as to working the railway and otherwise were transferred to the Government. Under these Acts it was decided in *Davison* v. *Railway Department* (14 S.C.R., 297) that the powers of the Government to expropriate land were not exhausted by the original construction of the line and that the Government was entitled under them to take additional land required for the same railway. The additional lands thus required were for the purpose of laying down additional rails, which had become absolutely necessary for the efficient working of the traffic between Cape Town and Wellington. The Court went further in that case than it

has done in any other in giving a wide interpretation to the powers of the Government under the Railway Acts, but the *ratio decidendi* is perfectly intelligible. If it would have been in the power of the Government when it entered into the original contract for the construction of the Wellington railway to authorise the laying of the additional rails it was equally in its power after the construction of the railway to authorise such additional rails. It cannot, however, under the widest possible interpretation of the Acts, be held that the Government had any power to authorise the company to erect workshops rendered necessary for the purposes of a railway beyond Wellington extending northward and eastward for many hundreds, if not some thousands, of miles and to construct sidings away from the original line over the main roads for the conveyance of stores to such workshops. The Government, on purchasing the Wellington line from the company, did not acquire any greater rights in this respect than it could originally have conferred on the company. Large as those rights were, they did not, in my opinion, include the right of expropriating land for the purpose of constructing the siding in question. It follows that, in my opinion, the plaintiff Council is entitled to the relief asked for. The 141st section of Act 40 of 1889 confers on every Divisional Council the right and imposes on it the duty of superintending, maintaining, keeping in repair, preserving, and improving all main and divisional roads within the division represented by such Council. By virtue of such right and duty the Council is clearly entitled to protect the roads under its superintendence against any interference with the ordinary traffic thereon. If any doubt existed on this point it would be removed by the 142nd section, which expressly vests in the Council the right to and property in the roads under the superintendence of the Council. With all the precautions proposed to be observed by the Railway Department, the use of the siding over the main road at Maitland constitutes an undoubted interference with the ordinary traffic. It is quite true that, in practice, wherever the construction of a line of railway has been authorised from one place to another, the lines have been laid across the main and divisional roads without the permission of the Divisional Councils concerned, but this practise has arisen out of the fact that under Act 19 of 1874 and most of the other Railway Acts the power is conferred on the Railway Department to enter on the land required without any previous agreement as to compensation. As it would be difficult to assess the compensation payable to Divisional Councils for the crossing of their roads by rails, the Councils concerned have never raised any objection to the interference with the traffic on the roads. It is a different matter, however, where a line of rails is laid without any legislative authority whatever. In such a case, the Council is justified, and, indeed, is in duty bound to guard the rights of the public against any obstruction to the traffic. Upon the evidence now before the Court I am of opinion that the plaintiff Council has made out a case for the interposition of the Court. I understand, however, that the Council does not object to the siding remaining as it is provided that the Railway Department undertakes to construct an overhead bridge for vehicular traffic. In order that there may be ample time for the construction of such an overhead bridge or for making other arrangements for the conveyance of stores to the workshops, there will be no summary interdict or order of removal. The Court will order that the line of rails be removed within six months from this date unless the defendant will in the meantime undertake that he will within twelve months from this date complete the construction of an overhead bridge for the conveyance of the ordinary road traffic over the siding in dispute. The defendant will pay the cost of this action.

His Lordship added that Buchanan, J., concurred in this judgment.

Maasdorp, J., also expressed his concurrence, and added that it seemed to him that this line crossed the road at a rather awkward spot, and he would suggest that the Government take special care to carry out the arrangements which had already been made and which they had so far observed for the safety of the public.

Mr. Schreiner asked whether the costs in the action would include the costs of the interdict.

The Chief Justice: I specially said "costs of the action," because the costs of the interdict were decided at the time. They did not bring forward all the evi-

dence that was available, and I do not see now that the question of costs, not having been reserved, will be affected by the costs of this action.

Sir H. Juta said it seemed somewhat hard that the Divisional Council should have to pay the costs of the interdict.

The Chief Justice: It was not a case for a motion at all; there was no such hurry about it. The order as to costs only refers to the present action.

[Plaintiff's Attorney: W. G. Coulton. Defendant's Attorneys: Reid and Nephew.]

PRICE v. STEYN. 1903. Mar. 9th. „ 10th.

Malicious prosecution — Reasonable and probable cause.

In an action for malicious prosecution it was proved that the affidavit made by the defendant in support of the prosecution, although substantially correct, erred in some unimportant details.

Held, *that the plaintiff was not entitled to succeed.*

This was an action brought by William James Henry Price, late of Woodstock, against Johannes L. Steyn, of Hout-street, Cape Town, for damages for alleged wrongful and malicious arrest and imprisonment.

The declaration was to the effect that in the course of last year the parties were associated in partnership in the buying and selling of coal ashes taken from the steamers at the Docks, the arrangement being that the plaintiff should provide horse and cart, manage the business, and bring into it a certain quantity of ashes, and the plaintiff should provide the necessary capital, some £300 being advanced by the defendant in this way. At the end of July, it was contended, the partnership came to an end, the plaintiff signing a promissory note in favour of the defendant for £340 4s. Subsequently the plaintiff was arrested at Kimberley, whither he had gone to join Texas Jack's Wild West Show, and he was brought to Cape Town and charged with theft on an affidavit sworn by the defendant. He was detained in gaol for some time, but the charge was afterwards withdrawn on the instructions of the Attorney-General.

The defendant, in his plea, admitted the partnership, and he admitted that it was unsuccessful, but he did not admit that plaintiff expended the money of the partnership in the way alleged. He denied that he acted falsely or maliciously, or without probable cause, and he also denied that the plaintiff had sustained damages in £2,000, or in any other amount.

Mr. Wilkinson (with him Mr. Upington) for plaintiff; Mr. Searle, K.C. (with him Mr. Benjamin) for defendant.

Wm. James Henry Price said that on the 13th May last he had an interview with the defendant, and at that time he was carrying on a business on his own account in the buying and selling of ashes. As a result of that interview an agreement of partnership was drawn up, and the following day they commenced business. Steyn provided the money from time to time as required, amounting altogether to about £300, for the business, besides which the defendant made advances on plaintiff's private account. Witness bought about 178 loads of ashes from steamers, generally from the chief engineer or the second engineer. No receipts were asked for or given; it was simply a cash transaction. Witness sold about 30 or 40 tons of ashes, and he informed the defendant. He paid certain sums to the defendant for ashes sold. He provided the horse and cart, and only charged for feeding and stabling. He brought a quantity of ashes into the business when the partnership commenced. He disbursed about £105 for labour and extra cart hire, and about £90 or so for ashes. Receipts were not usually given for cart hire. He had employed three "boys" as labourers and one carter. He had pointed out the heaps of ashes belonging to the partnership at the Docks to the defendant. In June the sea rose owing to a strong wind, and the result was that about 20 or 30 loads of ashes were carried away. Another washaway occurred in July, and the result of this was that nearly all the ashes went into the sea. He estimated that about 150 loads of ashes were lost by the two washaways. About the 24th July he received a letter from the defendant with regard to a loan of £50 with interest and commission amounting to £6 17s. 6d. That was a personal advance; no ar-

rangement had been made as to the payment of interest. He believed he received the money early in June or the last week in May. He had tried to work out the rate of interest, but he had not been able to do so; he believed it was about 82 per cent. After receiving that letter, he saw the defendant and told him he was not prepared to meet the demand, but that it should stand over till the settlement at the end of six months. In the latter part of July he received a demand for £340 4s. and also a demand for rent. He saw Mr. Swanepoel, Mr. Steyn's chief clerk, as Mr. Steyn was absent and Mr. Swanepoel said that he had to draw up a promissory note and witness was to sign it. In that statement £30 was charged for interest and commission, the rate being about 180 per cent. He afterwards received a letter, calling upon him to pay all the money advanced to him, with interest, or drastic measures would be taken against him. He signed the promissory note in Mr. Steyn's office. Shortly afterwards he had an engagement with Texas Jack's Wild West Show. Two days after receiving the letter about the drastic measures he called at Mr. Steyn's office, and said he would sign the promissory note on condition that a statement was drawn up showing a reasonable amount of interest. He received a letter from Texas Jack's Show, appointing him assistant manager, at a salary of £10 a week for the first two months, and afterwards £15 a week and 2½ per cent. The partnership was concluded on the 31st of July. The arrangement with Texas Jack took effect on the 11th of August. There was no secret about his departure to the North. He left his affairs in the hands of Mr. Poole, with whom he placed a power of attorney. He had been in Kimberley about a fortnight when, after the Saturday night performance, he was called away from Texas Jack and arrested by detectives. Ultimately he was brought to Cape Town. He was detained in gaol about a month. He was first brought up in Cape Town on September 11, in custody, and taken first to Wale-street and then to Roeland-street, where he was remanded for a week. He was remanded on the second occasion for another week. After his third appearance he was let out on bail, and he received notification on November 11, through Mr. Shaw, that the proceedings had been dropped. As to his damages, he had lost a situation equivalent to £1,000 a year under a two years' agreement. His arrest and prosecution greatly affected his wife. He had incurred in the way of expenses in the Magistrate's Court about 16 guineas, and sundry medical expenses for himself and wife amounting to about £20.

Cross-examined by Mr. Searle: He had accounted to Mr. Steyn for all the ashes he had sold. He had accounted to Mr. Steyn for ashes sold to Mr. Edwards, besides the two firms mentioned. He told Mr. Steyn about this transaction in his office. He received from Mr. Edwards £50, less £10 10s., deducted for a debt that he owed to Mr. Edwards. He told Mr. Swanepoel about the transaction with Mr. Edwards. He got an advance of £25 from Mr. Van Wyk, but he brought it up. He sold ashes to Mr. Vitch, but that was after the partnership had been dissolved, and the ashes had then become his property. He did not tell Mr. Steyn that he had 800 loads of ashes at the Docks. He had owed money to Mr. Vitch, which was deducted in account. He had got 178 loads of ashes from different vessels. He gave Mr. Steyn the money that he drew for the ashes, viz., £8 6s., £17 3s. 6d., £7 13s., and £23. The two latter items were absorbed by wages. Mr. Cheatham's ashes were in a much more sheltered position than witness's. He was not "flush of money" in July. His mother-in-law paid for his carriages and theatre-going. He had been in the ashes business about three years. He was very hard-up in March. He got some money from Thomson Watson and Co., at Mr. Coigne's instigation, in the name of John Barron. He obtained £27 from Thomson, Watson and Co. He saw Mr. Coigne in March about some money. He had often been called Barron. Coigne said that if there was any trouble about this bill he would buy it over. He did not beg Mr. Coigne to buy the bill. He got the money from Thomson, Watson and Co. to pay for some ashes in a steamer that was discharging. He signed the bill at Mr. Coigne's instigation. The money was not obtained by false pretences. He knew there was another man, called John Barron, at the docks, but he (witness) was known to Thomson, Watson and Co. as Barron, and he denied that the money was lent, except as a loan to himself. He did not see the defendant at the time the partnership was dissolved. It cost £50

to carry on the business during the two months. In addition to the £50 for stabling and forage, he charged for cart hire certain sums, but held no receipts. He rented a house at Woodstock from Mr. Steyn; he did not go away without saying anything. He arranged with a person to pay the rent. He knew that the promissory note was not met, but at the time of the arrest he was arranging about the note being met with Texas Jack. The note was due on the 1st day of September. He told one of the young men in Mr. Steyn's office that he was leaving Cape Town the following night to join Texas Jack's show, and that Mr. Poole held his power of attorney, and that he would settle with him about the promissory note. He also sent a letter to Mr. Steyn, telling him of this. He did not have this letter returned through the post. Mr. Swanepoel told him that nothing could be done unless Mr. Steyn approved. He did not tell Mr. Steyn that he was going to sell his furniture on the Parade. He saw no need to do this, as he had given Mr. Steyn the promissory note. With regard to interest on the £50, Mr. Steyn did not arrange with him to pay ordinary bank rates. The interest, he considered, was most extraordinary. With regard to the other item, he thought the commission and interest charges in this account were excessive. The ashes he sold to Edwards were his own property, and had been put to one side to repay the loan of £10 10s. He signed a guarantee to Mr. Van Wyk for the supply of certain ashes on payment of £25. He did not supply the ashes, but it was because of Mr. Van Wyk's own fault. He accounted for £17 of this money, and the balance went in wages. He had since been negotiating with Mr. Van Wyk with a view of supplying him with the ashes. He signed the promissory note because he did not want to see Mr. Steyn lose any of the money. He did not know the quantity of ashes washed away until after he had signed the promissory note.

Re-examined by Mr. Wilkinson: He understood, after the dissolution of partnership, that any ashes remaining would belong to him. The arrangement was that Steyn should keep the books. He subsequently told witness it was too much trouble to keep an account, and he asked witness to render him statements, which witness afterwards did week by week. Witness referred Swanepoel to inaccuracies in the account. This was the cause of an argument between Swanepoel and witness. Of the £25 received from Van Wyk, witness paid Steyn £17 3s. 6d., and paid in the balance to the partnership's account. The ashes were used for brickmaking purposes. Witness's mother-in-law lived in Fleming-street. Steyn had been at the house previously. His mother-in-law could have told Steyn where he had gone. When witness left he made arrangements to pay the rent with Mr. Poole. Witness also wrote to tell Steyn that Poole had his power of attorney, and would deal with the matter of the promissory note. Witness was sued by Steyn for two months' rent. He tendered the amount of a month's rent, and the magistrate gave judgment in terms of the tender.

Christopher Carstens, clerk in the Resident Magistrate's Office, at Cape Town, produced the record of proceedings.

John J. H. Smeeda said that during July ashes at the Docks were washed away. A considerable quantity of Price's heap was washed away—sixty or seventy loads, witness believed. A portion of the tip was washed away.

Cross-examined: Witness lost eleven loads at the time. Witness's heap was nearer the sea than Price's.

Re-examined: It was where Price's heap projected beyond witness's that the washaway occurred.

This closed plaintiff's case.

Mr. Searle called,

Johannes L. Steyn, partner in the firm of Steyn and Serrurier. He said Price was introduced to him by one of his clients. Witness advanced him a £50 loan in connection with the ashes. The advances were correctly shown with the account produced. Price usually came in on Saturday's. He always said he was storing the ashes for the winter, when the price would be better. He once told witness he had about 800 tons. Witness went to the Docks in July with Price and Swanepoel. Plaintiff pointed out as his three heaps which witness estimated contained 800 tons. Witness went on advancing money, but, later, the plaintiff not having been to the office for a fortnight, witness made inquiries and found out he only apparently had 14 or 15 loads. Some of the heaps which Price had pre-

viously said belonged to him were claimed by others. Witness went to Price's house, but did not find him there. He wrote a note and left it at the house to the effect that witness had found he had not the quantity of ashes he had represented, and that he would communicate with the police. Subsequently witness found that Swanepoel had taken the promissory note from Price. This he had no authority to do. Witness had not the slightest idea Price was going away. When he had gone witness made efforts to trace him, and afterwards found he was in Kimberley. Witness did not receive a letter from Price stating that Poole had been appointed his attorney, nor did he hear from Poole. Afterwards witness went to the Magistrate, and made an affidavit (produced). He charged Price with theft by means of fraud. Price never said anything about the money received from Edwards and Van Wyk. Price never said there were amounts for wages to be added to those brought up in the Magistrate's Court.

Cross-examined by Mr. Wilkinson: Witness had accounts in his books of every transaction reported to him in regard to these ashes. It was early in July, witness believed, that Price said he had 800 tons; he could not say for certain; it was some time in July. Witness had never inquired the whereabouts of Price at the house of his mother-in-law. He never knew Price had a mother-in-law. He heard about the alleged power of attorney to-day for the first time. Witness went to Mr. Tennant, the chief clerk in the Resident Magistrate's Office, to swear an affidavit, and to get a warrant. Mr. Tennant referred witness to his solicitor. The police drew the affidavit, which witness took to Mr. Tennant. Witness afterwards consulted his attorneys, who drew up the affidavit upon which the warrant was issued. Witness always charged commission and interest. During the transactions Price came to the office and said he had lost about two loads of ashes, which the Harbour Board had replaced. This was the only time witness heard of a washaway. That took place in June, witness believed.

Johannes J. Swanepoel, clerk in the employ of Messrs. Steyn and Serrurier, said he was present when the agreement of May was drawn up. The witness corroborated the evidence of Mr. Steyn as to what took place at the Docks. On the 31st July Price came to see Mr. Steyn, who was, however, not in. He asked witness to make an account showing his indebtedness, and to draw out a promissory note. Witness made out the statement put in showing a balance of £340 4s. He took this to Steyn's house with a letter dated July 31, with which was enclosed a promissory note for the amount. Witness did this before seeing Mr. Steyn. Price was not in, and witness left the letter at his house. Afterwards Price came to the office, and left the bill. Witness said he would have to come and see Mr. Steyn about the bill, but he never came back. Witness made up the items for interest with the account. He was unable to see Mr. Steyn before doing so. Price said he was perfectly satisfied with the statement. Witness charged eight per cent. for finding the money. This was the usual commission.

Cross-examined by Mr. Wilkinson: He took steps almost immediately to return the promissory note to the plaintiff. He went to plaintiff's house; he left word for the plaintiff to call again at the office, but the man did not call.

Richard Spencer Cheetham said his father was a dealer in coal ash at the Docks. His heaps of ash in June and July last were near the plaintiff's. He was not aware of any considerable washaway of ash at the Docks during June and July. None of their stock was lost. He should not think that plaintiff's stock exceeded about sixty loads. Further evidence was given to the effect that no serious washaway of ashes had occurred during June and July.

William Henry Coigne gave evidence as to a promissory note given by the plaintiff to Thomson, Watson and Co. under the name of Barron, but it was held to be irrelevant to the issue before the Court. Plaintiff still owed witness £41 for the purchase of ash that he sold to Vitch. He had originally lent the plaintiff £70. Witness did not know that the plaintiff was in partnership with Steyn at the time.

Cross-examined by Mr. Wilkinson: He did not consider that the money was borrowed from him under false pretences; it might have been lent in April.

Alven Hansen, clerk in the employ of Steyn and Serrurier, said Price never told him he was going away, as he had

stated in the witness-box. Witness only saw him on one occasion—on the 1st August—when he gave him a receipt for the rent.

Mr. Searle closed his case.

After Counsel had been heard in argument on the facts:—

De Villiers, C.J.: If in this matter the defendant was guilty of malice, and if there was no reasonable and probable ground for the prosecution, the defendant must be held liable, and must pay damages. I will deal only with the question of reasonable and probable cause, and for this purpose it is necessary to go shortly into the facts of the case. It appears that the plaintiff and the defendant were strangers to each other, and that in the month of May last the plaintiff was introduced to the defendant, and suggested that they should go into partnership for the purpose of buying and selling ashes. Such a partnership was entered into, and the agreement was that the plaintiff was to do the work of buying and selling, and the defendant was to supply the funds, and also keep the books. From time to time moneys were advanced by the defendant, to whose office the plaintiff repeatedly came. After some time, a fortnight elapsed without the plaintiff coming to the office, but before this, according to the evidence, which I entirely credit, the plaintiff and defendant had gone together to the Docks, and the plaintiff had then pointed out the ashes which had been stacked from time to time, and had told the defendant that there were 800 tons of stuff there. He pointed out several heaps, one of which, he said, belonged to McKenzie, and the rest to himself. Then, as I said, a fortnight elapsed without the plaintiff coming to the office, and the defendant then became suspicious, and went again to the docks, and found there were only about thirteen tons. He thereupon tried to find the plaintiff, and went to his house. Plaintiff was not in, and the defendant wrote a letter in pencil which he left for him, and it is in the concluding portion of this letter, no doubt, that the words "drastic steps" appear. But unfortunately the first portion of this letter is torn out. Now, it is a somewhat extraordinary circumstance that this mutilated letter should have been put in at all. It is put in for the purpose of proving the use of the words "drastic steps," but a portion of it is torn off. That being so, the defendant was allowed to give oral evidence as to the contents, and this is what he says in his evidence: "I said I had just come from the Docks, and found that there were only ten or fifteen loads of ashes, and not 800, as he had told me; and that things had become so unsatisfactory that unless plaintiff showed me to the contrary I would consider that plaintiff acted dishonestly, and I would communicate with the police." The important thing is that the defendant states that in that letter he told the plaintiff that he had informed him there were 800 tons, and there is no answer to that statement, no immediate denial by the plaintiff to the defendant that he had ever said so. Now, as this piece of the letter is torn off and as the defendant has been allowed to give evidence upon it, I am quite satisfied that the version now given by the defendant is the correct one. Then the plaintiff, upon the receipt of this letter, went to the office of the defendant, but the latter was not in. I am satisfied that it was not at the plaintiff's suggestion that the account was drawn up and the promissory note made by the plaintiff in favour of the defendant. It would suit plaintiff well now, after what occurred, to be able to give a promissory note, and gain time for his purpose. Swanepoel, after the note had been signed, informed the defendant of the fact, and defendant then at once took steps to have this matter remedied, and to return the promissory note. But shortly afterwards the plaintiff disappeared; he went as manager to the Texas Jack Wild West Show. He says that before he left he informed defendant of his intention to go. I am satisfied he never did anything of the kind. He pointed out a boy in Court as the one whom he stated this to, but this boy has been called, and denied it, and I quite believe him. Nor do I believe that the letter was sent, of which what was said to be a copy was produced. During these months, according to the admitted account, only £25 had been paid by the plaintiff into the partnership. Now, the question is: Was not the plaintiff justified in coming to the conclusion that all these large quantities of ashes which the plaintiff had received had been sold, that he had gone away with the partnership money, and that there was an intention to commit a fraud or to commit a theft? I think that, from these cir-

cumstances, the defendant would have been justified in drawing these conclusions, and I think if we look further into the documents which are put in by the plaintiff, these documents, on the face of them, seem to have shown that the plaintiff had been using partnership funds for the purpose of paying some of his own private debts. He produced receipts for ashes which had been sold to persons, and from these amounts were deducted, amounts owing by the plaintiff to these parties, but when he rendered an account to the defendant these items were not brought up. According to the plaintiff's own statements he appears to have acted dishonestly in his dealings with the defendant. Now, this being proved to the satisfaction of the Court, I do not think the Court should inquire very minutely into the terms in which the affidavit of the 4th September is framed. No doubt if criticised very minutely some of the statements are somewhat exaggerated, but the question is after all, whether, substantially, the affidavit makes a true statement of the facts of the case. Now, to my mind, substantially the affidavit is correct. It errs somewhat in detail, but the substance of it seems to show there was reason for believing that the plaintiff had committed a fraud upon his partner. I do not say now that, upon the full facts of the case, the Attorney-General erred in not prosecuting. It is unnecessary to go into that; the point we have to consider is whether, upon the facts known to the defendant, he was justified in coming to the conclusion he arrived at, and being satisfied upon that, I am of opinion that the plaintiff is not entitled to succeed in this action. The judgment of the Court must therefore be for the defendant, with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorney: W. G. Coulton; Defendant's Attorneys: Friedlander and Du Toit.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr Justice MAASDORP.]

CLIFFORD v. CLIFFORD AND ANOTHER. { 1903. Mar. 10th

Adultery—Damages.

In an action for damages against the co-defendant who had committed adultery with the defendant, the wife of the plaintiff, it was proved that the plaintiff had frequently used foul language towards his wife. No damages were awarded, but the co-defendant was ordered to pay the costs of the action.

This was an action instituted by John Whiteside Clifford, of Cape Town, for divorce, on the ground of his wife's adultery with the co-defendant, R. Boutellier, against whom £500 damages were claimed.

The declaration set forth that the parties were married in 1890 in England, and that on divers occasions since June, 1901, the defendants had committed adultery. The wife was in possession of certain furniture, purchased about 1901 from the co-defendant for the sum of £40 out of moneys which the plaintiff alleged belonged to him. The plaintiff sought a decree of divorce, with custody of the children, an order for the return of the furniture, and judgment against the co-defendant in the sum of £500 and costs.

The defendant in her plea admitted possession of the furniture, but denied that it was bought with the plaintiff's money, or that it was his furniture; she said it was bought with her own money and belonged to her. There were three children of the marriage, and she alleged that she had been denied access to them. While living in England the plaintiff frequently struck her, and a month after her arrival in this country he violently assaulted and beat her. Paragraphs 3 and 5, as to the alleged adultery and the damages, were denied. The defendant, Mrs. Clifford, sought a judicial separa-

tion, with custody of the children, and asked for alimony for herself and children.

Mr. Benjamin for plaintiff; Mr. Wilkinson for defendant.

The plaintiff, John Whiteside Clifford, in his evidence said that he and his wife were married on November 1, 1890, at Derby, England. They lived in England until November 30, 1890, and then he came to this colony on doctor's orders, leaving his wife and children in England. They followed him in March of 1901. He made provision for their support during the interval. He denied that he had cruelly treated her. Hitherto they had lived amicably together. They lived for about two months at Mount Nelson Villas, Sea Point, and they were joined by a boarder, named Boutellier, the co-defendant. Witness had to complain to his wife about her going to balls and dances with the co-defendant. He then discovered a letter written by her to a lady in England; it was under a blotting pad. He left it there, and she had since told him she had torn it up. He spoke to her about the contents. The letter described the lovely country, and said what a nice young man the lodger was, that he had made her a present of a fan, and had taken her to a ball on the previous evening. Witness had never struck the defendant; she struck him with a stick, and she fell and bumped her forehead. They afterwards removed to Blackheath Villas. Witness objected to Boutellier joining, but his wife wanted him to go, as she said she wanted to let the room. They stayed there from August to December, and witness then went to Robben Island, where he was sent on Government survey. He returned on the last day in February. On his return he found that his wife had gone from Blackheath Villas. While he was at Robben Island he continued to support her. He then learned something about his wife about the end of January, which caused him to stop payments. The furniture was paid for out of witness's money, which had been left with his wife when he came away from England. There were three children of the marriage, and witness asked for the custody of the three.

Cross-examined: He took exception to Boutellier when they were removing to Blackheath Villas. He had no quarrel at that time respecting any suspicions of infidelity; he only quarrelled about the letter. He regarded Boutellier as a friend at that time; he objected, however, to the boarder making his wife a present of a fan. Their married life in England was happy. He did not assault her or ill-treat her, or use foul language towards her. He had not assaulted her in this country. He admitted writing a long letter to his wife, in which he spoke of the coming suit, and said he would see that the case got into the Burton and Liverpool papers. He had pretty letters from Colville, Burton, and Derby as to her carryings-on. He only hoped she would face the music and listen to her little son giving evidence against her with Mr. Lovejoy. It was through his influence that Mr. Lovejoy obtained work with the American firm, the manager being a great friend of his (witness). She was quite welcome to the bargain she had made. The letter also referred in opprobrious terms to the defendant's character. He denied that he struck his wife, or that she screamed, or that the boarder interfered. He was not turned out of Mount Nelson Villas through ill-treatment and abuse of his wife. They first lived in apartments on the Beach-road, and he denied that he was turned out from there for quarrelling. He took the lodgings for three months, and paid £24. He only stayed there four days. Mrs. Bishop persuaded him to buy the furniture from the co-defendant. He did not every week while his wife was in England write to her and request her to come out; on the other hand, he advised her not to come out till the plague was over. He did not know at the time that his wife was going to live with Boutellier as his housekeeper, and he did not learn it till afterwards. He denied that he requested the Mother Superior at the Orphanage not to allow his wife to see the two children. He accused the co-defendant of being a scoundrel, and the latter then took him by the throat. On the occasion of the marriage, his wife only brought £5 worth of furniture. He had lately inherited £150, a reversionary interest of his cousin's estate. He was now employed as a temporary clerk of works in the Public Works Department at £20 a month.

Re-examined by Mr. Benjamin: He had raised the £150 in order to proceed

with the case. The balance of the money was with the solicitors in England for litigation. There was about £7,000 at stake; the matter had lapsed twenty years ago, and it might be difficult to get a penny. He forfeited the rooms at Beach-road, although he only stayed there two nights.

Mrs. Cornish, maternity nurse, spoke to having been called to attend the defendant while she was living at Albert-terrace. She was called in by the co-defendant, who, on the way, asked her to call the defendant "Mrs. Boutellier." Dr. Elliott performed an operation on the defendant. Witness spoke to acts of familiarity between the defendant and co-defendant.

Harry Edwin Carter said that he had been staying in a house for which he had made arrangements for a certain period, when the co-defendant came and told him that he had bought the house, and that he had engaged Mrs. Clifford as his housekeeper at £10 a month. He did not notice any familiarity between Mrs. Clifford and Boutellier. He did not remember making a statement in the St. George's Hotel to the plaintiff and another gentleman, Mr. Whitaker. He remembered the day referred to; they were all drunk together. Of course a man made statements then that he forgot afterwards. He was quite sober now. He was a friend of both parties. He denied that he had recently spoken to Boutellier about this matter. Clifford offered him £5 to sign an affidavit which was not true. Mr. Price Hughes, the plaintiff's solicitor, threatened to put witness in the "tronk" for perjury.

The evidence of Dr. Elliott, taken on commission, was read. He stated that on the birth of the child, which was premature, Boutellier came for him. He referred to the woman as Mrs. Boutellier, and gave the witness to understand that she was his wife. If Clifford had ceased to cohabit with his wife in the middle of July the child could not be his.

Mr. Benjamine losed his case.

Mr. Wilkinson called

Mrs. Clifford who said that during her residence in England she did not live happily with her husband. Directly after the marriage the unhappiness commenced. Her husband assaulted her, and on one occasion the marks caused by his blows obliged her to remain indoors for six weeks. Clifford came out here in December, 1900, and witness remained with her three children in England. Her husband wrote asking her to come out, and promised to turn over a new leaf, saying he would give up drinking. Witness thought drinking was the cause of his conduct. She did not keep the letters. Witness came out on the 10th June, 1901, and went to live with her husband. She remained with him up to the 19th August. During this time he was in the habit of using the vilest of language, and he also assaulted her. The landlady of the house said she could not put up with so much quarrelling, and so witness left the place. She did not remember saying she would go to the world's end with Boutellier. She told Mrs. Cornish that she would not go back to her husband. Witness went as housekeeper to Boutellier. She had not been allowed to see her two sons. Witness had some furniture when she was married.

Mr. Benjamin said he would abandon the claim for furniture.

By De Villiers, C. J.: It was not true that Boutellier ever lay on the bed as stated by Mrs. Cornish. When witness was ill people came and sat on the bed.

Cross-examined by Mr. Benjamin: Witness did not give instructions to her attorney that she had ceased to cohabit with her husband about a month after her arrival. Witness did not fix the date after seeing Dr. Elliott's evidence. Witness dared say that Boutellier had kissed her in sympathy when she had been crying over letters from her husband; and so had Mrs. Cornish.

Re-examined: Witness remembered the 19th August because it was the date of the Royal procession.

By De Villiers, C.J.: Witness was still housekeeper to Boutellier. She wanted the custody of the girl, who was 3½ years old, and she wanted access to the boys.

Albert Edward Boutellier, cabinet-maker, said that on a day in the middle of August he heard the cries of the children, and came downstairs. He saw Clifford standing with a stick in his hand and the woman lying on the floor. Witness arranged with Mrs. Clifford that she should act as his housekeeper. Wit-

ness denied the allegations as to adultery. Witness had sat on the bed, but had never laid down. Witness went to the doctor's on the occasion of Mrs. Clifford's confinement. He might then have referred to her as Mrs. Boutellier, in view of the fact that she was in such a condition. He might have kissed her in sympathy in the presence of Mrs. Cornish. From the language witness had heard Clifford use, he should not think him a proper person to have charge of the children.

Cross-examined by Mr. Benjamin: Witness did not give the doctor to understand that Mrs. Clifford was his (witness's) wife. Witness could not swear whether he told Mrs. Cornish to call Mrs. Clifford Mrs. Boutellier.

This concluded the evidence, and counsel were then heard in arguments on the facts.

Mr. Benjamin said the plaintiff would be content to have the custody of the two boys, and was willing to leave the girl with the mother, and to contribute 5s. a week as maintenance if she led a proper life.

De Villiers, C.J.: The chief question to be decided in this case is whether the first defendant has been guilty of adultery with the second defendant. The defendants themselves deny such adultery, but I am satisfied from the evidence given on behalf of the plaintiff that the adultery was committed. There is no direct evidence of adultery, but all the circumstances of the case lead to the conclusion that the connection between these two was a guilty one. The taking of her as a housekeeper was a mere blind. It may be, no doubt, true that he was induced to take compassion upon her by reason of her husband's ill-treatment of her. That may be the case, but I have no doubt whatever that their connection was a guilty one. The doctor's evidence in regard to the birth of the child satisfies me that the child, which was born in February, was not the plaintiff's, but was the child of the second defendant. He engaged a doctor, and told the doctor to come and see Mrs. Boutellier. He told the nurse to call her Mrs. Boutellier, and I quite believe the evidence of Mrs. Cornish as to what took place while she was attending as nurse to the first defendant. I quite believe her statement as to the familiarity of the first defendant with the second. There is no suggestion made that on the occasion in which they were seen together on a bed there was any adultery, but the fact that they were lying together on one bed goes very far to show what were the previous relations between the two. Then there was also the kissing; and all the other circumstances go to show that their relations were of a guilty nature. On the other hand, I am of opinion that this is not a case in which any damages whatever should be awarded to the plaintiff. His conduct has not been that of a kind husband. The language which he used towards her was, even with the provocation that was received, so gross as no husband should use towards his wife. He denied ever having used foul language, but a letter containing the foulest possible language was produced, and I am quite satisfied that if a man could deliberately sit down and write in such foul terms to his wife, he would use even fouler language when provoked by the altercations which from time to time took place. And if a man could use such language towards a wife it is not surprising that she became disgusted with him and sought for sympathy and consolation elsewhere. Therefore, I shall not in this case award any damages whatever to the plaintiff. As to the costs of this action, these, I think, should be paid by the second defendant, because, whatever foul language plaintiff may have used towards his wife, that was no reason for the second defendant doing anything to induce the wife to leave her husband. It was his duty to have acted as peacemaker, instead of which he took her away. As to the claim in reconvention, alleging cruelty, that, of course, falls to the ground when once adultery is proved. Plaintiff naturally is entitled to the custody of the children, but the daughter is of very tender years, and for the present at all events the daughter must be allowed to remain in the custody of the mother. Plaintiff is to have the custody of the two boys, with the right of access for the defendant at all reasonable times and places. Defendant is to have the custody of the daughter of the marriage, with similar right of access for the plaintiff, and with leave to the plaintiff to apply again for the custody of such child. The claim in reconvention is dismissed, and a decree of divorce is granted, with costs against the second defendant.

Maasdorp, J., concurred.

[Plaintiff's Attorney: Price Hughes; Defendant's Attorney: C. W. Brady.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

ABRAHAMS v. KAISER BROS. { 1903. Mar. 11th.

Damage to house—Negligence of owner of adjoining property.

Through the defendant's negligent construction of a house on his land the house fell and part of the debris struck the roof of the plaintiff's house, which adjoined the new building. The roof was so much damaged that it became necessary to place a practically new roof on the plaintiff's house, and there was no evidence to show that the value of the house was increased by reason of the new roof.

Held, *that the measure of damages was the cost of placing the roof as nearly as practicable in the condition in which it was before the accident, and that the plaintiff was entitled to recover the amount which he had paid to the contractor for the repair of the roof.*

This was a claim for £185 damages, alleged to have been caused to the plaintiff's property by reason of the collapse of property in Sir Lowry-road, Cape Town, belonging to the defendants.

The declaration set forth that the plaintiff was the proprietor of certain landed property in Sir Lowry-road, Cape Town, where he carried on business as a forage and grain merchant, and the defendants, who were proprietors and speculators in land and buildings, acquired a plot of ground adjoining the plaintiff's property. They commenced to build, but on the 24th June their structure collapsed and came down upon the plaintiff's building, which was, in consequence, seriously damaged, as was also his stock. Plaintiff claimed £185, of which £153 was the amount spent on the repairs, £13 spent on tarpaulins to cover the stock, and £15 damage done to goods and cost of labour in removing the same. The defendant refused to pay the amount claimed. Defendants' plea admitted the first three paragraphs of the declaration as to the names of the parties and the ownership of the land and buildings. They said it was on the 23rd of May that the collapse took place. They admitted that some of the debris did fall on the plaintiff's ground and building, but denied that their building was constructed in a negligent or improper manner. They denied that they had admitted any liability or that they had requested the plaintiff to effect any repairs or arrange for the purchase of tarpaulins, or that they had said that they would pay for the damage. They further said that the plaintiff had not only done the repairs to his building required through the mishap, but that he had done repairs in excess of such damage. On the 13th February of this year the defendant's attorneys wrote a letter, in which they said they had no wish to indulge in expensive litigation, and that, while they could not admit their liability, they tendered £75, and taxed costs to date, in full settlement of the plaintiff's claim. They added that they should put in this tender at the trial

Mr. Searle, K.C. (with him Mr. M. Bisset), for plaintiff. Sir H. Juta, K.C. (with him Mr. C. W. De Villiers), for defendant.

The plaintiff in his evidence said that he owned a building in Sir Lowry-road, used by him as a forage and grain store. He bought it three years ago for £3,000. This was adjoined by property belonging to the defendants. Shortly before June he had to repair the roof a little, but the building itself was in good condition. The defendants bought land, and in April of last year they commenced to build. Jacob Kaizer came to him and asked him whether he wanted to make a party wall. Witness refused, and then the defendant said that whatever might happen he would give him a written guarantee against damage. Kaiser came again the following day, but witness still refused. Kaiser afterwards wanted to buy the

property, but witness told him that he would not take £7,000 for the property. The defendants did not lay a proper foundation for their building, but simply a few brick piers, about 18 inches high. Two stories were erected over the beams. The piers were close to the wall of witness's property. The whole building would be about 40 feet high. Witness's building was lower, 27 feet to 30 feet. On the morning of June 24 he found that the defendants' building had collapsed, and that his own building had been damaged. The roof was broken, and there was a lot of rubbish about, slates and bricks, and so on. Witness's store was filled with forage and grain—over 4,000 bags of grain, wheat, barley, and so on, apart from the oat hay. Rain was falling in upon his stock, which was damaged. From 80 to 100 bags would be affected He claimed for these £13, and £2 for labour for removing them. The whole damage would be over £200. He saw Jacob Kaiser the same morning; Kaiser said he was sorry, but it was not his fault. His man had done it, because he had taken some corner blocks out of the building. Kaiser told him that he must start with the work at once, and said he must remove his stock to a store which he (Kaiser) would provide. Witness suggested that tarpaulins be put over the stock, and Kaiser agreed, and said that tarpaulins could be used afterwards. About four o'clock the roof was covered. He got Davidson, the contractor, and they started to put on a new roof. The work occupied about three weeks. The contractor's tender was £153. Witness thought that was a very low price, and he was well satisfied with it. One of the "hips" of the roof was broken by the debris. The bricks for three or four feet down had been broken. There were also cracks in the wall. Damage was also done to the window frames. The roof had now been restored to as good a state as it was formerly in. Witness did not think any work had been done beyond that which was necessary to restore the roof to its former condition. Soon after the collapse of the building, Kaiser called on him and offered him men to put on an iron roof. He declined, however, to consent to an iron roof. Witness did not return the tarpaulins to the defendants, because when he sent in the bill they refused to have anything to do with it. He was still willing to hand over the tarpaulins if the defendants would pay for them. He had to have his name painted on the building again in consequence of the mishap. He did not get possession of the old materials.

Cross-examined by Sir H. Juta: His roof had four pitches. Kaiser's building fell in, and the debris fell almost all over the roof. It did not fall on one side simply. There was more than one hole in the roof. He was not aware that there were cracks in the wall before the mishap occurred. It was not true that Kaiser came and wanted to rebuild all witness's walls as a party-wall, but nothing was said about rebuilding. He did not know whether the debris was removed by Kaiser's men. He painted the whole building on the front. He had nothing in writing at the time the contractor began the work of restoration.

Re-examined by Mr. Searle: It was important after the collapse that the work should be begun at once, otherwise with the wet weather they might have lost £2,000 through damage to stock.

James Davidson, builder and contractor, Woodstock, said he had seen the building before the collapse occurred. The building had four sides to the roof, and it was a good one, with a slate roof. The walls were in good condition. He saw Kaiser's building after the accident; he could see the place where the piers had been. He should think they were about 14 by 18, and about seven feet apart. Kaiser's building was about 50 feet high at the front, while the plaintiff's would be under 30 feet. Kaiser's building was composed of dagar, and it had not been plastered. Witness was being questioned as to the cause of the collapse, when

Sir H. Juta interposed, and said that there was no need to go into the question.

De Villiers, C.J., said he did not understand that the defendant admitted liability for the collapse.

Sir H. Juta: If we tender we must admit liability.

De Villiers, C.J.: If you admit negligence then we shall have no need to consider the question of negligence.

Sir H. Juta: It is a mere question of how much; we do not admit negligence.

Mr. Searle: The defendants' attorneys say, "Although the defendants cannot admit their liability for any damage, etc."

Sir H. Juta said that for the purposes of the case he would admit liability to the extent of the tender.

Mr. Searle said that would shorten the case considerably, and that there were certain witnesses whom it would not now be necessary to call.

Witness (proceeding) said he could not give a tender at once, but it was important that he should begin the work at once. If it was said that there was only one hole in the roof, then that hole was all the roof. The main principal was broken. He did not use the old material from the roof; it was understood that the defendants would take the old materials. Kaisers had two men for one day helping to remove the debris. He denied that he did a good deal of unnecessary work. The roof was about as good as prior to the mishap, but the walls received a shock, and they were not as good as before, and on one side had gone out of the perpendicular. The front of Kaiser's building was strongly built, heavy in the face, and the structure fell inwards and about 20 ft. of material dropped on the plaintiff's building. There was a foundation to the building.

Cross-examined: The roof was entirely new, except for the six principals. He put on new guttering. Mr. Godfrey, a plumber, tendered for some of the work, the amount of his tender being £57. Witness used wood of the value of £37. He used none of Kaiser's wood for the roof; the wood from Kaiser's was used for the hoarding in front of the building. He denied that he took materials belonging to some other people, for which Kaisers had to pay. A little rain fell on the 24th June. There was a hole on the side of the roof next Kaisers' buildings, and there were holes on two other sides. Witness could not form an estimate at once, because he could not see the full extent of the damage. He used 2,800 bricks at £5 a thousand.

De Villiers, C.J.: From what you saw it was necessary, in order to make it a decent job, to do everything you did?

Witness: Yes.

To put it in the same condition as it was before?--Yes.

Witness said that all the old rafters removed were put into Mr. Kaisers' building.

Richmond E. Richards, architect, of Woodstock, said he was called in to make an estimate of the damage. The whole side was nearly broken in, and the plates on the walls had been shifted. It was absolutely necessary to have a new roof. As to the tender of Mr. Davidson, it was a wonder to witness how he came out successfully with it. Witness estimated the work would cost £200. It was necessary to rebuild parts of the walls.

Cross-examined: Witness could not swear that a board was broken on the three sides other than the one nearest Kaisers'.

Re-examined: The whole roof was strained and shifted, and everything had to be removed before the roof could be restored.

Ernest J. R. Jansen, plumber, deposed that about a month before the accident, he had repaired the roof, which was, in his opinion, as good as new when he had finished.

Daniel Mills Abrahamse, son of the plaintiff, said that in June he was managing the Sir Lowry-road establishment for his father. He saw the building after the accident. The roof was smashed in and covered with debris. On the first layer about 80 to 100 bags of cereals, bran, etc., were damaged by rain and debris. Of these about a third had to be entirely thrown away. The rest had to be removed to another store. Witness considered that £13 was a reasonable amount to charge for the goods damaged. As a fact, the damage amounted to £200, the goods below for about five or six layers being damaged. Witness did not know of this when the account was sent in. There was rain while the roof was being repaired, and in witness's opinion it was necessary to get tarpaulins. Everything was done to prevent damage to the goods.

Mr. Searle closed his case.

Sir Henry Juta called

Charles Stewart, clerk to the Meteorological Commission, who produced records of the rainfall in Cape Town for the month of June. From the 22nd to 25th there was no rain. The records were taken at the S.A. College and Burg-street. From the 26th to the 30th there was rain.

Thomas Swain, building inspector in the employ of the Cape Town Council, deposed to having inspected defendant's and plaintiff's buildings. He found a good amount of debris had fallen on the plaintiff's roof nearest Kaisers', where

there was a hole about five feet in diameter. On the other sides there were slates removed by the shaking, but there were not what would be called holes. Witness considered that the roof could be repaired without the whole being removed. He thought that £50 or £60 would be a fair amount to allow for repairing the roof.

Philip Booysen, foreman builder to defendants at the time of the accident, said he made a careful inspection of the roof immediately after the accident. On the three sides farthest from Kaisers', slates were shifted, but no woodwork was broken excepting one piece, which was easily to be replaced. He did not think it necessary to put a new roof on. By stripping the one side he could have made a better job of it than it was before. He would have done the work for £40, allowing for a profit. Witness had seen the contractor's men taking away the old material from the roof; it was not deposited in Kaisers' building. Some of the rafters were rotten through old age. Witness estimated the cost of repairing the wall at £7 10s. After the accident witness examined the bags of grain with young Abrahamse. Witness then saw no damage, and Abrahamse did not point out any injury. Witness remembered Mr. Kaiser offering to repair the damage. Abrahamse then said: "No; I have given it to Mr. Davidson."

Cross-examined by Mr. Searle: If a new roof had to be put on witness considered £150 excessive. Witness would undertake to do a roof at £5 per square. There were 14 squares on that roof. Witness thought the brickwork Davidson did was worth about £15. He considered this work unnecessary.

David Thomas Godfrey, plumbing and drainage contractor, Cape Town, said he was doing work on Kaisers' building when it collapsed. He had previously worked on the plaintiff's roof; it was an old roof. During the mishap there was one hole knocked into the roof of the plaintiff's building on one side, besides a little more damage. On the other side there was very little damage, and no hole had been caused. He afterwards did work on the plaintiff's building after the collapse. He considered that after the collapse of the building it could have been made watertight, as it was before, without taking down the whole of the roof. The defendant's wall did not fall on the plaintiff's roof; it was only some of the debris that fell. Defendants' wall fell inwards. His account amounted to £57. He considered that all the work which was necessary to be done in the way of plumbing and slating in order to restore the roof to its former condition could have been done for £20. He asked Mr. Davidson what he was going to do. The latter said that Mr. Abrahamse told him to put on a new roof. Witness did not think that a new roof was necessary. There were cracks in the front wall of plaintiff's building before the collapse occurred. It was usual for contractors to provide canvas when they undertook repairs to buildings such as this. If the work actually required had been done, nothing like so much canvas would be required as the plaintiff put on the building.

Cross-examined by Mr. Searle: He did box guttering, ridging, and slating on the plaintiff's building, but no wood work. He did not examine the premises with a view of making an estimate of the whole work. He would not pit his evidence as to whether the work executed was necessary against the evidence of an architect. He saw some cracks in the plaintiff's wall before the collapse happened, but he would not say whether they were merely cracks in the plaster.

By De Villiers, C.J.: He did not remove the slates. He saw the slates when they were off; the under parts were perfectly rotten, and were unfit to be used again. The boards on the other side furthest from Kaisers' building would have been fit to use again. That side was perfectly sound except for a few slates.

J. Mackay, building contractor, Cape Town, said he was doing contract work on the defendants' building when that structure fell in. On the side of the roof, near the defendants' building, two holes were caused in the plaintiff's building by the collapse, but on the further side very little damage had been caused. He did not think there was any need to put a new roof on. He should have been prepared to put the roof into order for £40 to £50. Materials belonging to him were taken away by Abrahamse's men, and had to be paid for by the defendants.

Cross-examined by Mr. Searle: He did not go inside the plaintiff's building. He saw the damage which had been done from Kaisers' wall. He did not make

the inspection for the purpose of framing an estimate. He would have patched up the plaintiff's building so as to make it waterproof for £40 or £50. He would have made everything good. He denied that all the rafters were broken. He saw the rafters from defendant's building. Lime, cement, and sand taken away by Davidson's men belonging to him was paid for by Kaisers to the amount of £1 2s. 6d.

[Maasdorp, J.: What was it caused the building to collapse?]

Witness: I believe there was a column a little out of plumb, and the foreman, I think it was, went to put two uprights alongside the beam that it was resting upon.

[Maasdorp, J.: Had you any responsibility for this?]

Witness: No; I was simply doing the plasterwork.

Sir H. Juta said that at the inquest it was found that the work and the material were very good, and what was found by the magistrate was that there was a column out of plumb, and he was going to put it right; but it did not appear to have been underpinned properly.

Mr. Searle said that that was not their evidence. There were some very important deviations from the plans as submitted, and the building inspectors were hauled over the coals in regard to the matter.

Jacob Kaiser, one of the defendants, said that before the building collapsed he spoke to the plaintiff about having a party wall. Plaintiff said that if they would give a guarantee in case the walls came down then he would agree to have a party wall. Plaintiff's was an old building. He inspected plaintiff's building after the collapse. There were two holes on one side, and on the other side there were simply a few slates off. On the other three sides the building was in perfect order. He offered to the plaintiff to repair the damage, and said he would cover it in the meantime. Plaintiff said he had his own contractor. Nothing was submitted by plaintiff to witness. He did not receive any of the old material. He gave Davidson permission to take wood for the hoardings and the roof, and the latter also took cement and so on. The contractor took down a large portion of the wall; witness considered that was quite unnecessary. He thought that the tender of £75 was sufficient to cover any damage done by the collapse. He made no arrangement about the tarpaulins.

Cross-examined by Mr. Searle: He had no conversation with the plaintiff about the tarpaulins. He did not mention anything of that kind to the plaintiff. Plaintiff told him afterwards that he had bought tarpaulins. He was running up this building of his without an architect. There was, of course, the building inspector. The piers were shown on the plans; in some places were solid walls. He could not go on with the building according to the plans, and he found it necessary to make a deviation. There was only one of the rafters that was cracked. The plaintiff's store had to be covered at once. He knew the day afterwards that Davidson was working at Abrahamse's building. He spoke to the plaintiff, and the latter said he should not take advantage of witness. He did not erect buildings for any one else. He did not see any damage done to the plaintiff's stock. He never suggested to Abrahamse that the stock should be removed. There was very little rubbish lying on the bags in the plaintiff's store. It was not true that 30 or 40 tons of material fell on plaintiff's building. He saw a load of old material cleared away from the plaintiff's building. He supposed that a good deal of the old material was built into the building again.

Re-examined by Sir H. Juta: After he had given the wood for the roof he did not expect any further claim to be made upon him.

By De Villiers, C.J.: He admitted liability for the damage done to one side of the plaintiff's roof. The reason why he denied liability in his plea was that he thought the materials which he supplied towards the repairs would be sufficient to clear him of all liability. He could have done the work cheaper than the contractor.

De Villiers, C.J.: Yes, but you see your roof might have come down in the same way that your building came down.

Sir H. Juta pointed out that at the inquest there was no question as to the workmanship.

Sir H. Juta closed his case, and counsel were then heard in argument on the facts.

De Villiers, C.J.: According to the pleadings in this case the defendants have all along denied all liability in respect to the damage done

to the plaintiff's building. The plea expressly denies any negligence and any liability, and it was only some time after the plea had been filed that a letter was written on behalf of the defendants to the plaintiff, tendering the sum of £75 in full satisfaction of any damage done. But even in that letter there is a disclaimer of any liability, and consequently a disclaimer of any negligence. The evidence, however, has clearly established negligence. This wall was certainly constructed in so negligent a manner as to cause the fall of the house and serious damage to the plaintiff's property. Now, what is the measure of damages in a case of this kind? Clearly the measure of damages is what it would cost the plaintiff to replace his house as nearly as practicable in the condition in which it was before the damage was done. It is not his duty to patch up the work just as he can, but to make it as good and serviceable a building as it was before. Now, the evidence is that it was a perfectly sound house before the damage. The roof was sound, and the building was quite capable of being used as a storehouse for the cereals which plaintiff kept in the place. Then came this damage, which plaintiff had to repair. If his house had been entirely destroyed, and he had consequently been obliged to build a new house on the site there would have been good ground for holding that some allowance should be made for increased value of the new building as compared with the old. But the old walls remained and a practically new roof was added. There is no evidence whatever that the house with the new roof is more valuable than the house was with the old roof. The plaintiff was quite satisfied with the old roof, and he would not have had it replaced by a new roof unless the damage was such as to necessitate the expense. No doubt the main damage was done on the side of the house on which the fall occurred, but the shaking was sufficient to remove some of the slates on the other side, and according to some of the witnesses for the plaintiff, the shaking was so great as to shift the roof plates several inches on the wall. Well, one doesn't need to be an architect or a builder to understand that such a severe shaking would wrench the whole thing out of joint and, in order to make a good job of it, that it would be necessary to construct a new roof. Upon this point we have the evidence of the architect who examined the place and gave his opinion as to what was necessary, and of the contractor who gave his evidence in a very intelligent manner, and who did what he says was necessary. But great reliance is placed by defendants' counsel upon the evidence given by Swain. Well, no doubt Swain does not go quite so far as plaintiff's witnesses, but he does not give his evidence with that certainty which would justify the Court, by reason of his evidence, in entirely setting aside the evidence for the plaintiff. He admits he did not inspect the building solely for the purpose of repairs, and I have no doubt if he had gone there with the view of deciding as a contractor what work would be necessary to replace the roof he would have inspected more closely, and would have given a considerably greater estimate of the damage. For the rest all the witnesses for the defendant were somewhat connected with him, and could not give that perfectly impartial evidence which is desirable. I am satisfied on the whole of the case that practically a new roof was necessary in order to place this building in the condition in which it was before the damage. The price of the contractor was, no doubt, a very liberal one, and I am certain it must have paid him very well, but, still, under the circumstances the plaintiff did the best he could —he selected a competent contractor, and he is entitled to recover the money he paid to replace the roof. For the amount of £153, therefore, judgment will be given. Then as to the extra labour and damage to the goods I am satisfied that the extra labour and damage amounted to even more than the amount claimed, and for that also judgment will be given. As to the waterproof canvas I am not satisfied that the plaintiff is entitled to recover. I am not satisfied either that the painting was necessitated by reason of the damage. Judgment will be for the plaintiff for £168 and costs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset; Defendants' Attorneys: Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

ADMISSIONS. { 1908. Mar. 12th.

Mr. Schreiner moved for the admission of Percival Carleton Gane as an advocate.

The application was granted.

Mr. Benjamin moved for the admission of Emil van de Sandt de Villiers as a conveyancer.

The application was granted.

WHITE V. BARNARD.

Mr. Gardiner mentioned this case, in which judgment was given on Tuesday, and asked that execution be stayed on the claim in convention, so as to enable the defendant to bring a fresh claim in reconvention next term.

The Chief Justice: Have you given notice of this application?

Mr. Gardiner: I understand that notice has not been given.

The Chief Justice: Very well, you must give notice.

PROVISIONAL ROLL.

EDWARDS V. SAACKS.

Mr. Benjamin moved for provisional sentence on certain conditions of sale for two sums of £193 and £45, less £60 paid on issue of summons. The conditions provided for payments by instalments, and on failure of an instalment, the whole amount became due.

Application granted.

MIKO V. SHENKER AND PERIL.

Mr. Russell moved for provisional sentence on a promissory note, due on the 12th February, 1902, for £20, with interest and costs.

De Villiers, C.J.: The document is unstamped; you must have a proper stamp on it.

VAN DER BYL AND CO. V. PEACHY.

Mr. Van Zyl moved for an order for the sequestration of the defendant's estate to be made final.

Order accordingly.

JONES V. MANSHOM.

Mr. P. Jones asked for judgment on a mortgage bond for £3,000, together with interest at 6 per cent. from the 15th April, 1902, and also applied that the property be declared executable.

Judgment accordingly.

CONDES V. SELITZBY.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £2,500, together with interest from the 1st July, 1902, due by reason of the non-payment of interest, and for the property specially hypothecated to be declared executable.

Application granted.

CONDES V. ISAACS.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £650, with interest at the rate of 6 per cent. from the 1st July, 1902, the bond having become due by the non-payment of interest, and also for the property hypothecated to be declared executable.

Application granted.

DE MARILLAC V. PEW AND CO.

Mr. Nightingale moved for provisional sentence on two promissory notes for £150 and £225 respectively, the defendant being sued both in his private capacity and as trading under the style of Edward Pew and Co.

Application granted.

DESCHAMPS V. TOTHILL.

Mr. Rainsford moved for provisional sentence on a promissory note for £240, with interest which had accrued.

Application granted.

SHARPE V. GLENDINNING.

Mr. M. Bisset moved for a decree of civil imprisonment on an unsatisfied judgment given by this Court for £85, together with taxed costs and charges. Respondent in default.

Decree granted.

LIQUIDATORS OF THE S.A. MINERAL WATER CO. V. CHETTY.

Mr. Buchanan moved for a decree of civil imprisonment against the defendant,

The summons, he said, called upon the defendant to appear there that day to answer a judgment obtained against him in the Magistrate's Court, Cape Town, on the 26th August last, and to pay the amount due, and unless he did so to show cause why a writ of attachment should not issue. The defendant had left the Magistrate's jurisdiction, and so a writ of attachment could not be granted against him by the Magistrate, or, if granted, it was not effectual. The amount of the debt was £120, with interest at 6 per cent. from October, 1902.

Decree granted.

FRASER V. GOODWRIGHT AND CAMM.

Mr. Benjamin moved for the provisional order granted by the Court on the 26th February for the sequestration of the defendants' estate to be made final.

The defendant Goodwright opposed the application, and said he was willing to pay the money if allowed time. He had paid more than half his share now, his partner had left him, and he could not pay the whole account at present, but if given a few months he would pay everything.

De Villiers, C.J.: How do you propose to pay it?

I will pay within four months.

Mr. Benjamin: I think the defendant was arrested going out of jurisdiction.

De Villiers, C.J.: Did you not take a passage to Port Elizabeth under an assumed name?

Yes.

Mr. Benjamin said the defendant had had a large business at Middelburg, the business had been disposed of, and they did not know what had become of the assets. There was nothing left, and this man had attempted to go out of the jurisdiction. Mr. Benjamin added that the amount of the debt was £130 14s.

De Villiers, C.J.: Can you give security for that amount?

My property is worth much more than that. Defendant added that he wished to go home and raise the funds among his friends.

De Villiers, C.J.: I am afraid we cannot help you.

Order granted as prayed.

ILLIQUID ROLL.

MCKEGG V. EVENNETT. { 1903. Mar. 12th.

Mr. P. Jones applied for judgment under rule 329d for £135 19s. 8d., balance of account due in connection with the sale of certain goods.

Application granted.

SCHIESEKAT V. DAVIES.

Mr. Alexander applied for judgment under rule 329d for £45, money lent on bond, and £19 10s., money paid by plaintiff, with costs of suit.

Granted.

SKIPPER V. SCOTT.

Mr. Rainsford applied for judgment in this matter in terms of consent paper.

Judgment accordingly.

SILBERBAUER V. ROSENBLATT AND OTHERS.

Mr. Alexander applied for judgment under Rule 329d for £69 1s. 11d., balance of account for professional services and money disbursed with interest a *tempore morae*.

Application granted.

SAUERLANDER V. SCOTT.

Mr. Searle, K.C., moved for judgment in default of plea for £241 7s. 8d., being half share of certain promissory notes for which the defendant was liable.

Application granted.

GENERAL MOTIONS.

ROSS V. NATIONAL BANK. { 1903. Mar. 12th.

Arrest—8th Rule of Court—Confirmation—Provisional Order of Sequestration—Anticipation of return day—Release from imprisonment—Ord. 6 of 1843, sec. 23—Security.

R., who was indebted to the bank in a sum of over £4,000 was arrested at the instance of

the bank manager under the 8th Rule of Court while attempting to quit the Colony under an assumed name. The bank now applied for a confirmation of the writ of arrest. This was opposed on behalf of R. on the ground that he had obtained a provisional order of sequestration and he now claimed his discharge from prison, but consented to the return day of the provisional order being anticipated and the order at once made final

Held, *that the Court had discretion under Section 23 of the Insolvent Ordinance either to grant or to refuse the confirmation of the order for civil imprisonment. In the circumstances the Court in this case ordered the prisoner's discharge on his finding security to attend the meetings of his creditors in £500 and granted a final order of sequestration.*

This was an application by the plaintiff, Hugh Stewart Campbell Ross, for his release from gaol. Mr. Searle, K.C., appeared for Ross, and Mr. Schreiner represented the bank.

Mr. Schreiner asked that the writ of arrest should be confirmed. He submitted that the writ was rightly taken out, because, on the affidavit, the man was shown to be about to leave the Colony.

The Chief Justice: But the effect of this provisional order is to stay all proceedings, is it not?

Mr. Schreiner: It does not absolutely stay proceedings. The position would be this, that the costs which will probably have been incurred in such a matter would be unprotected in so far as the insolvency is concerned.

Mr. Searle read the petition of the applicant, which stated that he was arrested at the instance of the National Bank of South Africa, and lodged in the gaol at Cape Town, where he still was. He was indebted to the said bank for something over £4,000, being money advanced to him for the purpose of buying cattle for the Repatriation Department, Transvaal. The cattle were brought from Basutoland, where the inspector passed them. He paid for them by drawing cheques on a bank in Johannesburg. The said cattle were afterwards quarantined at Edenburg, and the Transvaal Repatriation Department refused to take them, and the petitioner was forced to sell them at a loss. It was the petitioner's intention to leave for England for the express purpose of raising funds for the discharge of the said debt. The petitioner had, and still was, willing to discharge the said debt.

Mr. Schreiner read the replying affidavit, which set forth that the applicant had not paid in the proceeds of the cattle which he appeared to have realised. Upon his arrival in Cape Town the applicant applied to the Standard Bank for a draft. It appeared that the offer made by the debtor was not a bona-fide one. He told deponent that he had no cash, whereas it seemed that he handed to the manager of the Grand Hotel a considerable sum of money, alleged to be £400, for safe custody. He also said he had remitted no money to England, and as a matter of fact drafts for £425 had been issued in his favour. Applicant's wife had been staying at the Grand Hotel since his arrest, and she was now staying at the Mount Nelson. Deponent was convinced that, if released, the petitioner would leave the country, and would not be in attendance to meet the creditors of his insolvent estate. From inquiries which had been made, it would appear that the petitioner had been making away with his assets, and it was imperative that he should be in attendance to meet his creditors to answer certain questions. A further affidavit set forth that the moneys had been advanced in November, 1902, and that the defendant had at the time of his arrest booked passages by the German. He was staying at the Grand Hotel under the name of Ford, and he booked his passage under the name of Rowe. It was alleged that he was possessed of the following moneys: Deposited with the manager of the Grand Hotel, £400; Standard Bank, £900; passage of the petitioner and his wife and manservant, £100. At the interview with the applicant he said he was insolvent, and unless his friends came to

his assistance he should surrender his estate. Deponent was of opinion that, if released, Ross would leave the country and defeat his creditors, and that it would be to the benefit of his creditors if his estate were placed in sequestration in the hands of the Master of the Supreme Court.

Mr. Searle read the answering affidavit of the applicant, which set forth that the draft had been cancelled and recollected, and had since been tendered to the respondents. He denied that he had handed £400 to the manager of the Grand Hotel, or that when asked if he had any money he said, "No," and he declared that the only money he had in his possession was £20. He declared that the said draft was never paid in England. He denied that his wife had been staying at the Grand Hotel, and that the money was being used for her maintenance. He repeated that he wished to proceed to England to raise money to meet his debts, and that he would return to South Africa after an absence of three months. He denied that he had been making away with or squandering the assets of the estate. The cattle were quarantined, having contracted lung sickness, and he could not leave them, and he was prevented from attending to other cattle on which he had an option. The passage he took on the German was for himself and his wife only, and represented about £60. There were no other assets in his control or possession. With the exception of the draft that he tendered to the respondents, he was not possessed of any other assets. He denied that he wished to leave South Africa in order to defraud his creditors. He had asked that Mr. Harry Gibson should be appointed *curator bonis*.

Mr. Schreiner intimated that the manager of the bank and the manager of the Grand Hotel were prepared to give evidence if the Court thought it necessary.

Mr. Searle said the point was: what was to be gained by keeping the man in prison? He owed this money to the bank, and he said he had actually tendered the draft, and he was willing to give up everything to pay his debts. He admitted his insolvency. The return day was not till the 14th April, and it would be open, he supposed, to him to file his schedule of debts. It seemed a pity that the proceedings in the estate should be delayed so long, and he submitted that no good object could be gained by keeping the man in prison.

[De Villiers, C.J.: What was his object in going under an assumed name?]

Mr. Searle: That I don't know. It is possible that he did think they would try and stop him. Still, the mere fact that he did that does not show that he was going with a bad motive. Even now he says he would like to go and endeavour to get funds to pay his debts, and come back in three months. Whatever name he had gone under, they would have stopped him.

[De Villiers, C.J.: Is it not a case in which the whole of his conduct will have to be minutely examined?]

Mr. Searle: That is so.

Counsel consented to the order being made final, and to the discharge of defendant, upon giving security.

After argument as to the amount of the security,

De Villiers, C.J.: It seems to me to be in the interests of all parties that the provisional order should now be made absolute. That is consented to by both sides, and will be granted. In regard to the custody of the defendant, it is quite clear that, under the 23rd section, the Court is not bound to release the defendant. The conditions on which the Court would release him are those mentioned in the 22nd section. In the present case, if the Court sees cause for refusing to make the order, it is quite competent for the Court to do so. Now, in my opinion, this order should be refused under all the circumstances disclosed by the affidavits, unless the defendant is prepared to give security, and the question is: what should be the amount of the security? Now that amount should not be prohibitive, and I think that anything approaching £4,000 would be so, but at the same time the amount should be one which the defendant may reasonably be expected to find security for. I am of opinion that the sum of £500 will be sufficient. The Court will confirm his arrest, and order defendant to remain in custody until he gives security to the satisfaction of the Registrar of the Supreme Court in the sum of £500 that he will remain in the Colony for a period of two months and appear at all meetings of creditors of his estate which he may lawfully be required to attend. I think the costs

should be made a charge against the insolvent estate.

[Applicant's Attorneys: Friedlander and Du Toit; Respondent's Attorneys: Van Zyl and Buissinné.]

Ex parte PALMER.

Mr. M. Bisset moved to make absolute a rule *nisi* under the Derelict Lands Act.

Granted.

Ex parte BERMAN. { 1903. Mar. 12th.

Lunatic—Curator—Domicile.

S. had been appointed curator to the person and property of his wife, who was of unsound mind. Thereafter a rule nisi *was obtained calling upon S. to show cause why his appointment should not be cancelled. On an application to have this rule made absolute,*

Held, *that as it had not been brought to the notice of the Court that all the said property was situated in the Transvaal and that S. was there domiciled the application must be granted.*

This was an application by one Jacob Berman to make absolute a rule *nisi*, calling upon Morris Segale to show cause why his appointment as curator of the person and property of his wife Rebecca Segale (born Berman), should not be cancelled.

The affidavits upon which the rule *nisi* was granted were read.

In a replying affidavit, Segale denied the allegations therein contained as to his ill-treatment of his wife, and a number of witnesses deposed that he had treated her affectionately.

Mr. Searle, K.C. (with him Mr. Melius de Villiers), appeared for petitioner; Sir Henry Juta, K.C. (with him Mr. J. E. R. de Villiers), for the respondent, Morris Segale.

Mr. Searle read affidavits of Mrs. Segale's father and others to the effect that the respondent had grossly under-stated the value of Mrs. Segale's property in Johannesburg, that she had been ill-treated by the respondent, and that this ill-treatment had in a large measure brought about her present mental condition, that the respondent was anxious to obtain the property and realise upon it, and that he then intended to go to America. It was further alleged that the respondent only paid £7 towards his wife's maintenance, and not £15 a month as he had stated, and that she was kept at the asylum very scantily clad. Counsel, in support of the present application, pointed out that the respondent had only been a refugee in this colony, that he had lived in Johannesburg, and that his interests were entirely in Johannesburg. Segale did not give the Court a proper statement at the time the order was made with regard to the increase derived from the estate. He stated that the wife's estate in Johannesburg produced £40 a month. It now appeared pretty clear that the estate was a very valuable one, the respondent said £5,000, while they in the present application said it was worth £10,000 to £12,000, and that it was producing a rental of £90 per month at the present time. That showed that Segale did not put the matter before the Court properly. Counsel submitted that under the circumstances the Court should have still less hesitation in altering the order. He suggested that the proper course would be to appoint the Chief Rabbi of the Jewish community as the curator of the wife's property, and to relegate the matter of a curator of her property to the Transvaal Court, where the property was at the present time the subject of litigation.

Sir H. Juta said that the application seemed to be made not upon the allegations contained in the affidavits, but upon quite other grounds as to jurisdiction. He submitted that all the allegations of ill-treatment were ill-founded, and had not been justified, and that the conduct of the respondent had all through been with the object of doing justice to the wife's estate. The statement that the respondent wished to go to America was denied *in toto*. Counsel could see nothing which had been adduced that day which should cause the Court to take a different course to that which they took when the matter was originally before the Court. What foundation was there for these allegations? Only the unsupported testimony of one person. Counsel questioned the *locus standi* of the father-in-law to come

into Court and ask that the previous order should be set aside, and that the costs should fall on the respondent.

Mr. Searle argued that it was very important that there should be an inquiry into the relations of the present curator with his wife's property. He contended that the Court would never have made the appointment if it had known the facts now before it.

De Villiers, C.J.: I am not prepared to say that there was any intention to deceive the Court on the occasion when this lady was declared to be of unsound mind, but I do say this, that if all the facts which are now known to me had been brought before the Court on that occasion, the order would not have been given. The petition then said that the wife owned certain property, and that it would be necessary in the interest of the said Segale to have the sanity or other condition of her mind ascertained. It is not here said that this property is situated in the Transvaal. It is stated that when the case came before the Court, the Court was informed that all the property was in the Transvaal. It is quite possible that that was stated, but I don't think it was brought to the notice of the Court that the plaintiff was domiciled in the Transvaal, and not in this colony, and certainly if that fact had been known, the Court would not have appointed him as curator both of her person and property. It is extremely important, and in fact absolutely necessary, that the person who was so appointed curator should be within the jurisdiction of the Court who so appointed him, and in the present case it is now clear that the respondent is not domiciled in this colony, and that his domicile is in the Transvaal. It is stated that he has bought some business which will give him interests in this colony, but the affidavit does not go so far as to show that he intends now to reside permanently in this colony. Then again, I was wholly unaware of the fact that an application had been made to the High Court by the present respondent to have certain property which was registered in his wife's name transferred into his own name, and that that application was then refused, because of the reason stated by Mr. Justice Solomon. It is said that that also had been mentioned incidentally, but that the matter was not brought prominently to the notice of the Court. It was an undefended case, and the Court, without knowledge of what had preceded between the parties, did not inquire minutely into all these circumstances. It now appears that the father of this lady and her brother are strongly opposed to the respondent being curator. It is said that they have no *locus standi*. In one sense, no doubt, they have no *locus standi*, but still the father and the brother have such an interest in the welfare of their relative, that they would be quite justified in bringing a matter of this kind to the notice of the Court, and the Court then, in its capacity as upper curator, if I may say so, of every unit in this colony, is bound to do everything it can to protect the interests of the lunatic; and the facts since brought to the notice of the Court are, at all events, sufficient to make me stay my hand, and to hold that the appointment already made should be cancelled, mainly for the reason that the respondent is not domiciled in this colony, and is unable to perform his duties, either as curator of the person or as curator of the property of the defendant. It is suggested that the Rev. Mr. Bender——

Mr. Searle (interposing): We suggested Mr. Hoffenberg, but we should not object to Mr. Bender.

Sir H. Juta said his client would have no objection to Mr. Bender.

De Villiers, C. J. (continuing) said: It is suggested that Mr. Bender should be appointed curator of the person. If he refuses to act, then that may be mentioned later. Then I think that this Court should also appoint a curator of the property, because moneys will have to be paid for and on behalf of this lady, and there must be some one to administer the moneys coming to her in this colony, and I think a fit and proper person would be Mr. Cheetham. It is for him, then, to apply to the High Court for such powers as he thinks ought to be granted. It may be that the High Court there will recognise this appointment, and give him the powers. It may be the High Court will say, "We will appoint our curator," but these are matters with which we have nothing to do. The Court has declared this lady of unsound mind, and it has to make provision for the care of her person and her property. The Court will there-

fore revoke the appointment of the respondent, and appoint the Rev. Mr. Bender as curator of her person, and Mr. Cheetham as curator of her property. With regard to the costs of this application, I do not think there has been any intention of concealment on the part of the respondent. I have no doubt that both the applicant and the respondent are only acting in the interests of the unfortunate lady, and her estate is an ample one, and I am of opinion that the proper course would be that the costs of this application should be borne by the estate.

Sir H. Juta: I take it that one part of your lordship's former order is not revoked, viz., that the money should be devoted to the maintenance of the wife and the maintenance and education of the children?

De Villiers, C. J.: Oh, yes, that part of the order is not touched.

[Applicant's Attorneys: Van der Byl and Van der Horst; Respondent's Attorneys: Friedlander and Du Toit.]

WOOLLEY V. MARNINS AND OTHERS.

Mr. Benjamin applied for an order calling upon the defendants to join in the partition of certain lands held by the plaintiff in common with the defendants. Counsel said he asked for judgment against both the defendants, but for costs only against one, the other defendant be understood having been formally joined to the suit.

[De Villiers, C.J.: Are you aware that one of the defendants is dead, and has been dead for many years.]

No.

[De Villiers, C.J. said the Sheriff's return stated he had been unable to trace one of the defendants, and that he was now informed that he died sixteen years ago.]

Mr. Benjamin said he had not seen a copy of the return, and he therefore asked that the case should stand over, so that they might see whether an executor had been appointed.

Order accordingly.

SANDERS V. STEIN.

Mr. Upington moved for judgment for £32 12s. 6d., account owing for certain work and labour done and materials supplied, with interest and costs, and he also asked for costs of the preparation of a declaration. He said that in this case the summons was issued on the 28th January, and an appearance was entered by the defendant on the 4th February through his attorneys, Messrs. Friedlander and Du Toit. Thereafter a letter was written by the defendant's attorneys tendering to pay £20. Then, after that, instructions were given to counsel to prepare a declaration on the 27th February. That was returned on the 28th, and then, on the same day, a letter was received from the defendant's attorneys notifying the plaintiff's attorneys that they intended to withdraw appearance. Appearance was not, however, withdrawn until the 10th inst.

De Villiers, C. J., said that the matter of the costs of the declaration was one for the Taxing Officer, who informed him that in this particular instance verbal notice was given before the declaration was drawn.

An order was granted for the amount asked, viz., £32 12s. 6d.

BRUSSEL AND CO. V. BEHN.

Mr. Russell applied for judgment under Rule 329d for £54 6s. 7d., for goods sold and delivered, with interest *a tempore morae* and costs of suit.

Application granted.

COZENZA AND CO. V. BRINSLEY.

Mr. Benjamin applied for judgment for £15, balance of account for goods sold and delivered.

Application granted.

MALLETT AND CO. V. BRINSLEY.

Mr. Benjamin applied for judgment for £177 2s., for goods sold and delivered.

Application granted.

REHABILITATIONS. { 1903. Mar. 12th.

Mr. De Waal applied for the rehabilitation of Jacobus Petrus Roux, whose estate was surrendered in 1894.

Granted.

Mr. C. de Villiers moved for the rehabilitation of Johan George Muller.

Granted.

An order was granted, on the motion of Mr. Alexander, for the rehabilitation of John Henry Smith.

On the application of Mr. Russell, an order was granted for the rehabilitation of Andrew James Allison.

Mr. Gardiner moved for an order for the rehabilitation of George Edward Mandy.

Granted.

Mr. Alexander applied for an order for the rehabilitation of Anne Fits Neville and Arthur James Pearson.

The application was refused, but leave granted to apply again in three months.

FIRTH v TOWN COUNCIL OF CAPE TOWN. { 1903 Mar. 12th.

Valuation—Section 93 of Act 26 of 1893—Subdivision.

The property of the applicant, on which there were a restaurant and a store, was valued for £3,000. After such valuation, he made additions to the store, whereupon the Town Council, at an interim valuation, increased the valuation not only of the store but also of the restaurant on the alleged ground that there had been a subdivision of the property.

Held, *that there was no such subdivision in terms of the 93rd Section of Act 26 of 1893 and that the Council had no right at such interim valuation to revalue the restaurant in respect of which there had been no improvement or change of tenancy.*

This was an application on notice calling on the Town Council to show cause why the decision of the Valuation Court with reference to the value placed upon certain property belonging to the applicant should not be reviewed and the valuation fixed by the Court set aside or reduced.

Sir Henry Juta, K.C., appeared for the applicant; Mr. Schreiner, K.C. (with him Mr. Gardiner), for the Town Council.

In his affidavit, the applicant, George Septimus Firth, deposed that in 1902 he bought from the S.A. Mutual Life Assurance Company certain property at the corner of Waterkant-street and Fish-lane, Cape Town, which then consisted of a restaurant in Waterkant-street and a store and yard in Fish-lane. The restaurant was then let on a lease for three years, at a rent of £16 a month. Applicant decided to rebuild the store, and made arrangements with the tenant of the restaurant, under which the latter gave up a portion of the restaurant and of the yard, in consideration of which the applicant reduced the rent by £4 10s. a month. He then proceeded to erect a new store. At the time of the purchase the Municipal valuation was £3,000. The Municipality of Cape Town recently made an interim valuation, and after deponent had appeared to object at the Court, the valuation of the restaurant, which had been reduced in area, was fixed at £3,500, and of the store, £3,000. The deponent referred to the valuation placed on other properties in the neighbourhood, and said a certain property in a similar position was valued at the rate of 19s. per superficial foot, whereas his property was valued at the rate of £3 13s. per superficial foot. He considered an equitable valuation, taking the property as a whole, would be £5,000; if taking separately £2,000 for the restaurant and £3,000 for the store. The divisional valuation, made six months ago, was £2,000. Mr. Henry Jones, valuer, made an affidavit in which he placed the value of the property at £2,500.

De Villiers, C. J.: How much did he pay for the property?

Sir Henry Juta: £6,000.

For the respondent Council, an affidavit made by Mr. J. R. Finch, the Town Clerk, was read. He said that there having been a sub-division of the property, a re-valuation was made. The new valuation was made by Messrs. Moller and Fock. At the time of the Divisional Council valuation, the new store was not built. Mr. Moller deposed that since 1901 there had been a great increase in the value of property in the City. He annexed a list showing the valuation of premises in that locality in 1901, and the amounts for which the same had since been sold. He considered that the value of £3,500 placed on the restaurant and £3,000 on the store was in each case fair and reasonable.

In an answering affidavit Mr. Firth said he did not admit that there had been any sub-division of the property.

Sir Henry Juta contended that the Town Council had no right to make an interim valuation of the property.

After argument, the Court reduced the valuation to £5,000, with costs.

De Villiers, C.J.: The owner of property within the municipality is bound to pay his rates according to the valuation, and he is therefore entitled to insist upon no alteration in the valuation being made without the sanction of the Act. In order to discover at what times there may be alteration in the valuation the Court has to refer to the 93rd section of Act 26 of 1893. Among the grounds on which an interim valuation may be made is the erection or improvement of existing buildings. In the present case there was a building improved, and in respect to that the Council was perfectly justified in increasing the valuation. Mr. Finch, in his affidavit, stated that the reason why there was an addition to the valuation, not only on the part on which the buildings were improved but also on the part of the ground in respect of which there was no addition or improvement at all, was because the property was deemed to be sub-divided. That was the ground on which the Council proceeded. Their counsel now states it was for another reason, that it was by reason of the fourth portion of the section. He (De Villiers, C. J.) found it difficult to understand what the words of that petition meant, but the Council were surely bound by what they themselves said, that the re-valuation of the property was by reason of a sub-division, and if there was no sub-division they would not be entitled to take advantage of the other portion of the section. He did not take this portion to be applicable to the case at all, but even if it were applicable, in his opinion the Council were bound by the reason which they stated, namely, that they re-valued it by reason of the property having been sub-divided. Now, in my opinion, the property was not sub-divided at all. Different portions of the property were devoted to different uses, but the meaning of sub-division, in my opinion, is a partition of the property. Well, if that is the correct reading of this section, then it is clear that all the Council were justified in doing was to have a fresh valuation of the new buildings erected, and not in any way to deal with the restaurant, to which there were no additions. The valuators had not, however, stated the exact valuation that they placed upon the improvement, but he thought that the proposal of the applicant was a fair one: that the reduction should be from £6,500 to £5,000. That would make an increase of £2,000 on the previous valuation. The applicant had expended £1,400 on the improvement, £2,000 I consider to be a fair amount to take in the absence of a special valuation by the Town Council of these improvements. In my opinion it would be a totally erroneous construction of the clause to hold that, merely because there had been an addition to one portion of the property, and a change of tenancy in respect to that portion, the Council would be entitled to revalue other portions in respect of which there was no change of tenancy and no improvement. The application, therefore, for reduction would be granted from £6,500 to £5,000, with costs.

[Applicant's Attorneys: Walker and Jacobsohn; Respondent's Attorney's: Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

PRESWICH v. KOENIG AND CO. { 1903. Mar. 13th.

Landlord and tenant—Extension of lease—Ejectment.

This was an action brought by Hilda Preswich, married woman, Cape Town, against Koenig and Co., merchants, Long-street, Cape Town, for an ejectment order in regard to certain premises in Jerry-street and for £500 damages.

The declaration set forth that the plaintiff was married out of community of property, that she had the sole control of her property, and that she was the owner of certain premises in Jerry-street, of which the defendants were formerly tenants, under a lease which expired on the 8th October, 1902, and that, after the expiration of the lease, the defendants continued on a monthly tenancy. A proper notice was given to the defendants to quit the premises on the 1st December. The plaintiff had sold the property to certain purchasers, to

whom she had to give possession on the 1st December, but the defendants refused to quit. The plaintiff claimed an ejectment order and damages to the amount of £500.

The defendants, in their plea, admitted the formal parts of the declaration, except that the plaintiff had sole control of the property. They said that in or about the month of July the plaintiff's husband, as her duly authorised agent, offered to renew the lease for a further period of two years, reckoned from the 9th October, upon the same terms and conditions; that that offer was made at the office of the defendants to one William Smith, a clerk in the employ of the defendants, and acting in their behalf, and thereafter the defendants' acceptance was communicated to the plaintiff's duly authorised agent. The defendants denied that they were ordinary tenants, or that the plaintiff was entitled to give them a month's notice to quit.

In reconvention, the defendants claimed that they were entitled to remain in possession of the premises.

Plaintiff's replication admitted that her husband had made an offer to renew the lease, but said that he was not duly authorised to make the offer so made on her behalf, and that such offer was not accepted by the defendants, and the alleged acceptance by the defendants was not communicated to her or her husband or any agent of the plaintiff.

Sir H. Juta, K.C. (with him Mr. Russel) for plaintiff; Mr. Searle, K.C (with him Mr. Alexander) for defendants.

Sir H. Juta said that the plaintiff, if her husband had made the offer, would endorse it, so that the issue would be narrowed down to whether there was any renewal of the lease. There was no written document in the matter.

Hilda Preswich, the plaintiff, said she was married to her husband without community of property. She was the registered owner of certain premises, No. 9, Jerry-street. The premises were leased to the defendants for twelve months in October, 1901. She showed Mr. Koenig over the property. The rental was £9 a month. While Koenig was the tenant her husband collected the rent on her behalf. Out of the money she paid the interest on a bond, and also the rates, and she used the balance for her own personal purposes. No negotiations took place between Koenig and herself with regard to a renewal of the lease. In October last she received an offer for the premises, and she eventually sold the property for £2,800 to Messrs. McLeod and McFarlane. She believed this took place on the 15th October. Possession was to be given on the 1st December. She sent notice to the defendants to leave the store on or before the 1st December. Messrs. McLeod and McFarlane had given her notice that they held her responsible for any damage sustained by them in not obtaining possession of the premises.

Cross-examined by Mr. Searle: She lost the letter sent to her by Mr. Koenig after notice had been given to the defendants. The premises were really two houses. Witness had lived in one house, and the other house was let as a store. Her husband was not present when Mr. Koenig came up to see her when the lease was arranged. Under the lease all the receipts were made out in her husband's name, and after that the receipts were made out in her own name. After the notice was given the rent was paid to the South African Association to the end of January. The South African Association were the agents of Messrs. McLeod and McFarlane.

Joseph Preswich, monumental mason (husband of the plaintiff), said his wife let the premises to Mr. Koenig. Witness collected the rents. He saw the defendants about the renewal of the lease about the beginning of the August. Mr. Koenig had previously complained that he had too much expense for haulage and coolie hire, and said he wanted a winch, which would cost about £20, and would have to be paid for by the plaintiff. Witness called at the office, and asked for Mr. Smith, Mr. Koenig's manager. He asked him if Mr. Koenig would renew the lease if he put up the winch. Mr. Smith said he did not know, but he would write to Mr. Koenig and ask him. Witness did not think they would put up the winch and not have raised the rental. In the beginning of September he asked Mr. Smith if he had heard anything, and the latter replied that he had heard nothing. About a fortnight later he met Mr. Koenig, who asked him when he was going to put up the winch. Wit-

ness asked him if he were going to renew the lease. Koenig said he had no time to discuss the matter now, and he then left witness. Witness heard nothing more, and afterwards his wife sold the property. He denied that he had thanked Mr. Koenig for having taken the store for two years. He had received no message from Koenig's representative, Mr. Smith. Witness denied that he had ever concluded a lease with Mr. Koenig. He did not undertake to provide Mr. Koenig with another store. The property was sold between October 15 and 20.

Cross-examined by Mr. Searle: He transacted all business in connection with the lease, such as receiving rents and doing repairs, and so on. He gave the receipts in his own name, and received the cheques in his own name. He himself sold the property, but it was on behalf of his wife. He admitted making an offer to renew the lease. That offer might have been made about the middle of July. At that time Mr. Koenig was absent from town. They never mentioned about renewing the lease for two years or any particular period. He had told Mr. Smith that he had thought of going to Europe with his family if he had suffioient means. He never offered Mr. Smith £5 if he could fix up the matter with Mr. Koenig. Mr. Smith did not stop him in Riebeek-street and tell him that Mr. Koenig had decided to take the place, and witness did not say, "All right." He had met Mr. Smith in Strand-street, and the latter then said he thought Mr. Koenig was going to take the place. He expected that if the defendants had accepted another lease they would have sent a letter of confirmation, and, as witness did not receive such a letter, he concluded that the lease had not been renewed, otherwise they would not have sold the premises.

Hector McLeod, of McLeod and McFarlane, said his firm had purchased the property in question, and they bought it in October. According to the terms of purchase, they were to take possession of the property on December 1. Witness saw Smith, who told him there was a rental lease between Koenig and himself. Witness offered to allow them to remain during December if witness could store some machinery there, and they paid the rent for that month. It was only on condition that they would go out at the end of the year that witness gave permission for them to remain for the month. Witness did not recognise their right to remain. Witness had imported considerable machinery to put in the store. Owing to not having the store, and being consequently unable to put up the machinery, witness had been unable to carry on the engineering business, and had been compelled to give out a good deal of work. The damages were continuing. Witness could not say the exact amount of damages which had been suffered, but it might be £800. No other store had been engaged; they could get no place.

Cross-examined: The S.A. Association were witness's agents in the matter, and were left to deal with Koenig in the matter. Smith told witness he would communicate with Koenig and let him know the result. However, witness received no communication from him. The firm did not know the association were receiving the rent; as soon as they found that out they stopped it.

Sir H. Juta closed his case.

Mr. Searle put in certain correspondence, and called

William Herbert Smith, chief clerk to Mr. Koenig, who said he held Mr. Koenig's special power of attorney. Witness knew of there being an agreement of lease for a year of these premises. Witness generally paid the rent. He always dealt with Mr. Preswich in regard to the property. Until the dispute in connection with the sale, he did not know Mrs. Preswich in the matter. At about the middle of July, Mr. Preswich called at the office, and asked witness whether Mr. Koenig would take the store on the same conditions for a period of two years, as he and his wife contemplated taking a holiday on the Continent the following year. Witness told him Mr. Koenig was away, but that he would communicate with him. Preswich appeared anxious in the matter, and said he wanted to leave the property with a good firm. He said he would make witness a present of £5 if he got Koenig to consent. Mr. Koenig returned on or about the 5th August. Witness spoke to him on the subject, and afterwards saw Mr. Preswich, and told him that Mr. Koenig was agreeable to take the store on the terms Mr. Preswich had offered him, viz., the same as in the existing lease, with the exception of the period named by plaintiff. At the end of October witness heard some-

thing, and in the early part of November he saw the notice to vacate the premises from Mrs. Preswich. Witness then went and saw Mr. and Mrs. Preswich, and reminded the former of the verbal lease. Mrs. Preswich took up the position that her husband had no authority in the matter.

Cross-examined by Sir Henry Juta: After seeing Preswich in July, witness did not write to Koenig about the matter. When Koenig came back, witness did not write to tell Preswich that Koenig was agreeable to renew the lease. He waited until he met Preswich casually in the street.

Mr. Searle intimated that the remaining evidence was that of the defendant, which had been taken on commission.

Maasdorp, J., said that he had read this evidence, and that it would therefore be unnecessary for Mr. Searle to read it to the Court.

Counsel having been heard in argument on the facts of the case,

Maasdorp, J.: The plaintiff in this case sues the defendant for an order of ejectment from certain premises situated in Jerry-street, and also for damages said to have been sustained by the plaintiff by reason of the defendant continuing to hold possession of the property, after he had received notice to quit. It would appear that an agreement of lease had been entered into between the parties in October, 1901, and that the lease was to be for twelve months, to expire on October 8, 1902. If no further agreement had been entered into by the parties, then the plaintiff would have been entitled to give the defendant one month's notice to quit, and would have been entitled to the possession of the property on the expiration of that notice. The question, therefore, arises, whether any further agreement was entered into by which this lease was extended. The defendant sets up as his defence that in August, 1902, he and the plaintiff had concluded a lease for a period of two years, to run from the expiration of the then current lease. The question the Court has now to decide is whether the lease alleged by him to have been then entered into was actually made by the parties. The defendant in this case seems to have conducted his business upon very careful business principles. On reference to his letter books, which have been produced, he seems to have gone in for extensive correspondenc on all sorts of transactions, and in this very month of August, when this lease is alleged to have been concluded, a large number of business letters have been posted up in his books. Considering the way the defendant carried on his business, one would have expected that in a matter of such importance as the lease, the arrangement would have been reduced to writing. In regard to the first lease in 1901, it seems that after the contract had been concluded between the parties the defendant was very careful to reduce the transaction to writing, and to send his written acceptance to the plaintiff. That was a very prudent way of doing business, and one would have expected him under ordinary circumstances to have carried out the same practice when he alleged the new contract was agreed upon. However, no document is produced which would constitute proof of any extension of the lease, and the whole case, therefore, depends upon the parole evidence which is produced in Court to-day. Now, I do not absolutely come to the conclusion because there is no document in this case, that it would necessarily follow that this lease was not entered into, but I consider in the absence of documentary evidence, that the burden of proving that such an agreement was entered into certainly lies upon the defendant. Mr. Preswich, the plaintiff's husband, says that in August he began negotiations with reference to the renewal of the lease, because he was quite willing that the defendant should remain in the property, and in his own mind he had decided to leave him in possession for another twelve months at the same rent. He communicated that intention, not in so many words, but generally, by telling Mr. Smith he was prepared to enter into a renewal of the lease. That, he says, was in August. Smith said he would communicate with Koenig. Preswich says that he saw Smith again, and the latter informed him that Mr. Koenig had not made up his mind on the subject; and that, afterwards, in September he met Koenig in the street, and Koenig seemed to be in too great a hurry to enter into any negotiations, much less to enter into any contract on that occasion. There the question was left so far as Mr. Preswich's evidence is concerned. He gives an admission that negotiations had been com-

menced, but says they had not been concluded. Now we come to the evidence of Smith, and the proof of this contract depends entirely on the evidence of Smith, because it is he who is said to have concluded the contract on behalf of the defendant with Preswich. Mr. Smith tells the Court that he casually met Mr. Preswich in the street, and at that casual meeting he informed him that Mr. Koenig was willing to accept his terms and to continue the lease upon the terms which had been mentioned. Now it would seem that the contract was not to expire until the 8th October, and this interview took place in August, and, as Mr. Smith said, there was really no hurry about the matter being concluded, and I can quite understand that there would be no object on the part of the defendant to conclude this matter finally until the other lease was much nearer its conclusion. But Smith says that, having met Mr. Koenig before this interview in August, Mr. Koenig had instructed him to accept the terms offered by Mr. Preswich. Smith does not thereupon proceed to Mr. Preswich and conclude this contract. He evidently takes no steps to meet Mr. Preswich, but he meets him casually in the street at a time when he was not on his way to see him, and informed him that Mr. Koenig was prepared to accept the terms. I am quite convinced that if instructions had been given to Smith to communicate with Preswich these instructions must necessarily have been in writing. One would expect that if Mr. Koenig spoke to Mr. Smith in his own office and told him to make a communication on a business matter of some importance to Mr. Preswich, he would tell him to put it in writing, or that he would put it himself in writing, and send Mr. Smith not as a casual messenger to deliver a message, but that he might be expected to instruct Mr. Smith to meet Mr. Preswich, take the document, put it in his hands, and so conclude the contract. Under all the circumstances I cannot accept the evidence of Mr. Smith as proof that a contract was concluded by the parties at that interview when he met Mr. Preswich in the street. It is quite probable that the matter was discussed, and I would even go so far as to say that Mr. Smith might have been under the impression that he had gone much nearer to concluding a contract than he had done. On the other hand, it was certainly clear to Mr. Preswich that they did come to anything like concluding the terms of their agreement. Taking the parole evidence of the parties, I think that that interview proves nothing further than that negotiations were being carried on by Mr. Smith and Mr. Preswich, and that no contract was then concluded between Mr. Smith and Mr. Preswich, and that then none exists, because everything depends on what took place in the street. To corroborate the statement of Mr. Smith, we have the evidence of Mr. Koenig that subsequently, having called at his office, Mr. Preswich mentioned the matter, and said that he was glad this contract was concluded. This is denied by Mr. Preswich, but we have this observation made by Mr. Koenig: "I had tried to get the lease cheaper." I am quite sure that this is exactly what he did try to do, and that was probably the cause of the delay during these negotiations, that he was constantly hoping and wishing to get the matter done cheaper, and he had a full opportunity up to the 8th October of getting it done cheaper, and I do not think, having that wish, that he would conclude the bargain in August at a higher rate than he was willing to give, but that he knew that he might keep it open and use pressure on Mr. Preswich until November. Under all the circumstances, I think the matter was kept open, and purposely kept open, by Mr. Koenig, that he was keeping the plaintiff hanging on, and that perhaps he might ultimately have thought he had brought him near enough to constitute a contract. I am of opinion that he did not bring him so far as absolutely to enter into a contract. I think the conduct also of Mr. Preswich absolutely disproves that. Immediately after the expiration of this contract on the 8th October he sets about selling the property, and this proves to my mind that he knew he was running no risk in respect of any agreement or lease that he had entered into, that he was free to sell the property, and that he set about selling it, and that immediately afterwards he gave notice to the defendant that he had disposed of this property. The want of documentary evidence in this case tells very strongly against the defendant's case, and, besides

that, the evidence of the witnesses satisfies me that no final contract was ever entered into by the parties for the extension of the lease for two years. As to the question of damages, Sir Henry Juta has said that under the circumstances proved in this case he does not see how he can claim any damages. Under the circumstances the plaintiff will be entitled to an order of ejectment. The only question is as to when that order shall take effect. [After hearing counsel on this point his lordship added:] Defendants will be ordered to give up possession by the end of this month. Defendant will pay costs. Judgment will be given for the defendant on the claim in reconvention.

[Plaintiff's Attorneys: Silberbauer, Wahl, and Fuller; Defendant's Attorney: D. Tennant.]

GENERAL MOTIONS.

CONTAT'S COLLIERIES v. CONTAT. { 1903. Mar. 13th.

Mr. Benjamin appeared for the plaintiff to apply for a commission to take the evidence of a witness named Mrs. Field, who was shortly proceeding to England.

The application was granted, Mr. Russell being appointed the commissioner, costs to be costs in the cause.

INGLE v. JOUBERT AND EKSTEIN.

Mr. Alexander moved for leave to sign judgment against plaintiff for not having filed his declaration in the specified time.

Granted.

Ex parte CLAASSEN { 1903. Mar. 13th.

Mortgage Bond — Registrar of Deeds—Liabilities of joint estate.

C. (married in community of property) had during the lifetime of his deceased spouse raised £600 on mortgage in order to enable him to carry through certain transactions in landed property. C. and his wife had executed a joint will whereby the issue of their marriage were instituted heirs to the entire joint estate subject to a life usufruct to the survivor. After the death of his wife C. endeavoured to pass the said mortgage bond. This the Registrar refused to do without an order of Court. The Court granted the order as prayed.

This was a motion for an order authorizing the Registrar of Deeds to register a certain mortgage bond.

The petition of George Paul Claassen, G.P.Son, was as follows:—

1. Your petitioner is the surviving spouse of and the executor testamentary in the estate of the late Martha M. Claassen, born Terblans, to whom he was married in community of property, and died on August 16, 1902.

2. During the lifetime of petitioner's said spouse, viz., on May 2, 1901, the petitioner bought from A. Stusser and Co., the following landed property, viz.: (a) 1-24th part, or share of, and in a certain piece of perpetual quitrent land, situate in the division of Oudtshoorn, being lot J.L. of the remaining extent of lot B of the farm "Goedeverwachting." (b) Certain 1-24th, or share of, and in a certain piece of perpetual quitrent land, situate as above, being lot J.D., as above.

3. On the same day the petitioner also purchased from Stephanus L. Fourie, married in community of property to Johanna H. I. C. Claassen, 1-24th part, or share of, and in the said lots J.H., and J.D., for the sum of £1,000.

4. On the same day the petitioner sold to the said A. Stusser and Co., certain 3-16th parts, or shares, in each of the said lots J.L. and J.D., for £1,000.

5. At the time of the said purchases and sale there existed on the property sold by the petitioner to the said A. Stusser and Co., a first mortgage for £550 in favour of Ellen Walker, married out of community of property to Alexander Walker.

6. At the same time aforesaid in order to pay off the aforesaid mortgage so as to give transfer to the said A. Stusser and Co., of the property sold to them, the petitioner arranged with them that they should lend him £600 on first mortgage of the property purchased by him,

viz., the property described in paragraphs 2 and 3 hereof.

7. The said sum was duly advanced to the petitioner by the said A. Stusser and Co., petitioner accordingly on June 12, 1901, executed the power of attorney to pass a bond in their favour. In the said "power" to pass the bond 1-24th and 1-12th of the lots J.H. and J.D., mentioned in paragraphs 2 and 3 hereof are combined and quoted as ½ part, or share of, and in each of the said lots.

8. The petitioner accordingly paid off the aforesaid mortgage bond of £550, which was due to the said Ellen Walker, and the same has been cancelled.

9. The said bond was paid off out of the £600, advanced by the said A. Stusser and Co., and the balance of £50 of the said advance was applied by petitioner towards payment of the arrear interest on the bond for £550 costs of cancellation thereof, transfer duty on the properties purchased by him, and other expenses incidental to the taking of transfer.

10. On June 20, 1901, that is subsequent to the above transactions, and to the signing of the abovementioned power of attorney to pass bond, the petitioner executed a joint will with his now deceased spouse, Martha M. Claassen (born Terblans), whereby all the landed property of their joint estate, which comprises the properties mentioned in paragraphs 2 and 3 hereof, is bequeathed to their sons, of whom there are five, subject to a life usufruct in favour of the survivor of them.

11. Before the transfers of the above described properties, and the mortgage bond aforesaid, could be put through, the petitioner's said spouse died, and their joint will was filed with the Master of the Supreme Court.

12. According to the account of the liquidation and distribution of the moveable property belonging to the joint estate of the petitioner and his said deceased spouse, filed on December 16, 1902, the balance of the proceeds of such movables available for distribution amounted to £61 0s. 7d., whereof one-half, or £30 10s. 4d., is the property of the four daughters of your petitioner and his said spouse, the other moiety, or £30 10s. 3d., is the property of the petitioner, and he has no other means wherewith to repay to the said A. Stusser and Co., the said sum of £600 advanced by them to him.

13. Subsequent to the death of the petitioner's said spouse he endeavoured to effect the transfers and mortgage aforesaid in terms of the agreements concluded previous to her death, but the Registrar, while allowing the transfers of the properties to be passed, refuses to allow the mortgage bond aforesaid to be passed by the petitioner in favour of the said A. Stusser and Co., unless authorized thereto by an order of Your Honourable Court; on the ground that on the death of the petitioner's said spouse the property now sought to be mortgaged vested in their joint estate, and is bequeathed under their joint will to their sons aforesaid.

14. The abovementioned purchases, sale and loan on mortgage were all arranged simultaneously and formed one single transaction, and as the Registrar refuses to register the said bond for £600 the petitioner is compelled to make this application.

Wherefore the petitioner prays for an order authorizing the Registrar of Deeds, at Cape Town, to register a mortgage bond for £600 to be passed by the petitioner in favour of the said A. Stusser and Co., whereby the property described in paragraphs 2 and 3 hereof will be hypothecated.

The Master's report was as follows:—"So far as I have been able to ascertain the facts are correctly stated in the petition, and the power of attorney to pass bond is annexed in support thereof. The £600 for which authority is now asked to pass a bond on the property bequeathed to the sons is a liability of the joint estate, and I think the application of the petitioner should be granted.

On the motion of Mr. Alexander the Court granted an order in terms of the Master's report.

[Applicant's Attorneys: Walker and Jacobsohn.]

Ex parte FATAAR.

Mr. Alexander moved to make absolute a rule *nisi* authorising the Master to pay out certain money. Counsel said the respondent had now returned to her husband, and the parties

seemed now to have composed their differences. He therefore only asked for the costs of the motion.

An order on respondent to pay costs was granted.

Ex parte ROSSOUW

Mr. J. E. R. de Villiers moved for the appointment of a curator *ad litem* to petitioner's husband, who had been removed to Robben Island as a leper, and who was further alleged to be of unsound mind.

Granted, Mr. De Waal being appointed curator.

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

Ex parte WILSON. { 1903. Mar. 17th.

Mr. Benjamin, on behalf of the petitioner, Harriet Ann Wilson (born Rodgers), applied, as a matter of urgency, for an interdict to restrain the respondent, John Edwin Wilson, from disposing of certain property. The petitioner's affidavit stated that they were married in community of property at Claremont, in the Cape Division. Owing to his treatmen she had had to leave her husband and go and live with her brother. She wished for a separation. Her husband possessed certain property in Second Avenue, Kenilworth, and petitioner was informed and had reason to believe that he was disposing of the property.

Rule granted calling upon the respondent to show cause on the 14th April why an interdict should not be granted as prayed, the rule to operate as an interdict in the meantime.

Postea (April 15). The Court refused to make the rule absolute, but ordered the respondent to pay to the applicant £50 to enable her to institute an action if so advised.

Re THE ESTATE OF SHARP AND HILL

Mr. Gardiner said that as a matter of some urgency he wished to apply for the appointment of a provisional trustee in the insolvent estate of John Healy Sharp and Walter Burnett Hill, trading under the style of Sharp and Hill. Many small debts were due to the estate, and it was highly desirable in the interests of all concerned that the perishable assets should be disposed of, and the debts collected as speedily as possible. The petitioners, who represented claims against the estate to the amount of £606 out of a total of £1,240, prayed that a provisional trustee should be appointed, and suggested the name of Mr. E. R. Syfret.

An order was granted, with power to sell perishable goods and collect debts, Mr. Syfret being appointed provisional trustee.

HIDDINGH V. EXECUTORS ESTATE HERTZOG.

Will — Allegation of fraud — Pleading.

This was an application on notice calling upon the respondents to show cause why they should not be ordered to give full particulars of the alleged fraud by which a will was said to have been obtained by one Heyer from the late William Frederic Hertzog. The affidavit of the applicant's attorney stated that it was alleged that the late Mr Hertzog was wrongfully and unlawfully induced to sign the said will. He was advised by counsel that it was absolutely impossible with such particulars to know what evidence to call to deal with a charge of fraud. The declaration alleged that Hertzog executed a will in the presence of two attesting witnesses. The applicant maintained that this will was the valid will of the late Mr. Hertzog. The respondents in their first plea denied that it was a valid will, and they had an alternative plea in which they said that the late William Frederic Hertzog did not knowingly sign the said will, but that he was wrongfully, unlawfully, and by fraud of the said Heyer induced to sign the said document, and that the said Mr. Hertzog signed the document without comprehending the nature and terms thereof.

The affidavit of Mr. Van Zyl, of the firm of Van Zyl and Buissinne, attorneys for the respondents, stated that one of the witnesses to the said

will was the said Albert Edward Heyer, who was charged at the last Criminal Sessions with the crime of concealing and stealing the will of the said Mr. Hertzog, and who was found guilty of the said crime.

Sir H. Juta, K.C. (for applicant): In the plea there is an allegation that this will was obtained by fraud; the nature of the fraud, however, is not disclosed, and it is therefore impossible to say what evidence we should call.

[De Villiers, C.J.: What more do you want?]

We want to know the nature of the fraud.

[De Villiers, C.J.: It seems to me that they say that the testator signed this will not knowing its contents.]

The plea rather suggests that this will was not signed voluntarily, but, if fraud is alleged, we are entitled to know the nature of the fraud, otherwise at the trial some surprise or other may be sprung upon us.

Mr. Upington (for defendants). The words of the plea are perfectly clear. We say that Hertzog signed this document, not knowing what it was. We are not bound to disclose our defence. If our plea is bad, it is for the other side to object and have the vague and embarrassing portions struck out. Rule 330g., *Pattison v. McLaughlan* (Buch., 1876, p. 82.)

Sir H. Juta (in reply). The plea may be good enough, but we are entitled to ask for particulars, and they have been asked for, and ordered in previous cases. We are not asking for their evidence. If we had said that the plea was embarrassing it would have amounted to much the same thing.

De Villiers, C.J.: If it were impossible to do justice between the parties without fuller particulars than are now indicated in the plea, I should think the Court would have the power to order the plea to be expunged unless such fuller particulars are added. To my mind, however, the plea objected to fairly states the grounds of the defence—"The said William Frederic Hertzog did not sign the document freely and voluntarily." The defendant has only to call his witnesses to prove that Hertzog did sign freely and voluntarily. Then the plea goes on, "but was wrongfully, unlawfully, and by fraud of the said Heyer induced to sign the said will, and the said Hertzog signed the said will without comprehending the nature and terms thereof." I confess I cannot see what more need be said. There is the illustration given that the man might have been drugged, but I do not gather from this plea that there is any suggestion of that kind. My opinion is that this plea is quite sufficient for the plaintiff's purposes, and that the application should be refused. As to the costs of the application, possibly when the case comes to trial and the Court sees what the nature of the case is, it may turn out that the plea should have been more fully stated, but as at present advised it seems to me quite sufficient to enable the plaintiff to prepare his case. The application will be refused, but the costs of the application will be costs in the cause.

[Applicant's Attorney: T. P. Peters; Respondent's Attorneys: Van Zyl and Buissinne.]

GOUS AND ANOTHER V. LOCHNER AND ANOTHER.

This was a motion by the plaintiffs for a rule *nisi* restraining an auctioneer from parting with the proceeds of the sale of certain lands at Somerset Strand to be made absolute. Mr. Searle, K.C., was for the plaintiff, and the defendant was represented by Sir H. Juta.

The Chief Justice made an order declaring the rule absolute, costs of the application to be costs in the cause.

HARTMAN V. DART. { 1903. Mar. 17th.

Hire of premises—Use of signboard

This was an application for an order for the removal of a certain signboard, fixed by the defendant on certain premises rented from defendant.

The applicant's case was that in December last he entered into a lease with the defendant for the rental of a portion of the premises, 128, Longmarket-street, for a period of five years. The respondent had wrongfully and unlawfully, and without his (plaintiff's) consent, attached a signboard bearing his name and style of business to a partition to the rooms, leaving him (plaintiff) no room on which to place a signboard regarding his business, and thus causing him great inconvenience and annoyance and loss. Customers were

apt to think that the premises had been vacated by plaintiff, and that they were in the occupation of the respondent.

The respondent's case was that he sub-let to the applicant a portion of the premises on the ground floor. He admitted that he had attached a signboard to the partition adjoining the room that he occupied, as well as the entrance to the room occupied by the applicant. He admitted that he had declined to remove the said notice board, but he denied that he had committed a trespass. The applicant never claimed any right to or control over the said partition when the said room was sub-let to him. Respondent contended that the partition was part of the premises over which the applicant had no control.

Mr. Gardiner (for applicant.) The letter constituting the contract of lease states that the property was let "as occupied by me." At that time the signboard was not up, and we are entitled to have the use of that partition. We have exhibited our wares on that partition, and I submit that we are legally entitled to the use of the whole partition.

Mr. Buchanan (for respondent). The applicant ask for what is practically a declaration of rights, and tries to give evidence on affidavit that he has been occupying these premises by hanging out mats and so forth.

[De Villiers, C.J.: But he hired the premises.]

Yes, but he did not occupy them. What the parties meant was that the premises were to be let as they were, and, if they were abandoned, they were to be abandoned as they were. Hart was willing not only to pay his rent, but to pay half of applicant's lease, so he did not get everything in his own favour. The words "portion of ground floor as at present occupied by you," do not give the applicant exclusive rights to the ground floor.

Mr. Gardiner was not called upon in reply.

De Villiers, C.J.: It appears to me that the applicant is entitled to succeed in this case. The respondent admits that, as to the ground floor, he sublet to the applicant that part of the ground floor at that time occupied by the applicant. I am quite satisfied that the part of the ground floor at that time occupied by Hartman was the whole of that ground floor, with the exception of the small portico at the street entrance, but that as to the partition it was in the occupation of Hartman. Zipp, who occupied Dart's place, it is true, had his name where the signboard is now, but both Zipp and Dart stated that this was done with the consent of Hartman. That in itself is proof of the occupation by Hartman. I think that, in regard to that partition, Hartman has as much right to the use of it as he has to the other little partition from the street to the entrance of his shop. I can quite understand that anyone coming into the street and seeing the signboard with Dart's name on would come to the conclusion that it is Dart's shop on the other side. Clearly that must be the conclusion, and it seems to me quite inconsistent with the subletting by Dart to Hartman that Dart should now appropriate to himself the partition which forms part of the premises occupied by Hartman. Applicant is certainly entitled, in my opinion, to place his own name upon the signboard. It is said that application should not be made by motion, but, if the facts are not in dispute, the Court can dispose of the matter as well by motion as by action. But I would really suggest that it is not a matter worth fighting about. I would suggest that Hartman should now allow Dart to appropriate portion of the partition with a sign board pointing out where Dart's business is, and another indicating where Hartman's is. That could only be done with the consent of Hartman, but I doubt not he will consent to this course in order to avoid further litigation. However, as the case presents itself to me the applicant is entitled to succeed. The application will therefore be granted with costs, with leave to the respondent to bring his action to have the order discharged.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton; Respondent's Attorneys: Friedlander and Du Toit.]

EXECUTORS OF ESTATE RHODES v. GAMBLE. { 1903. Mar. 17th.

Interdict—Evidence—Affidavits.

In an application for an interdict to restrain the lessee of a farm from keeping an excessive

number of animals on such farm, there should be clear evidence that the number of animals is excessive, and for that purpose the area and capacity of the farm should be stated, and, if possible, the purposes for which it had been leased.

This was a motion on notice calling upon the respondent to show cause why he should not be interdicted from keeping an excessive number of animals on a certain farm situated on the Wynberg Flats, leased by the late C. J. Rhodes to the respondent; and also to show cause why he should not be restrained from cutting down trees on the farm. It was alleged that the respondent allowed about 500 sheep to run on the farm, contrary to an agreement made when the lease was entered into to the effect that respondent would not allow more than about 30 head of stock to run on the farm. It was stated on affidavit that respondent had since admitted this agreement. It was further alleged that the respondent had, in violation of the terms of the lease, cut down certain trees and sold the wood.

The respondent's brother made affidavit to the effect that respondent was away, and could not be advised of the present motion in time to make a replying affidavit. The deponent produced certain correspondence with the late C. J. Rhodes relating to the tenancy of the farm, and denied that the farm was used for any purpose for which it was not let. As for the trees, none has been cut down since July, 1902, excepting such as were decayed and such as were obstructions. Deponent alleged that the present proceedings were brought in order to compel respondent to vacate the farm so that it might be sold immediately in building lots.

Sir H. Juta, K.C. (for applicants). Gamble has cut down and sold large quantities of wood; and he had no right to do this.

[De Villiers, C.J.: There is no evidence as to the quantity of wood he might cut.]

No, but he had no right to cut wood for sale; nor had he any right to take other people's stock on the farm, and so deteriorate it. Gamble's brother (who at first claimed to be a sub-tenant of Gamble) was the first to over-stock the farm. We now ask for an interdict to restrain respondent from cutting timber and from over-stocking, pending an action to be brought.

[De Villiers, C.J.: You cannot restrain altogether from cutting timber, and the common law does not allow them to over-stock.]

That is so, and, of course, the interdict would be only declaratory of the common law. The farm cannot support more than 20 head of stock. As the respondent's affidavit does not deny the affidavit of Mr. Syfret it must be taken that they admit it.

[De Villiers, C.J.: What is the nature of the farm?]

It is purely agricultural.

Mr. Buchanan (for respondent): We have no evidence as to the nature of the farm. As to the affidavits, the respondent is not to be taken to have admitted an allegation, because he does not specifically deny it. In order to obtain an interdict the applicants must show a clear right, and I submit they have not done so.

[De Villiers, C.J.: You have no right to run an excessive number of stock.]

There is no proof that we are doing so. Half of the farm is pastural. We deny that all these sheep were placed in one paddock.

[De Villiers, C.J.: What do you say about the trees?]

We deny having cut any since July, 1902. No complaints were made till January 14, 1903, and then the applicants seem to have become very anxious to get Gamble out of the farm. They had sold it, and, therefore, wished to get rid of their tenant.

Sir H. Juta (in reply).

De Villiers, C.J.: This is an application to restrain respondent from keeping an excessive number of animals on the farm Bamboesvlei, and from cutting wood and trees on the farm. I must say that the evidence in support of the application is extremely meagre. There is no statement in any affidavit as to what would be a proper number of animals having regard to the size and capacity of the farm, and

the Court does not know what the farm was originally let for, whether for agricultural or pastoral purposes. To give an interdict restraining respondent from keeping an excessive number of animals in the farm would be wholly useless, because, unless a number were fixed, there would be no hold on the respondent. It would be impossible to say there had been a disobedience of the order of Court if the respondent continued to keep the present number. In fact the Court does not know how many there are at present. It is said that there are approximately 500, but there is no proof that 500 is an excessive number. Then, I do not consider, in the absence of evidence, that the mere keeping of sheep upon land intended for ploughing would injure the land. But, at the same time I must indicate this to the respondent, that in my opinion he should not be allowed to keep more than the farm, having regard to its size, and all the circumstances, was capable of containing. Then, in regard to cutting wood and trees, upon this point also the evidence is not clear. There is no evidence that the wood which was cut down was removed from the place, or that the wood was of such kind as the respondent was not justified in cutting. There is not sufficient evidence before the Court to justify the granting of an interdict. At the same time, as to the question of costs, I am not prepared to say that the application should be refused with costs. It is quite possible that when the case comes on for trial it may appear that more damage was done than clearly appeared at present. The question of costs will therefore abide the result of the action.

[Plaintiff's Attorneys: Scanlen and Syfret; Respondent's Attorneys: Findlay and Tait.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

GENERAL MOTIONS.

ZFAS v. LEVITON. { 1903. Mar. 18th.

Mr. Benjamin applied for an order dissolving the partnership existing between Max Zfas and Jacob and Elias Leviton, and for the appointment of a liquidator.

Mr. Upington appeared on behalf of the respondents.

From the affidavits it appeared that the parties agreed upon a dissolution. Applicant, however, wanted Mr. Joseph Jacobson, of Burghersdorp, who had acted as his attorney, appointed liquidator, while respondents suggested Mr. Hardwick Andrews, deputy sheriff of Albert. Applicant alleged that Mr. Andrews had been consulted by respondents, but this was denied.

The case was ordered to stand over until to-morrow, in order that counsel might consult the attorneys as to the appointment of a liquidator.

Postea (March 20). The Court granted judgment in terms of a consent paper appointing F. R. Tennant, of Burghersdorp, as liquidator.

Ex parte WOODMAN AND ANOTHER. { 1903. Mar. 18th.

This was an application by one John Woodman on behalf of his minor children for leave to sell certain landed property situate at Wynberg to one Lydia L. Gomez. His married daughter Johanna C. Pinto joined in the petition. It appeared that certain landed property with a house thereon had been transferred to the second petitioner, which property was entirely surrounded by other private property, so that all access to a public road was cut off. The aforesaid Lydia C. Gomez (an adjoining proprietor) was willing, however, to grant to the said minors a passage across her ground on condition of her receiving transfer of 85 square roods and 24 square feet of land from the second petitioner.

The Master's report was favourable, and on the motion of Mr. Russell, the Court granted an order in terms of the report.

Ex parte THE PORT ELIZABETH TOWN COUNCIL.

Mr. Russell moved for an order cancelling the sale of certain property. The circumstances were that, in 1861, the property in question was sold to one C. Green for £38 odd, for which sum Green gave three promissory notes. Of these the amounts of two had been paid, but the third had not been, and there was still owing to the Town Council the sum of £9 in respect of the purchase, with interest thereon from April, 1861. The lots had never been transferred.

A rule was granted, calling upon C. Green and all parties concerned to show cause on the 14th April why the order prayed for should not be granted, the rule to be published once in two Port Elizabeth papers.

Ex parte WATSON AND ANOTHER. { 1903. Mar. 18th.

This was an application for leave to purchase a property in the name of Charles T. G. Watson, who had been declared to be of unsound mind, and was detained in the Valkenberg Asylum. The petitioners were Susan M. Watson (the wife of C. T. G. Watson) and Paul J. van Collar, curators *bonis* to the estate of C. T. G. Watson. The said curators had paid into the Master's hands a sum of about £13,000 on account of the estate, and now asked that the first named petitioner might be allowed to purchase a house within the Cape Peninsula as a place of residence for herself and her children for £2,500, to be deducted from the said £13,000. The reasons assigned for the application were: (1) that the first petitioner might have greater facilities for visiting her husband; (2) and for the education of her minor child.

The Master recommended that the prayer of the petition be granted, and that he should be authorised to pay such sum as might be required for the purchase of a house, costs of transfer, and of the present application: such sum not to exceed in all £2,500.

On the motion of Mr. Russell, the Court granted an order in terms of the Master's report.

[Applicants' Attorney: G. Trollip.]

Ex parte BLIGNAUT AND ANOTHER.

Mr. Close applied for an order authorising the Master to pay out certain money for the maintenance and education of a minor.

Granted.

Ex parte STRASSBERG.

Mr. Benjamin moved for leave to amend certain title deeds, in which the name of the petitioner had been incorrectly stated.

Granted.

Ex parte VAN HUYSSTEEN. { 1903. Mar. 18th.

This was an application on behalf of one Daniel Petrus Simeon van Huyssteen for an order authorising the transfer of certain landed property situate in the division of Knysna to one Aaron Toplis.

The facts stated in the petition sufficiently appear from the Master's report, which reads as follows:—

"The petitioner liquidated his wife's estate, but in terms of the joint will by them executed remained in possession of the landed property which devolved from his deceased's wife's father's estate. After petitioner had liquidated his wife's estate he purchased the share of another heir in the estate of his wife's parents. An application was then made to this Hon. Court (Motions 63-1897) to consolidate the shares in several properties so that each owner should come into possession of an appreciable share in one farm; which application was granted. At the same time that this exchange was going on petitioner sold ½ of Lot A of the property named Gansevlei, belonging to the joint estate, and ½ of his own share in Lot A acquired after his wife's death. He held similarly the estate half and himself the other half in the remaining extent, of equal value with Lot A. He now applies that the remaining half of his own half share in the remaining extent subsequently purchased be substituted for the half share of Lot A in the joint estate sold by him, both being

of about the same value. He also offers to transfer now to the minors the shares in the farms 'Welkom' and 'Matthys Bosch,' standing in his name, which would be of greater value than the share in Lot A sold by him. It would distinctly be to the advantage of the children to grant the application on condition that transfer be passed to them at once."

On the motion of Mr. P. S. T. Jones, the Court granted an order in terms of the Master's report.

[Applicants' Attorneys: Fairbridge, Arderne and Lawton.]

Ex parte MICKLEM.

This was an application by one Nathaniel Micklem to have a rule *nisi* made absolute. From the original petition, it appeared that on June 27, 1900, one Thomas Micklem, of Stellenbosch, passed a bond in favour of the petitioner for £1,000. This bond, having been lost or mislaid, the petitioner prayed for an order authorising the Registrar of Deeds to issue a certified copy of the said bond. The rule *nisi* granted on February 28, calling upon all persons concerned to show cause on March 12, 1903, why an order should not be granted as prayed, was made absolute on the motion of Mr. Russell.

Ex parte LABUSCHAGNE.

Mr. P. S. T. Jones moved for the appointment of a *curator bonis* for the petitioner's father, F. J. Labuschagne, who was certified to be of impaired intellect.

The Court declared the respondent to be incapable of managing his own affairs, and appointed Johannes Nicholas Labuschagne curator.

KLEYNHANS V. KLEYNHANS.

This was an application upon notice of motion calling upon respondent to show cause why he should not be ordered to contribute the sum of £50 to enable applicant to institute an action for divorce on the ground of adultery, and why he should not be interdicted from disposing of property, pending the result of the action. Petitioner said she was married in community of property to respondent on the 7th August, 1883, and there were eight children of the marriage, of whom seven were still alive. She alleged that in July, 1892, and at other times, respondent committed adultery with a coloured woman employed in the house. The parties resided at Riversdale. Applicant had no money to carry on the action.

Respondent denied the allegations of adultery, and said that since the date of the alleged adultery petitioner had cohabited with him. He said that petitioner had led him an unhappy life, and that the application for divorce was vexatious and unfounded.

The Court made an order on respondent to pay £20, costs to stand over.

Ex parte GRESSE.

This was an application for leave to sell certain property. From the petition of Heilejo Z. E. Cresse, the applicant, it appeared that she was the surviving spouse and executrix testamentary of the late Lodewijk F. S. Gresse, and that a mutual will ,executed by the petitioner and her late husband provided that the surviving spouse should be sole heir of the first dying, provision was made for the distribution of certain portions of the landed estate on the death of the survivor, and certain other landed property was bequeathed to one C. Ford, the adopted son of the testators. The survivor, however, was to remain in the undisturbed possession of the whole of the joint estate until his or her death, before which time it was directed that no distribution should take place. Some 3,000 morgen of the testator's farm was specifically bequeathed to the said C. Ford, and as the said C. Ford has incurred heavy debts by improving the said property, which debts he is unable to repay, and for which the petitioner is surety and co-principal debtor, she is desirous of selling the whole farm (including Ford's portion), in order to pay off these debts. A favourable opportunity now offers of doing this, and Ford consents to the sale.

On the motion of Mr. P. S. Jones, the Court granted an order as prayed.

[Applicant's Attorneys: Fairbridge, Arderne, and Lawton:]

Ex parte ROSENBERG AND ANOTHER.

This was an application for leave to execute an ante-nuptial contract.

The petition of Max Rosenberg and his wife Lefray H. Rosenberg, showed

that they were domiciled within this colony, and had, prior to their marriage agreed to be married by ante-nuptial contract. With a view to this being done, the first petitioner obtained from his attorney a printed form of an ante-nuptial contract. The second petitioner accompanied her father to England, where it had been arranged that the marriage should be solemnised. The first petitioner followed them shortly after, but forgot to take the aforesaid form of ante-nuptial contract with him. He consulted an English attorney, but, not being able to instruct him properly, a defective form of ante-nuptial contract was drawn up and signed. The petitioners now prayed for leave to execute an ante-nuptial contract in due form, embodying all the provisions which they had intended to embody.

On the motion of Mr. Benjamin, the Court granted an order as prayed, saving the rights of creditors which might have accrued prior to the registration of the contract.

Ex parte MATHEE.

This was an application for leave to sell certain erven situate at Humansdorp, the property of Aletta A. Matthee, a minor. The petitioner was one Louisa Margaret Mathee (born Dassonville), and married without community of property to one Elias Matthee. The petitioner had purchased the property in question in the early part of 1889, for her eldest daughter (the said Aletta A. Matthee), and the petitioner duly took transfer of the same in trust for her said minor daughter. Since the date of purchase, the said property had been lying waste, but several offers have recently been made to petitioner for the purchase of the same.

The Master recommended that the petition be granted on condition that the proceeds be paid into the Guardians' Fund until the minor attains her majority.

On the motion of Mr. Benjamin, the Court granted an order in terms of the Master's report.

Ex parte MANNING AND ANOTHER.

This was an application for an order authorising the Master to pay out certain monies.

The petition of Benjamin Manning, of Mowbray, and James Dodd, of Stellenbosch, showed (1) That they were the executors testamentary of the estate of the late Phœbe Williams Lucas, widow of Joseph B. Lucas, the tutors testamentary to their minor children, A. P. Lucas, F. R. Lucas, and E. J. Lucas; (2) that the following monies stood to the credit of the said minors in the Guardians' Fund, viz., to A. P. Lucas, £432 4s. 1d., to F. R. Lucas, £405 7s. 8d., and to E. J. Lucas, £402 0s. 2d., on which interest at the rate of 4 per cent. is being paid for the maintenance of the said minors; (3) that this sum was wholly insufficient for that purpose; (4) that the claims of creditors against the said minors for maintenance, education, etc., amounted to £162 10s. 2d. (as per accounts annexed), which sum the petitioners were unable to pay out of the income derived from the said minors' portions; (5) that in order to maintain the said minors in a proper and efficient manner, the sum of £6 per month each, from January 1, 1904, would have to be drawn from the capital of each child's portion.

Wherefore the petitioners prayed for an order authorising the Master to pay out the said sum of £162 10s. 2d., and to pay the sum of £6 per month from January 1, 1904.

The Master recommended that the petition be granted.

On the motion of Mr. Russell, an order was granted accordingly.

[Applicants' Attorney: G. Trollip.]

Ex parte SCHEEPERS.

This was an application for leave to sell certain properties at Oudtshoorn, in which certain minors were interested, by public auction.

The petitioner was one Anna M. Scheepers (born Schoeman), surviving spouse and executrix testamentary of the estate of the late Gideon J. H. Scheepers, who married her in community of property. The petitioner and her late husband had executed a joint will, and two of the legatees under this will were minors at the date of the present application. In accordance with the provisions of the said will, the petitioner realised the immovable properties therein described by public auction, but the proceeds were insufficient to pay the debts of the joint estate, and petitioner raised £600 upon mortgage on the rest of the immovable properties, in addition to a

then already existing mortgage of £1,100, which still left a deficiency of £36 19s. 3d. The said mortgages were still in existence, and the petitioner had enjoyed, and was continuing to enjoy, the usufruct of the said properties, and was paying the interest on the mortgage debt. The petitioner stated that she found that the income derived from the farming of the said land was insufficient to pay rates and taxes, on the property, interest on mortgage bonds, and to support herself and children. Many of the neighbouring proprietors possessed copious supplies of water, and would therefore be able to cultivate petitioner's land to much greater advantage than she could possibly do. The major legatees all consented to the sale.

Wherefore the petitioner prayed for an order authorising the sale of the properties in question.

The Master's report recommended that the application be granted on condition that the balance of the estate be invested, reserving the right of petitioner to draw the interest during her lifetime.

On the motion of Mr. Buchanan, an order was granted in terms of the Master's report.

[Applicant's Attorneys: Tredgold, McIntyre, and Bissett.]

Ex parte KOK.

Minors—Age of childbearing—Distribution of Estate.

A testatrix had bequeathed certain immovable property "to the male children of her son G. begotten and to be begotten from his present marriage." The testatrix had died and G. had had 8 children born to him as issue of the said marriage. He was now 56 and his wife 52 years of age. No children had been born to them during the previous eleven years and a medical certificate showed that there was no probability of further issue. G. as executor of his late mother's estate now asked for an order authorizing the Registrar of Deeds to pass transfer to each of his male children of his portion of the bequest. The Court granted an order as prayed.

This was an application for an order authorising the Registrar of Deeds to register certain landed property. From the petition of the applicant (Gerhardus S. Kok, of Quacha, Hümansdorp), it appeared that the petitioner was the executor of his late mother, the widow of G. S. Kok, sen., to whom she had been married in community of property. That at the time of her death certain landed property (fully described in the petition) stood registered in her name, a portion of which (fully described) she bequeathed to "the male children of her son Gideon J Kok, begotten and to be begotten from his present marriage" subject to the payment to the female children of the said G. J. Kok, within 12 months of the death of the testator £100 jointly, and in equal shares. That the said G. J. Kok and his wife Hester J. Kok were still living, and were aged 56 and 52 years respectively, and that eight children have been born of their marriage, who have paid the £100 named in the will to the female heirs, and also transfer and succession duty due in respect of the property transferred to them. That in view of the fact that petitioner's wife was then 52 years of age: that no child had been born to them during the 11 years, and that the family doctor of the petitioner by certificate, annexed testifies that there is no probability of further issue: the petitioner prayed for an order authorising the Registrar of Deeds to transfer to his said children the landed property bequeathed to them by his late mother.

The Master reported that there appeared to be no objection to petitioner's application being granted.

On the motion of Mr. Benjamin the Court granted an order as prayed.

[Applicant's attorneys: Walker and Jacobsohn.]

STORK V. STORK. { 1903. Mar 18th.

Edictal citation—Court of Chief Magistrate of Griqualand East.

The Court of the Chief Magistrate has no power or authority to direct service of process on a defendant by edictal citation.

This was an appeal from a decision of the Assistant Chief Magistrate of Griqualand East.

The appellant had applied in the Court of the Chief Magistrate for leave to sue his wife (who had gone to Natal) by edictal citation for divorce on the ground of her adultery. It was argued for the applicant (John D. Stork) in the Court below that on several previous occasions the Chief Magistrate had issued edictal citations. The Court, however, decided that the application should remain in abeyance until the Attorney-General's opinion on the point should be obtained.

Postea (December 5). Applicant's agent was informed by the Court that as the Attorney-General was of opinion that the Court of a Chief Magistrate had no power to summon by edict the application must be dismissed. J. D. Stork now appealed against this decision.

Mr. Upington (for appellant): See paragraphs 23 and 31 to 33 of Proclamation 110, of 1879. *Re Estate Dugdale* (5, E.D.C., 96), shows that the limitation of the second section of the Transkeian Annexation Act (38 of 1877) as to Acts of the Colonial Parliament not extending to the Transkei, does not exclude ordinances enacted before the establishment of the Colonial Parliament from extending to and being in force in the said territory. See also *Reed* v. *Turner* (1, Roscoe, 220). There it is decided that if a general jurisdiction in any certain matter is given to a Magistrate, that jurisdiction is not confined within territorial limits. If the Chief Magistrate has jurisdiction over all matrimonial causes he must have the power necessary for the exercise of that jurisdiction, and I submit that among these powers must be that of granting leave to sue by edictal citation.

The respondent was in default.

De Villiers, C.J.: The procedure by edictal citation is a survival of the practice of the Dutch times. When the Charter of Justice was brought into operation in this colony, rules of Court were framed, but these rules of Court were silent as to the process of edictal citation, which, has, however, continued in operation up to the present time. The first reference in the rules of Court to edictal citation that I am aware of is to be found in the 273rd Rule of Court, passed in 1874, but before the date the practise had, I understand, been adopted in the Eastern Districts Court and High Court of Griqualand, as well as in the Supreme Court. It is now proposed to extend the power of suing by edictal citation to the Chief Magistrates' Courts. In my opinion, this claim cannot be admitted. In order to ascertain the powers of the Chief Magistrates' Courts, we have to refer to the Acts by which these Courts are constituted. There is nothing in any of the sections which have been read by Mr. Upington which conferred any power on the Chief Magistrates to issue edictal citations. They have full power, no doubt, in regard to all questions of marriage and divorce, but the fact that they have such jurisidiction does not affect the question of procedure. In my opinion, the Chief Magistrate, in the absence of special legislative authority given by the Acts constituting these Courts, had no such power, and the Magistrate in the Court below therefore, in my opinion, properly refused to issue this process, and the appeal must be dismissed.

[Appellant's Attorneys: Faure and Zietsman; Respondent in default.)

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

REX V. PARSONS. { 1903. Mar. 19th.

Liquor laws—Holder of licence—Agent—Barman.

The appellant, the holder of a liquor licence, was charged

with a contravention of the liquor licence, and the evidence was to the effect that his barman had effected an illicit sale to a native, that the appellant knew natives were trying to get liquor, and that he did nothing to prevent the sale.

Held, *that, although the appellant was not present at the sale, he was rightly convicted.*

This was an appeal against a conviction by the R.M. of Mount Ayliff.

The appellant, Wm. Parsons, of the Mount Ayliff Hotel, had been convicted of the crime of contravening section 30 of the Proclamation 255 of 1900, in that he did "wrongfully and unlawfully sell, give, supply, or deliver a certain quantity of liquor, to wit, a glass of brandy, to Macadosie, a native, the said native not having produced a permit to obtain such intoxicating liquor as required by section 29." The appellant was sentenced to a fine of £50, or in default three months' imprisonment.

Sir H. Juta, K.C. (for the appellant): The summons was faulty. Under section 30, the offence was handing liquor to a native who had a permit, but which permit was not handed over to the dealer who was to transmit it to the Magistrate. The other section, 29, made it an offence to supply liquor to a native who had not got a permit. The summons was wrong in that it put a number of words into the summons which were not in the section. The proceedings again had been taken under the wrong section, and should have been instituted under section 29. There is no evidence that Parsons was managing this business. Under the Licensing Act, two persons cannot hold a licence, and therefore, if the licence was given to Matthews, Parsons could not have it too. Parsons was not responsible, and ought not to have been summoned.

Mr. H. Jones (for the Crown): See *Rex* v. *Phillips* (11 Shiel, 205). It is clear that the barman had authority to sell during the absence of the holder of the licence. The onus of proof in such a case is on the holder of the licence, and the argument of appellant's counsel falls to the ground. See *Queen* v. *Murtha* (3 H.C., 15 and 157). Presumably a man in charge of a bar acts with his principal's full instructions, and the principal is responsible.

Sir H. Juta (in reply): According to counsel for the Crown, one person may be responsible for the conduct of a licensed business at one time, and somebody else at another time. That would lead to endless confusion. If a licence is temporarily transferred, the fact that the original holder comes back does not re-invest him with responsibility. Again, on the day in question Parsons told Matthews not to open the bar, as "traps" who had been convicted of perjury were hanging about. I submit that the appellant's conviction was bad.

De Villiers, C.J.: The first objection to the decision of the Magistrate is that the accused has been charged with contravening the wrong section of the Proclamation, namely, the 30th instead of the 29th. The two sections are very closely allied, and in this very charge against the accused the offence is distinctly stated that he did sell, give, supply, or deliver, or cause to be sold, given, supplied, or delivered a certain quantity of intoxicating liquor, to wit, one glass of brandy, to Macadosie, a native, the said Macadosie not having produced a permit to obtain such intoxicating liquor as "required by section 29 of the Proclamation aforesaid." It appears to me, seeing that the substance of the offence is correctly stated, and the 29th section is mentioned in this charge, that the accused would not be in any way prejudiced by the additional reference to the 30th instead of the 29th section of the Proclamation. A further objection has been raised that words are in the summons which are not in the Proclamation "that he caused to be sold, given, supplied, or delivered." They may be superfluous words, but they do not in any way invalidate the summons. So much for the objections in point of form. As to the more substantial objections, I am not prepared to hold where a licensed person expressly prohibits his barman from selling illicitly and takes all the necessary steps to prevent it, that he would be liable in case his barman does not follow his instruction and sells the liquor. But that point does

not arise now, because upon the evidence I am not at all satisfied that there was such a prohibition on the part of the appellant. Sir Henry Juta relies upon the 16th section of the Proclamation, which provides that "in case of the absence of the holder of the licence his business may be carried on by arrangement duly approved of in writing by the Resident Magistrate without any formal transfer of the licence, and thereupon such agent shall in the absence of such holder of the licence possess all the rights and be subject and liable to all the duties and obligations of the original holder of the licence." It appears that on the day when this liquor sale to a native took place the accused was not absent. He was at Mount Ayliff at the time, and had been there for some time, owing, as he says, to an accident to his foot. He was there on that date, and this transfer, this temporary transfer under the 16th section, is to be valid only during the absence of such holder of the licence. According to the accused himself he was not absent on that day; he says, "I was here on the 23rd December, I remember, Tuesday, the 23rd December, I particularly advised Mr. Matthews not to go to the bar on that date." So that he was not only present, but he was giving advice to Mr. Matthews. I should have thought, if he was afraid that Mr. Matthews would on that date sell liquor to natives, that instead of advising Matthews not to go on that day he would have prohibited him from going, so that it would have been impossible to say that there was any contravention of the law He says, "I do not know anything about the alleged liquor selling on the 23rd: two or three of the natives were worrying round to get liquor." Knowing that they were worrying about on that date he simply advised his barman not to go on that day. Then he says, "I have given him notice to leave," and he proceeds, "There are two keys to the bar, I keep one and Matthews keeps the other; I come to the bar and help myself to what I require in Matthews' presence." That does not look like a man who is absent entirely, and who leaves the management to the agent. There is no proof of accused having done everything that he could do to prevent the liquor selling on that date He knew there was a danger of its being done because he says natives were about worrying for liquor, but he leaves the matter entirely in the hands of this agent, and he seems to have told the barman that if he sells to natives he does it entirely on his own responsibility. I am pretty sure I saw that in the evidence.

Sir H. Juta: Matthews says he was not told that; I think the reference is in Matthews' evidence.

The Chief Justice (continuing): Yes, that is how it came to strike me. A question is put to Matthews in examination, and his answer is: "I do not remember Mr. Parsons telling me not to go to the bar on that day. Mr. Parsons did not tell me that if I sold liquor to natives it would be on my own responsibility." However, I leave that out of consideration, because it is possible that the question may not have been put that way, and therefore this answer of Matthews should not affect the case. Quite independently of that answer, and upon the rest of the evidence, I think that the Magistrate was justified in convicting the accused. The appeal must be dismissed.

[Appellant's Attorneys: Findlay and Tait.]

HAVISIDE V. JORDAN. 1903. Mar. 19th. Apr. 14th.

Redhibitory action — Sale and purchase — Latent defect — Prescription—Pleading—Appeal—Final judgment.

Within seven days after the plaintiff had purchased two oxen from the defendant, they sickened of lungsickness and within three days afterwards they died. The expert evidence shewed that the disease, although latent, had been contracted before date of sale.

Held, *that the Magistrate's Court properly decided that the plaintiff was entitled, by means of the redhibitory action to recover back the price he had paid.*

The action was instituted more than six months after the date of sale, but no objection was

taken on the ground of lapse of time. On appeal to the Chief Magistrate, however, the objection was taken and disallowed on the ground that it ought to have been taken in the lower Court.

Held, *that the defence ought to have been raised before final judgment in the lower Court and that, not having been so raised, it could not be raised on appeal.*

This was an appeal against a judgment given by the Chief Magistrate of Kokstad. Mr. Benjamin appeared for the appellant, and Mr. Buchanan was for the respondent.

In the Court of the R.M. the plaintiff sued the defendant, firstly, for the refund of £16. the purchase price of two oxen, and, secondly, for £16, the value of one ox, which died from lung sickness, being infected by the other animals. Judgment was given for the amount claimed on the first part of the claim and absolution from the instance was granted in the other part. The plaintiff's case was that he purchased two oxen from the defendant, the animals being guaranteed to be clean, and that ten days afterwards lung sickness manifested itself among the purchased oxen. The two animals died, and another ox, owned by the plaintiff, also died from lung sickness, caught, it was said, from the two animals bought from the plaintiff. The case came before the Resident Magistrate in the first instance, and was afterwards taken on appeal to the Court of the Chief Magistrate, Kokstad. The Chief Magistrate, in upholding the judgment, said he agreed with the Magistrate in the Court below in his finding. Lung sickness took some 20 days to develop; consequently the two oxen, which died within eight or ten days of the purchase from the defendant, must have been suffering from the disease when in the defendant's possession. It was clear that the respondent, according to Van Zyl's "Judicial Practice," should have instituted this action within six months of the death of the animals. Being a native, he would not know this. He would think that this case could be brought any time, in accordance with native law. In his (the C.M.'s) opinion the plea of prescription should have been brought forward in the Lower Court, and he held that prescription could not now be pleaded, and the appeal must be dismissed, with costs.

Mr. Benjamin (for the appellant) contended that the Chief Magistrate was wrong in holding that the native was excused from bringing the action within six months by the fact that he might not have known the law. If it were the law that such action must be brought within six months, and he (counsel) submitted that it was, then the law was binding on the native, and he must be taken to know the law of the country. The Chief Magistrate also contended that because the plea of prescription had not been brought in the Court below, it could not be pleaded. Counsel submitted that there was no need to bring prescription forward in the Court below. The animals died in October, 1901, and the action was not brought until November, 1902. Judgment ought to have been given for the defendant, the appellant in the present action.

Mr. Buchanan (for the respondent) said that the attorney who took the appeal to the Chief Magistrate's Court relied upon the point that the action had not been brought within six months. He (Mr. Buchanan) contended that the exception ought to have been taken before the Magistrate in the Court below in the first instance, and that it could not afterwards be raised.

Cur. Adv. Vult.

Postea (April 14th).

De Villiers, C.J.: This case, which is an appeal from the Court of the Chief Magistrate of Griqualand East, raises some important questions in connection with the redhibitory action and with the procedure in cases where prescription is relied upon as a defence to such an action. The plaintiff in November, 1902, sued the defendant in the Magistrate's Court of Mount Fletcher for £16, being the price paid by the plaintiff for two oxen purchased by him from the defendant in October, 1901, which died from lung-sickness within ten days after purchase. The oxen were apparently well at the time of purchase, but the disease showed itself

seven days afterwards, and the expert evidence was to the effect that the oxen must have been infected before the date of purchase. The Magistrate gave judgment for the plaintiff with costs, whereupon the defendant appealed to the Court of the Chief Magistrate. On the hearing of the appeal, the appellant did not dispute the correctness of the judgment upon the facts, but contended that, as the redhibitory action must be brought within six months after the date of sale, the obligation to repay the price was barred by prescription, and that, although prescription had not been pleaded in the lower Court, the appellant was entitled on appeal to claim the benefit of such bar. The Court held that prescription ought to have been pleaded in the lower Court, and dismissed the appeal, with costs.

In this court the question has again been raised whether—apart from the question of prescription — the Magistrate was right in holding that the plaintiff was entitled to recover the price which he had paid for the oxen. In my opinion, however, the evidence is fairly conclusive that the oxen died from lung-sickness, which was latent at the date of the sale, but had been contracted before that date. The redhibitory action therefore lay, and if the plaintiff had brought his action within six months after the sale, he would certainly have been entitled to judgment. The action was, however, brought after six months, and if the defendant had raised the exception in the lower Court, he would, in the absence of any satisfactory explanation of the delay, have been entitled to judgment. There was no evidence in this case, as there was in the recent case of *Christie* v. *Etheridge* (12 C.T.R., 628), of such a *justa causa* as would, according to Voet (21, 1, 6), equally justify the delay. But the objection was not raised, and no opportunity was given to the plaintiff in the lower Court to explain the reason of the delay, and the question to be decided is whether it is competent for the appellant to raise it on appeal. The question whether a creditor's delay beyond the prescriptive period in enforcing his obligation operates as an extinction, *ipso jure* of the obligation, or merely confers on the debtor the right of excepting to its subsequent enforcement, has never been authoritatively decided in this Court. According to Grotius (Introd. 3, 46, 2), obligations were not, under the Roman law, extinguished by time, which afforded only a bar against their enforcement by action. He adds, however—I quote from Herbert's translation: "If we look further to our own old laws, we shall perceive that, as dominion is acquired by us through prescription, so also obligation is actually extinguished by the process of time, and as some laws expressly enact, is considered as released, so that no claim can be founded thereon; whence it follows that the Judge, when the lapse of time is proved to him, ought to declare the plaintiff as inadmissible." This doctrine is approved of by Voet (Comm. 44, 3, 10), but its correctness is doubted by Van der Keersel (Thes., 874). The last-named author cites Averranius (Int. Jur., 2, 12, 20.), who says that "an obligation is not extinguished by lapse of time, inasmuch as time is not one of the modes of putting an end to obligations." The question is fully discussed by Wesel (ad. Nov. Const. art 21, sections 25, 26, and 27), who cites the different authorities in favour of and against the view that, in order to obtain the benefit of prescription of an obligation, the defendant must raise the defence of prescription. Among the authorities cited by him are two cases decided in the High Court of Vriesland and reported by Sande (1, 7, 3 and 5, 6, 2). On reference, however, to Sande, I find that the decisions were mainly founded upon the express words of the statutes, which established the period of prescription in each case. Upon the first case, that of *Hermans* v. *Tiacrda*, the author makes the following remarks: "In the opinion of many writers, where the prescription appears on the record, although not specially alleged by the defendant, it must be given effect to by the Judge. But to others the more correct opinion appears to be that prescription requires the aid of an exception in order to extinguish an action, and that it must consequently be alleged in order to require the Judge to take notice of it. Unless it be a prescription arising from a statute, which extinguishes the action *ipso jure*, and denies it after the lapse of time. And this opinion the Court has followed in the present case, being thereto moved by the words of our statute that 'after the

expiration of the aforesaid period such debts shall be deemed to have been duly released, and no action shall lie for the same.'" No case bearing on the point has been cited at the Bar from our own reports, and the only one I have been able to find is that of *Reid* v. *Van der Walt* (2, Searle 285). It was there held that an action of damages for slander is prescribed if not brought within a year after knowledge of the slander on the part of the plaintiff, and that it is incumbent on the defendant to plead and prove as matter of defence that the plaintiff was aware of the slander for upwards of a year after it was uttered, and yet failed to proceed. In the present case the Court has to deal with a prescription established not by a Dutch or Colonial statute, but by the edict of the Aedile, under the Roman law. Under that law, as I have already said, the obligation was not extinguished *ipso jure* by the lapse of six months after the date of sale. It was, moreover, competent for the plaintiff to institute his action after the lapse of six months upon good and sufficient cause shown, and this rule has been adopted by our law as well as by the Dutch law. Unless, however, the defendant raises the defence of prescription, the plaintiff cannot be expected to explain the reason of his delay. It is no injustice, therefore, to hold that before final judgment is given the defendant should call the attention of the Court to the fact that he relies upon the lapse of time as a defence. With its large powers of allowing the amendment of pleadings, the Court would always allow a defendant up to the last moment to raise a defence which would bar the action. But after final judgment the Court could not alter its judgment, and the only remaining question is whether a Court of Appeal can take cognisance of a defence which ought to have been raised in the Lower Court. According to Voet (49, 7, 2), exceptions not taken in a lower Court may be taken in an appellate Court in those cases where evidence not advanced in the lower Court would be admissible. He states that on an appeal to the Supreme Court from the Court of Holland no proof of freshly discovered facts would be admissible, although it would be admissible in certain cases in appeals from inferior courts to the Court of Holland, but no such distinction has ever been recognised in our practice. The defendant failed to raise the defence of prescription in the Magistrate's Court, and thus gave the plaintiff no opportunity of explaining the reason of the delay. It was too late for the defendant to take the objection on appeal to the Chief Magistrate's Court, and *a fortiori* it is too late to take the objection in this Court. The appeal must, therefore, be dismissed with costs.

[Appellant's Attorneys: Findlay and Tait; Respondent's Attorney: G. Trollip.]

HIGHMAN AND MARKS v. GRAHAM AND SMITH. 1903. Mar. 19th.

Magistrate's jurisdiction—Counter claim—Liquidated demand—Compensation.

A counter-claim for the price of bricks which the defendant, as vendor, is ready and willing to deliver, is a liquidated demand which is capable of being opposed in compensation.

This was an appeal from a judgment of the Court of the Resident Magistrate of Stellenbosch upon certain dishonoured cheques, and also for a certain amount claimed for board and lodging, the latter part of the claim being abandoned during the course of the case. The dishonoured cheques apparently were not denied, but the defendants set up a counter-claim for between £600 and £700, and the point in the case really was whether that counter-claim was *bona fide*, and, secondly, whether it could be pleaded in compensation. The counter-claim was for £688 odd, and principally related to 250,000 bricks, which it was alleged that the plaintiff ordered from the defendant in October some three or four months before the action was brought in the Magistrate's Court. These bricks were never delivered, but the defendants, although they had not delivered the bricks, claimed the price which they said had been agreed upon. The point was whether that was a claim that could be treated as a liquidated demand, or whether it was a claim that could only be brought in the way of damages. The Magistrate, in his judgment, said that the claim in reconvention was in excess of the amount in respect of which the Magistrate had jurisdiction, and he could not

enter into the claim in convention, and the case would be dismissed, with costs. Mr. Searle (for appellants) submitted that the defendants' claim could not be pleaded in reconvention. He contended that it was simply brought forward to oust the jurisdiction of the Magistrate, and that, if anything, it was a claim that ought to be dealt with by way of damages. The defendants admitted that they had not delivered the bricks, that they could only deliver them week by week, and counsel submitted that if there had been a breach of contract by the plaintiffs then there was the remedy of an action for damages open to the defendants.

Defendants in default.

De Villiers, C.J.: The Magistrate had to decide two points—firstly, was this a *bona fide* counter-claim, and, secondly, was it in the nature of a liquidated demand? As to its being a *bona fide* counter-claim, the Magistrate had witnesses before him, the defendants' witnesses were examined, and the Magistrate was satisfied after hearing them that it was *bona fide*. I am not disposed to dispute the Magistrate's decision on that point. As to the nature of the demand, it is in the form in which the counter-claim is put forward a liquidated demand, because it is a demand for the price of bricks sold by the defendants to the plaintiffs, for a fixed price according to the defendants' statement, which may be disproved, but that is his statement, there was a fixed price for the bricks, and the bricks were to be delivered in 20,000 at a time. Defendant states that he is ready and willing to deliver them in this amount of 20,000 at a time. He, no doubt, would have a further claim for damages in case the plaintiff does not take the bricks, but the fact that he has another remedy does not exclude defendant's remedy to sue for the price of the bricks upon tendering the bricks themselves. It may be that at the trial he may fail, but that is not the point. The point is, is that a *bona fide* claim that is made, and if it is a *bona fide* claim, and it is a liquidated demand, the Magistrate was right in holding that his jurisdiction was ousted? For these reasons, I hold that the appeal must be dismissed.

[Appellant's Attorneys: Walker and Jacobson.]

KOTZE v. PRINS. { 1903. Mar. 20th. Apr. 14th.

Vindicatio—Ownership—Sale by military authorities—War.

During the recent war some British soldiers removed a mule belonging to the defendant from his farm and, after the proclamation of peace, the Magistrate held a public sale of cattle including the mule in question which was sold to C. and by him sold and delivered to the plaintiff. The mule subsequently came into the possession of defendant whereupon the plaintiff brought an action against him for the restoration of the mule or payment of its price:

Held, *that in the absence of any proof of authority given to the Magistrate to sell the mule the plaintiff was not entitled to succeed and judgment of absolution from the instance was entered accordingly.*

This was an appeal against a decision of the R.M. of Van Rhyn's Dorp. An action had been brought by the respondent against the appellant in the R.M.'s Court at Van Rhyn's Dorp on February 2 last, to recover a certain mule, or the payment of its value, £20, and judgment was given for the plaintiff with costs. The principal facts were that on the 10th October, 1901, the mule, which was then running on the defendant's farm, was seized by a European in khaki, and a number of armed natives, and no receipt was given for the animal. Thereafter, on the 11th July, 1902, the mule appeared to have been purchased at a military sale by one Cillie, who subsequently, on the 29th September, exchanged the mule with the plaintiff for another mule. The defendant's plea denied specifically that the mule in question was the property of the plaintiff, and he pleaded the general issue. The magis-

trate, in the reasons for his judgment, overruled the exception taken as to the jurisdiction of the Court. He came to the conclusion that the mule in question was taken by the military for operations under martial law in October, 1901, and no receipt was given by the military men who took it. The evidence proved to his mind that the column to which these men who had taken the animals were attached was actually in pursuit of the enemy, and that it would hardly be likely to encumber itself with animals which were thought to be in danger of falling into the hands of the enemy, but they would be required for purposes of pursuit. As far as the civil law was concerned, it had nothing to do with this matter in October 1901, because martial law did away entirely with the civil law at that time. The military sale was supervised by the Acting Magistrate. The defendant did not recognise his animal amongst those which were put to auction. The animal was knocked down to Mr. Cillie, who met the plaintiff in this case, and arranged a transaction whereby the mule passed into the possession of the plaintiff. The plaintiff's evidence he considered was perfectly reliable. The defendant first made an offer to the plaintiff to obtain the animal. The evidence of the defendant he considered was all through most unsatisfactory, and his conduct in connection with the transaction most extraordinary. He (the Magistrate) came to the conclusion that the plaintiff was the rightful owner of the mule, and he therefore gave judgment in his favour with costs of suit.

Mr. Upington for the appellant; Mr. Benjamin for the respondent.

Mr. Upington: In this case is proved that in October, 1901, the mule in question was the property of the defendant, and he afterwards finds it in the possession of the plaintiff.

[De Villiers, C.J.: What is the respondent's case?]

Mr. Benjamin (for the respondent): That the ownership of the mule was in the military. Sec. 2 of Act 4 of 1902 legalises seizures of animals made by the military during the late war. If the military thus became owners of these animals, all persons who received such animals have also a good title. As to the right to acquire title by seizure under Martial Law see *Taylor* v. *Nashville* (Digest of American Cases, Vol. 1, p. 1,232). The mule was seized in pursuance of military operations, and was afterwards sold, together with other animals. The appellant may have a claim under the Compensation Acts (Nos. 16 of 1900 and 17 of 1902), but he cannot have a double claim.

Mr. Upington: For our law as to purchases from the *fiscus* see *Voet* (6, 1, 23), where *Resp. J. Corum. Holl.* (part 4, Consil. 128, quest. 2) is cited. A person who purchases from the fiscus is only warranted if the goods have been properly confiscated or escheated, or attached by legal process. The position taken up for the respondent is that goods which have been seized by men who are presumed to have been attached to a column they may lawfully be sold. One would assume that a receipt of some kind would be given whenever property was seized by order of any military man in authority. The plaintiff must show that he has a good title to that mule before he can get possession of it. It is not proved that the European who seized the mule was a member of a column, and there is evidence that these animals were not requisitioned. As to the American case of *Taylor* v. *Nashville*, we have to go on our own law, and it is perfectly clear. Things cannot be confiscated until all legal formalities have been observed, and unless this sale was carried out subject to such formalities, no legal validity is given to the acts of the military. Under Martial Law no goods can be requisitioned without a receipt being given.

Mr. Benjamin, in reply, contended that the military acquired a good title to the mule by seizure, and that this title was protected by Act 4 of 1902.

Cur. Adv. Vult.

Postea (April 14): The Court gave judgment.

De Villiers, C.J.: This is an appeal against a judgment of the Resident Magistrate of Van Rhynsdorp, by which he ordered the defendant, now appellant, to restore to the plaintiff a certain mule, or to pay him its value, namely, £20. It is common cause that the mule was reared on the defendant's farm, and remained his property until it was removed from the farm by a European in military uniform and ten natives. The removal took place before the declaration of peace, but the defendant had not joined the enemy. No receipt was given to him for the

mule, nor were any of the other forms required in the case of requisitions observed by the persons removing it. After the declaration of peace a public sale of cattle was held in Van Rhynsdorp by the Acting Resident Magistrate, assisted by Lieutenant Peek, of the Imperial Yeomanry. Among the cattle thus sold was the mule in question, which was bought by one Celliers, and he exchanged it for another mule with the plaintiff. The mule in question subsequently came into the possession of the defendant, and the plaintiff thereupon instituted the action for the restoration of the mule or the payment of its value. In support of the Magistrate's decision, reliance was mainly placed on an American case, in which it was held that the owner of land on which the troops of the United States had during war cut down certain trees, was not entitled to recover the timber from a person who had subsequently purchased it from the military authorities. Unfortunately, we have only a headnote of the case, without a full report, and it is, consequently, impossible to state the exact grounds of the decision. The case is cited under the heading "eminent domain," and it appears to me to be extremely probable that the decision was based upon the doctrine of "eminent domain," which is peculiar to the American law. According to *Voet* (6, 1, 23), a person who has purchased the goods of another from the *fiscus* is not liable to an action at the suit of the owner, but the authority cited by him (Dutch Cons. 4, 128, 2) does not support his view without an important qualification. Advising upon a case submitted to them, counsel there stated the law to be as follows: "Although it be true that a person who has purchased anything from the *fiscus* is free from liability to third arties, whatever remedy they might have against the *fiscus*, yet this is only true provided that the *fiscus* has sold it under a proper title and with the solemnities required by law, that is to say, when the goods have devolved on the *fiscus* by virtue of a confiscation, or as *bona vacantia*, and have been sold by public auction." The difficulty in the present case is to find by what right or title the Acting Magistrate purported to sell the mule. He by no means represented the public treasury, nor is there evidence that he had been authorised by the proper military authority to sell the mule, and he took no steps, by obtaining a decree of confiscation, or otherwise to deprive the owner of his ownership. If a court-martial or other military tribunal had adjudged a confiscation of the defendant's property this Court would have been bound to assume the validity of such judgment, seeing that the 5th section of Act No. 4, of 1902, promulgated on the 15th of September of that year, confirms all sentences pronounced before that date. The section refers to the Martial Law Regulations which were in force during the war, and it has been contended on behalf of the plaintiff that the sale to Celliers having taken place under these regulations, the property must be held to have passed to him. It is not, however, by any means clear that the sale was authorised by or took place under the regulations. The 22nd Article provides that "stock, etc., may be (1) requisitioned to supply the wants of the Army; (2) seized to prevent its falling into the hands of the enemy; (3) captured from the enemy." The mule in question was not requisitioned from any one, nor was it captured from the enemy. Possibly it may have been seized to prevent its falling into the hands of the enemy, but it was sold at a time when there was no enemy into whose hands it could fall. In the case of cattle thus seized, the 22nd Article says: "The general principle underlying the transaction is that the stock, etc., remains the property of the owner. It may be sold by public auction after removal to districts in which sales can be safely permitted, the proceeds being credited to the owner." In the present case the proceeds were not credited to the owner, and it is impossible, therefore, to assume that the sale took place under the 22nd Article of the regulations. The sale, moreover, took place in a time of peace, when there could hardly be a question of removal to a district in which sales could be safely permitted. The fact that there was not a state of war at the time of the sale was entirely lost sight of in the Court below, and was not referred to in the arguments at the Bar, and yet it is a circumstance of importance for the decision of the present case. Without deciding that if the sale had taken place before the conclusion of hostilities, the ownership would have been transferred,

I am certainly of opinion that the evidence is insufficient to establish the transfer of ownership by means of a sale which took place after the conclusion of hostilities. It was not a sale in execution, or any other recognised mode of transferring property in time of peace against the will and without the consent of the owner. In the case of *Woodhead* v. *Gunn* (11 S.C., 10), this Court expressed approval of the decision of the Eastern Districts Court in *Van der Merwe* v. *Webb* (3 E.D.C., 97), where it was held that the owner of cattle is not deprived of his ownership by the sale of the cattle at a municipal market without his knowledge or consent. A sale held in time of peace by a Resident Magistrate, assisted by a subordinate military officer, appears to me to be of no greater efficacy to transfer the ownership of cattle without the owner's consent than a sale at a public municipal market. The owner retains his right of vindication against the purchaser, and where the property has reverted to the possession of the owner, the purchaser has no right to recover it from him. The appeal must, therefore, be allowed with costs in this Court, and judgment of absolution from the instance must be entered with costs in the Court below.

[Appellant's Attorneys: Walker and Jacobsohn; Respondent's Attorney; G. J. D'Olivera.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

REX v. CLAASEN. REX v. POTGIETER. 1903. Mar. 20th.

Insulting language—Public place.

De Villiers, C.J.: Two special justice cases have come under my notice as judge of the week. In the case of *Rex* v. *Brend Daniel Claasen*, heard at Herbertsdale, in the district of Mossel Bay, the defendant is charged with contravening section 10 of Ord. 27 of 1812, in that he "did wrongfully and unlawfully insult one Mrs. Leonard." Accused pleaded guilty. The evidence showed that it was in a mealy field that the insult took place. Mrs. Leonard says: "On Saturday, the 1st of March, I went in our mealy field, when I met the defendant, who was cursing and swearing and calling me names." There was the following note by the special justice: "The Court regretted by saying that on Sunday the people ought to be in church instead of keep drunkenness, and by so doing they are giving a bad example for another. Therefore, the Court found him guilty and fines with ten shillings, or five days' imprisonment. Fine was paid." Of course that is no reason for charging him under the Act; the offence must be committed in a public place, and the conviction therefore is quashed.

There is also another case in which two men, Josias Johannes Nicolaas de Kock and Martin David Potgieter, were charged with stealing certain donkeys. They were both found guilty, and as to De Kock, I am satisfied that the conviction is right. As to Potgieter "the evidence shows that he acted by directions of De Kock, and that he took the donkeys to a certain place at De Kock's request, and was found in possession. The evidence satisfies me that Potgieter was instructed to do what he did, and he was not aware that De Kock had stolen the donkeys. Therefore the conviction as to Potgieter will be quashed.

Ex parte VAN DER WALT.

This was an application for an order with regard to the sale of certain property in which minors were interested. The petitioner stated that he was a retired farmer, formerly of Colesberg, and now residing at Middelburg, and in 1883 he executed a will and codicil together with his late wife bequeathing certain farms to the survivor and the children of the marriage. The Colesberg Divisional Council's valuation of the land was £8,600, and petitioner had received from the Rhodes, Bailey, and Beit Syndicate, Ltd., an offer of £36,000 for the property, a price which petitioner and his children, who were legatees considered was far in excess of the real value. They were agreed that the offer should be accepted. The surviving sons were all of full age, but one of the petitioner's children died a few years ago, and, in the

terms of the will and the codicil aforesaid, his one-third share devolved on his six children, three of whom were of age, and who consented to the sale by the other legatees. There were three other children who were still minors. The Master reported favourably, and asked for permission to alienate the small share in the land belonging to the minors, so that the sale so advantageous to all concerned might be concluded.

On the motion of Mr. Benjamin, an order was granted in terms of the Master's report.

MASANGWANA v. PRATT. { 1903. Mar. 20th. Apr. 14th.

Native custom – Dowry cattle—Seizure in execution.

One S. (a Pondo) had received certain cattle as a dowry for his sister. These he handed over for custody to M., his chief and half brother. P., acting as messenger of the Resident Magistrate's Court, had seized certain of these cattle (as was alleged) in execution of a judgment obtained against S. M. brought an action in the Magistrate's Court for the recovery of these cattle. The Magistrate gave judgment for the defendant on the ground that by Pondo custom the son of the chief wife is responsible for his younger brothers. On appeal the Court referred the matter to the Magistrate for a full report as to whether he found as a fact that the cattle had been paid to M. or to S. On its appearing from the Magistrate's report that M. gave up the cattle to the messenger voluntarily, the appeal was dismissed.

This was an appeal brought by one Masangwana (a native chief) against a judgment of the Resident Magistrate of Libode (Pondoland).

In the Court below the plaintiff (now appellant) had claimed from the defendant (now respondent) the restoration of a certain chestnut stallion, one black heifer and one bull calf; or their total value, the sum of £60, which stock the defendant did, about September 26, 1902, wrongfully and unlawfully seize and take possession of, and which are the property of the said plaintiff.

The Magistrate gave judgment for the defendant with costs.

The Magistrate's reasons for his judgment were as follows:

1. Masangwana is the elder half-brother of Siqakula by the chief wife.

2. The cattle in question are the original, or increase of cattle paid as dowry for Siqakula's own sister.

3. The cattle when paid as dowry remained at Masangwana's kraal because Siqakula had no cattle kraal.

4. The deputy-messenger, who is the son of a Pondo chief, went to the head of the family, Masangwana, and after taking some time, Masangwana handed the stock to the deputy-messenger, knowing that Siqakula had referred the deputy-messenger to his family chief and elder brother, Masangwana.

5. Pondo custom does not differ much in this respect from that of the other tribes. The son of the chief wife is responsible for his younger brothers; he stands in the light of a father of the family. In this case he was more so, as the stock was still under Masangwana's protection and care. Two of the cattle paid as dowry (which were well known) were paid out by Masangwana for the dowry of Siqakula's younger brother's wife to avoid their being seized.

On these grounds judgment was entered for the defendant with costs, and the stock declared executable.

Mr. Searle, K.C., for the appellant, Mr. Benjamin for the respondent.

Mr. Searle said it seemed to be admitted in this case that these cattle belonged to Masangwana. Apparently the principle applied in this case was that Masangwana was responsible for Siqakola's debts, and he (counsel) submitted in the first place that that was not a principle that could be applied in this case. The magistrate had not to decide according to native law, because it was a case between a European and a native.

[De Villiers, C.J.: No, it is a case between two natives.]

Mr. Searle: No, it is not an interpleader issue. It is an action against Pratt.

[De Villiers, C.J.: The question of the ownership of the cattle is one of native law.]

Mr. Searle: That is so. Counsel went on to contend that the cattle attached were acquired by Masangwana as a dowry for his daughter, and that they should not have been seized. It was also admitted, he said, that these parties had separate kraals.

Mr. Benjamin, in support of the judgment, said that it seemed to be agreed that the plaintiff was the owner of the cattle, but he willingly handed them over to the deputy messenger because he no doubt had in his possession the cattle of Sequakula's. That act, he contended, was quite voluntary.

De Villiers, C.J., said he found it difficult in this case to do justice between the parties without having a fuller report from the magistrate as to the facts of the case, and the matter would be referred to the Resident Magistrate for a full report as to the facts, and more especially as to whether he disbelieved the plaintiff Masangwana on the question of whether the cattle had been given to him as a dowry for his daughter, or whether the cattle which had been paid to Sequakula's sister were at the time this took place under the control of the plaintiff. His lordship added that, upon receiving the magistrate's report, he might hear counsel further.

Postea (April 14):

De Villiers, C.J., said he had been in communication with the Resident Magistrate of Libode, Pondoland, and the effect of the latter's reply was that the cattle were given up voluntarily. The appeal would, therefore, be dismissed.

[Appellant's Attorneys: Walker and Jacobsohn; Respondent's Attorneys: Faure and Zietsman.]

SUPREME COURT

[Before the Hon. Sir JOHN BUCHANAN.]

REVIEW.

REX. v. GERMAN. { 1903. Mar. 31st.

Act 40 of 1902, sec. 16.

Buchanan, J., said that the case of Sarah German, alias Sarah Jacobs, had come under review. The prisoner was charged with contravening section 16 of Act 40 of 1902, in that she was found in possession of a quantity of intoxicating liquor. There was also a second conviction, and the Magistrate fined the prisoner £15, or four months' imprisonment. The limit fixed under the Act was £10. The sentence would therefore be reduced to a fine of £10.

NATIONAL BANK v. ROSS { 1903. Mar. 31st.

Extradition — Supercession of Colonial Order of Sequestration and of civil imprisonment—Transmission of insolvent's Colonial assets to foreign trustee.

R.'s estate had been finally sequestrated by the Supreme Court as insolvent, and on failure to find security that he would attend the meetings of his creditors he had been committed to civil imprisonment. Thereafter proceedings had been instituted against him in the Transvaal, where his estate had also been sequestrated for fraudulent insolvency, and an order had been granted for his extradition thither. His only creditor in this Colony was the National Bank and his assets were in the Orange River Colony and in Basutoland. On the application of the chief local agent of the bank, and with the consent of the curator bonis *to the in-*

solvent estate, the Court granted an order discharging the Colonial order for sequestration and the order for the civil imprisonment of the insolvent, and directing the curator bonis *to hand over any assets in his hands to the trustee appointed in the Transvaal.*

This was an application arising out of a writ of arrest granted against the respondent. The writ was confirmed on March 12, 1903, and the applicants now asked for an order to allow the removal of the respondent to the Transvaal, if need be, to withdraw the order for sequestration, and to authorize that whatever assets the *curator bonis* has be transmitted to the trustee appointed in the Transvaal for the benefit of the creditors. About the 9th instant, before the return day, his estate was provisionally sequestrated, the bank being the petitioning creditor, and on the return day, the 12th, the bank moved in the ordinary way for confirmation of the writ, and made an application to the Court for the detention of Ross, pending a meeting of creditors to be held in his insolvent estate, and upon that the Court made an order that Ross was to find security for £500 to attend the meeting of his creditors, or otherwise be detained in gaol, and also on the same day, by the consent of Ross, who was represented by counsel, the Court finally adjudicated Ross's estate to be insolvent. In the ordinary course the provisional order of sequestration would only have been returnable on the 14th April, but, by consent of Ross, the date of final adjudication was anticipated, and his estate was finally sequestrated. On the 26th of this month a final order for the sequestration of his estate was made in the Transvaal, and since then the creditors had initiated proceedings for fraudulent insolvency there, and an order had been granted for the extradition of Ross, but this could not be executed, because of the order of the Court of the Cape Colony civilly detaining him in gaol, and the bank now applied for the supercession of the order for his detention in gaol to allow him to be handed over to the police. Counsel read the notice of application, in which it was stated by Mr. W. C. Cruickshank, chief agent of the National Bank, that he had reason to believe that there were no creditors of Ross in this colony other than the bank, that his assets were in the Orange River Colony and in Basutcland, and that Ross was wanted in the Transvaal to answer a charge of fraudulent insolvency. The police had approached petitioner to ask him what position he took in the matter. Petitioner was of opinion that it would be more convenient if Ross were removed to the Transvaal, and he asked that the Court should consent to his removal to the Transvaal and to the withdrawal of the order of sequestration, and authorise whatever assets might be placed in the hands of the *curator bonis* to be transmitted to the trustee appointed in the Transvaal for the benefit of his creditors. A letter of approval of this course was produced from the *curator bonis* in Cape Town.

On the motion of Mr. Upington the Court directed that the order for final sequestration and the order for his detention in gaol, pending security for his attending the meetings in his insolvent estate, be hereby discharged.

[Applicant's Attorneys: Van Zyl and Buissinne.]

Ex parte ROSE.

Builder's lien—Retention money—Security.

This was an application for an order calling upon the respondent A. R. Wojeichowski, to deliver up the keys of certain premises in Main-road, Sea Point. The respondent was the contractor for certain premises erected by the applicant situate in that road, and he refused to give up the keys on the ground that there was an outstanding account still due to him on the contract. A contract was entered into between the parties, whereby the respondent was to complete the work for £770. The building was near completion, and the necessary certificate of occupation had been given by the Sea Point Council. The respondent still neglected to finally finish the building, and he declined to deliver up the keys. There remained due to him a sum of £40, but under the contract the applicant was

entitled to retain a certain sum pending the completion of the work. The respondent claimed that he was entitled to £370 19s from the applicant under the contract. Applicant had tendered to the respondent security up to the amount of his claim, pending the result of the action to be instituted by him, but he had declined to accept this security. Respondent urged that he was entitled to continue in possession of the premises until his claim was satisfied, and, as to any delay in the work, he contended that it was due to the unlawful interference of the applicant.

Mr. Upington moved.

Buchanan, J., remarked that the whole question between the parties seemed to be one as to security. The respondent had a lien on the premises *prima facie*, and the applicant seemed to have taken possession against his wish.

Mr. Upington said it was quite clear that the respondent had a lien on the premises until his charges were paid, and he seemed prepared to waive that lien provided he got security for the amount of his claim. What the applicant was prepared to do was to give security to the satisfaction of the Registrar.

The Court granted an order requiring the respondent to give up the keys upon the payment by the applicant of £400 to abide further proceedings, such proceedings to be instituted by the respondent within one month, leave being reserved to the respondent to move to have this order set aside.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton.]

"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS. { 1903. April 14th.

ADMISSIONS.

Mr. M. Bisset moved for the admission of Frederick Harold Burton Moore as an attorney-at-law and notary public.

Granted.

Mr. Benjamin moved for the admission of Francis Wm. Foley as an attorney-at-law and notary public.

Granted.

Mr. M. Bisset moved for the admission of Anna Elizabeth Christina von Velden as a translator.

Granted.

Mr. J. E. R. de Villiers moved for the admission of Johannes Gerhardus Pieter van der Horst as a conveyancer.

Granted.

Mr. J. E. R. de Villiers called the attention of Court to the application made on the 23rd October last by Mr. Klerck for admission as an attorney.

The Chief Justice intimated that the Bench had consulted in regard to the point raised, and had decided that the applicant should be admitted.

PROVISIONAL ROLL.

STEVENS AND FLECK V. ANDRIES.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £450. due by reason of the non-payment of interest, and also for £1 15s. for premiums, stamps, etc., and he also asked that the property be declared executable.

Granted.

AUSTEN AND HODGES V. HODGES.

Mr. Gardiner moved for provisional sentence on certain promissory notes made by the defendant in favour of the plaintiffs.

Sir H. Juta, for the respondent, said that this matter had already been once postponed, so as to ascertain whether or not his client was indebted to the applicants, a point which depended on the result of a certain arbitration. Last time the case was before the Court the arbitration was unfinished. The arbitration had now been completed, and the whole matter could be settled as soon as the terms of the award became known, and he therefore applied for a postponement until the May term.

Mr. Gardiner said these repeated postponements were seriously prejudicing his clients' business, because they were allowing the promissory notes which were the subject of the proceedings to form part of their capital.

The matter was ordered to stand over until the May term, costs to be costs in the cause.

HAWKER V. PATTERSON.

Mr. J. E. R. de Villiers, on behalf of the plaintiff, moved for confirmation of a writ of arrest upon which defendant had been imprisoned for a debt of £60 5s., account for goods sold and delivered to

him. The writ was issued under the 8th Rule of Court, as the Defendant was meditating departure from the Colony.

Defendant said he had been three weeks in prison. He admitted the debt.

Judgment was given for the amount claimed, with costs, and the writ confirmed.

STEVENSON V. HONWITZ.

Mr. Upington moved for provisional sentence for £72 on a promissory note, with interest, and also for judgment, under Rule 329d, for £71. balance due to the plaintiff from the defendant on account of money lent and advanced, and also for £50, money collected by the defendant on account of the plaintiff, which sum the defendant had not accounted for.

Order granted accordingly.

HAVENGA AND DICKSON V. REDELINGHUYS.

Mr. Benjamin moved for provisional sentence on promissory notes for the following amounts: £250, £310, £148 15s. 6d., £755 15s. 3d., and £553 11s. 6d.

Granted.

HEDDLE BROS. V. SPITTLE AND LLOYD.

Mr. Buchanan moved for provisional sentence on a bill payable 180 days after sight, by order of the Bank of Africa, for £71 14s., made by Heddle Bros., the present plaintiffs, upon the defendants, and accepted by them. The bill had not been met, the bank declaring that the defendants had no account. Counsel added that there was also in the summons a claim under Rule 329d, but the time not having elapsed, he could not mention it now, and he should have to come to the Court later on.

Order granted.

SAUERLANDER AND KRUGER V. SCOTT.

Mr. M. Bisset moved for a decree of civil imprisonment on an unsatisfied judgment for £241 7s. 8d., with interest and taxed costs.

The debtor made an offer of £5 a month and said that this was all he was in a position to pay. He had impoverished himself in this matter already, having paid £2,500.

Mr. Bisset said that he thought that the offer was very small.

The defendant said that there were other judgments on behalf of the same plaintiffs against him. He foolishly endorsed certain bills two years ago, and he had been paying ever since, and the real party had not paid threepence.

The Chief Justice: How do you mean?

Defendant: When he took a certain hotel, I endorsed his bills, and I have paid already £2,500 on his behalf, and now this judgment is brought against me. The original bill was £1,850. I am not the debtor at all. I signed the bills on behalf of one Parsons or Core, and he has absconded.

The Court granted a decree as asked for, to be suspended on payment of £5 a month from the 1st May, leave to be given to the plaintiffs to apply later for an increased order.

KLERCK V. ABDOL.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £200, together with interest, the bond having become due by reason of the non-payment of interest, and he also asked that the property specially hypothecated be declared executable.

Granted.

ISRAELSON V. BLAKE.

Mr. Benjamin moved for provisional sentence on a mortgage bond, due by reason of notice given by the defendant calling in the bond. He asked for judgment on the bond for £1,000, together with interest due from December last, and also that the property specially hypothecated be declared executable.

Granted.

DEMPERS V. POGGENPOEL.

Mr. Rowson said that he was instructed by the plaintiff to apply for provisional sentence on a certain mortgage bond, but he understood that the summons had not yet been returned, and he therefore asked that the case should stand over until the 1st day of next term.

The Court assented.

LAWRIE V. ISAACS.

Mr. Close said he appeared for the plaintiff, but he understood that a final

order for the adjudication of the estate had been made, and he therefore asked that the case should stand over.

Order accordingly.

DEMPERS AND VAN RYNEVELD V. PENTZ.

Mr. Joubert moved for provisional sentence on a mortgage bond for £500, which had become due by reason of the non-payment of interest.

Granted.

BOSMAN, POWIS AND CO. V. A. COWELL AND CO.

Mr. M. Bisset moved for provisional sentence for £307 5s. on a certain promissory note, together with interest and costs.

Granted.

HADLEY V. LEONARD.

Mr. Benjamin moved for a decree of civil imprisonment on an unsatisfied judgment for £176.

Debtor said he was a cartage contractor, and he could not possibly pay more than £2 a month.

A decreee was granted, with costs, operation to be suspended on the debtor paying £2 a month from the 1st May, leave being given to the plaintiff to apply for an increased order.

GELL V. AHMED.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £130, with interest at the rate of 6 per cent. per annum, the bond having become due by reason of the non-payment of monthly instalments. Counsel also asked that the property specially hypothecated be declared executable.

Granted.

ZIETSMAN V. SAYDIEN.

Mr. M. Bisset moved for provisional sentence on a promissory note for £250, less £25 paid on account.

Granted.

FREEMAN AND CO. V. WEINTROB.

Mr. De Waal asked that this matter should be postponed until the 1st May.

The Court assented.

SPENGLER V. ALVIENS.

Mr. De Waal moved for provisional sentence on a mortgage bond for £400, with interest at the rate of 6 per cent. per annum, due by reason of the non-payment of interest. Counsel also asked that the property specially hypothecated be declared executable, and applied for provisional sentence for 16s., on account of insurance of the said property.

Granted.

BLAKE V. CORTIS. { 1903. April 14th.

Mortgage bond—Notice of payment—Provisional sentence.

The plaintiff sued the defendant for provisional sentence on a bond which was payable upon three months' notice given on either side. The summons alleged that such notice had been given to the plaintiff by the defendant, but the evidence showed that the plaintiff at once wrote refusing to accept such notice.

Held, *that after such refusal the plaintiff could not rely upon the notice given by the defendant, and provisional sentence was accordingly refused.*

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond for £1,150, less £100 paid on account, due by virtue of notice of re payment having been given by the defendant to the plaintiff. Counsel also asked that the property specially mortgaged by the said bond be declared executable, and that costs be granted of the present application.

Mr. Upington, for the defendant, read an answering affidavit, which set forth that on the 13th December last, the defendant, through his attorney, gave notice to the plaintiff's agent that he would pay off the bond now sued upon, and that the plaintiff's agent refused to accept the notice. Deponent added that he had paid interest to the 31st December, 1902.

Mr. De Villiers read the replying affidavit of the plaintiff, which was to

the effect that he admitted that he had received the said notice from the defendant, but he contended that the defendant had not complied with the conditions stipulated in the bond.

Mr. Upington submitted that the notice which was relied upon as forming the basis of the action was rejected by the plaintiff. Then a month afterwards the plaintiff turned round, and said he must give notice to pay off the capital and interest.

Mr. De Villiers said it was true that they refused to accept the notice, but their letter set forth that they could not accept the notice unless Mr. Cortis complied with the terms of the bond. They only refused conditionally. The defendant absolutely owed £200, which he ought to have paid on the 18th October. Then he said he would pay off the sum within three months.

The Chief Justice said the most extraordinary feature of the case was that the plaintiff, writing on the 15th December, required the defendant to pay £300 on the 18th October.

Mr. De Villiers: We refused the notice conditionally.

The Chief Justice: Conditionally on his doing an impossibility.

Mr. De Villiers: We asked for £850, for which three months' notice was to be given, and for £200, for which no notice was to be given.

De Villiers, C.J.: The defendant is sued for the sum of £1,150, less £100, on a bond which, according to the summons, has become due and payable in consequence of the notice of repayment having been given by the defendant to the plaintiff. That is all the summons relies upon—notice of repayment having been given by the said defendant to the said plaintiff. The summons says nothing whatever about £200 being due and payable at a previous time. It is true that the correspondence shows that, but the summons should have stated it as the ground of claim, which it does not. As to the notice of repayment referred to in the summons, there is no doubt that such a notice of repayment was given, but the plaintiff refused to accept it. He refused on the 31st December, or some time in December, 1902, unless £300 were paid in October, 1902, an utterly impossible condition. There is an absolute rejection by him of the notice, and it is wholly impossible for the plaintiff now to rely on the validity of the notice, which he himself had rejected. Provisional sentence will therefore be refused, with costs.

[Plaintiff's Attorneys: Sauer and Standen; Defendant's Attorneys: Herold and Gie.]

HEATLIE V. CHETTY.

Mr. Howel Jones moved for provisional sentence on two promissory notes of £1,085 1s. 6d. and £350 respectively, with interest.

Granted.

BAINBRIDGE V. GILLANDERS.

Sir H. Juta appeared for the petitioner, and asked for the discharge of the provisional order for sequestration.

Granted.

MOTT V WARIES.

Mr. Close moved for provisional sentence on a bond for £115, with interest and costs, the bond having become due by reason of the non-payment of interest, and he asked further that the property be declared executable.

Granted.

DR. T. WATER V. NORTJE.

Mr. De Waal moved for provisional sentence for £102, interest on a mortgage bond from May 21, 1901, to May 21, 1902.

Granted.

HERMANN V. ISAACS.

Insolvency — alleged excess of assets over liabilities.

Mr. Gardiner, for plaintiff, moved for the final adjudication of defendant's estate, a provisional order having been granted on March 21.

Mr. Murray Bisset, for defendant, opposed the application.

Mr. Benjamin intervened on behalf of one Vincent Hutt to support plaintiff's application.

Mr. Bisset read an affidavit by defendant, who stated that his assets exceeded his liabilities, and denied that he was insolvent. Owing to certain papers being in the hands of his agent (Mr. Steer), who refused to give them up, he was prevented from dealing with his landed properties, which, if sold, would show a surplus of over £2,000.

His creditors were secured by mortgage bonds.

Mr. Buchanan stated that Mr. Steer denied the truth of defendant's allegations as to the retention of papers.

De Villiers, C.J.: It is quite clear that defendant has committed acts of insolvency. The defendant makes certain serious accusations against Mr. Steer, and I think these allegations should, in some form or other, be closely scrutinised. The question is, whether time should be given defendant to bring his action against his agent. On the whole, I think it will be impossible for the defendant to stave off insolvency, and he is indebted to so many creditors that I am afraid further postponements will be of no avail. I think the best course is for the Court to order a sequestration of the defendant's estate and a close investigation into the allegations made against Mr. Steer. If there is a surplus after the payment of creditors, the defendant will get it. Seeing that the defendant has committed divers acts of insolvency, the Court must now grant the order asked for.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton.]

PRITCHARD V. FORD AND ANOTHER.

Mr. M. Bisset moved for provisional sentence for £506 13s. 3d., due on a promissory note.

Granted.

ARDERNE AND CO. V. SELITKZY.

Mr. M. Bisset moved that the provisional order of sequestration against defendant's estate, granted last March, be made final.

Granted.

COOMER V. MURISON.

Mr. Benjamin moved for a final order of sequestration, the provisional order having been granted in March last.

Granted.

ILLIQUID ROLL.

J. C. SMITH AND CO. V. DRURY. } 1903. April 14th.

Mr. Close moved for judgment, under Rule 329d, for £103 10s., balance of account for goods sold and delivered.

Granted.

WHITE, RYAN AND CO. V. COMMITTEE OF THE CAPE TOWN CLUB.

Mr. Benjamin moved for judgment, under Rule 329d, for £166 8s. 2d., and for an order that the moneys in the hands of Mr. T. J. O'Reilly, as a trustee of the club, be made available for the purpose of satisfying the judgment.

Granted.

CAISSE V. FISHER.

Mr. Gardiner moved for judgment, under Rule 329d, for £52 10s., rent due for the months of October, November, and December.

Granted.

ESTATE J. S. MARQUARD V. KAPELUS AND ABRAMS.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £31 9s. 6d., for goods sold and delivered.

Granted.

MASTERTON V. BRAND.

Mr. Benjamin moved, under Rule 329d, for a full and true account of the debt against defendant, supported by vouchers.

Granted.

DAVIDS V. MURRAY.

Mr. M. Bisset moved, under Rule 329d, for an order on the defendant to give transfer of a certain piece of ground at Beaufort West.

Granted.

MIKS AND SONS V. GIN.

Mr. Close moved, under Rule 329d, for judgment for £42, for goods sold and delivered.

Granted.

VASSIS V. COHEN.

Mr. Benjamin moved, under Rule 329d, for judgment for £22 1s. 9d., for goods sold and delivered.

Granted.

CLEMENT V. ASTON.

Mr. Close moved, under Rule 329d, for judgment for £35 11s. 6d., for labour done and material supplied.

Granted.

VASSIS V. CADER.

Mr. Benjamin moved for judgment, under Rule 329d, for £17 5s. 9d., for goods sold and delivered.

Granted.

SCOTT V. URQUHART.

Mr. Gardiner moved for judgment, under Rule 329d, for £31 0s. 6d., for goods sold and delivered and for work and labour done.

Granted.

MARSH AND SONS V. SHIRLEY.

Mr. Benjamin moved for judgment, under Rule 329d, for £174 17s. 9d., balance of purchase price of goods sold and delivered.

Granted.

MILNE V. SMUTS.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £250, purchase price of certain property situate in the Cape Division, and for the execution of a mortgage bond for £200, which respondent had engaged to pass.

Granted.

SCHRODER V. VAN DER MERWE.

Sir H. Juta, K.C., moved for judgment in terms of a consent paper in an action for slander for the payment of £200 damages and costs.

Granted.

PALMER V. HADLEY.

Mr. J. E. R. de Villiers moved, under Rule 329d, for an order for the delivery by defendant of a certain cart belonging to plaintiff, or failing delivery, the payment of the sum of £51 as damages.

Granted.

VAN REENEN V FRIEDLAND.

Mr. Benjamin asked for judgment, under Rule 329d, for £12, balance of purchase price of certain ground.

Granted.

MORSER V. SILVERMAN AND ANOTHER.

Mr. Close moved for judgment, under Rule 329d, for £134, for goods sold and delivered.

Granted.

VAN BLOMMESTEIN V. HAZELRIGG.

Mr. Benjamin asked for judgment. under Rule 329d, for £37 14s. 3d.

Granted.

FREMOND V. ARNOLD.

Mr. Gardiner moved for judgment, under Rule 329d, for £16, for goods sold and delivered.

Granted.

LEWIN BROS. V. SHIRLEY.

Mr. Benjamin moved for judgment, under Rule 329d, for £8. due for rent.

Granted.

MCKAY V. GARDINER AND EASTON.

Mr. Upington moved for judgment, under Rule 329d, for £294 19s. 2d., for goods sold and delivered.

Granted.

NORBYE V. BENSIMON. { 1903. April 14th.

Review — Irregularity — Resident Magistrate.

On an application for a review of proceedings in a Magistrate's Court it was alleged that the Magistrate had refused to hear the witnesses for the plaintiff. The Magistrate denied the allegation on oath, and there was nothing to show that an application had been made to him to enter on the record a refusal to hear the evidence.

Held, *that in the absence of proof of irregularity on the face of the record, clear proof* aliunde *was required.*

This was a motion for an order to review and set aside the proceedings in this case in the Court of the Resident Magistrate of Cape Town, on the ground of gross irregularity in the proceedings, owing to the Magistrate (Mr. Roussow, A.R.M.), refusing to allow evidence to be called on behalf of plaintiff.

The action in the court below was for the recovery of the sum of £14 5s. 6d., balance of an account. Plaintiff had done some paving work for defendant at Sea Point, and the

disputed claim was for extra work alleged to have been done at the request of Bensimon. The point at issue was whether the original tender covered the extra work or not. A special plea of settlement was set up, and it was held by the Magistrate that the onus of proof was on the defendant. A cheque, endorsed to the effect that it was in full settlement of plaintiff's claim, was put in, and absolution was granted from the instance without plaintiff's witnesses being allowed to be called.

In his affidavit, the Assistant Resident Magistrate denied that he had refused to hear the evidence of plaintiff's witnesses.

Sir H. Juta, K.C., for applicant; Mr. J. E. R. de Villiers for respondent.

Sir H. Juta, K.C.: In this matter, according to an account put in, a balance of £14 5s. 6d. is left in appellant's favour. To a claim for this balance the respondent pleads a settlement; or, in the alternative, admits £1 to be due but puts in a counterclaim for the same amount. The Magistrate said that the special plea must be dealt with before the defendant could be heard. He should have called upon the plaintiff to go into the box and prove his case. The Magistrate took no evidence save on the special plea of settlement, and then proceeded to give absolution from the instance. In point of fact there was no evidence in support of this special plea. The plaintiff never accepted £71 in full settlement, because he was always asking, "When will you pay me the balance?" Even the Magistrate could not have held that this was a settlement, or he would have given judgment for the defendant.

[De Villiers, C.J.: What was the special plea?]

That the matter had been settled, and we say that there is no evidence as to this.

[De Villiers, C.J.: You cannot object to the finding of absolution from the instance.]

But we do object; we had evidence on the merits, but the Magistrate would not allow us to lead it.

[De Villiers, C.J.: But where is the irregularity? Is it because the Magistrate did not call the evidence of plaintiff as to the special plea?]

Yes; the plaintiff had evidence on the merits. If the Magistrate had given judgment for the defendant we could have appealed, but we cannot appeal against his finding of absolution from the instance.

[De Villiers, C.J.: Why?]

We have nothing to appeal on. There is no evidence that the amount we claim is due to us. The evidence in our possession does not appear on the record, and we cannot ask to have the record amended, as these matters did not come out in the Court. I submit that the Magistrate was wrong in not taking evidence on the merits.

Mr. J. E. de Villiers (who was requested by the Court to confine himself to the question of costs): Even should the Court find that the Magistrate was guilty of any irregularity, we are still entitled to costs. The irregularity (if any) was due solely to the action of the attorneys. Defendant's attorney asked only for absolution frvom the instance, and the plaintiff tendered no evidence and made no protest against the finding of the Magistrate.

Sir H. Juta (in reply): If the *onus probandi* was on the defendants, that concludes the whole case; but if this cheque was given in full settlement of the account, that only makes the finding of absolution from the instance more incomprehensible than ever.

De Villiers, C.J.: It is very much to be regretted that a misunderstanding arose between the parties, and that the Magistrate did not allow the plaintiff's evidence, because there was no clear admission by the defendant's agent of the liability, and therefore evidence in support of the plea should not have been heard until the plaintiff's case was first of all established. The evidence for the defendant was heard, and then I have no doubt that plaintiff assumed that the Magistrate, on the merits of the case, was in his favour, and therefore did not take proper steps to produce his own evidence. The Magistrate absolutely denied that he refused to allow plaintiff to give evidence, and the record supports the Magistrate. There is nothing on the record to show that there was any application on the part of the plaintiff for an order that his witnesses should be examined, and that a refusal was given. If the record had shown that the Magistrate refused to hear the plaintiff's witnesses, I would have been prepared to set aside the proceedings, but the record is silent on the

point, and the evidence leaves the matter, to say the least of it, very doubtful. Only the clearest evidence would justify the Court in holding that the irregularity had been proved in opposition to the positive denial on oath of the Magistrate and the other witnesses for the respondent. The application must be refused, with costs.

[Applicant's Attorneys: Tredgold, McIntyre and Bisset; Respondent's Attorneys: Michau and de Villiers.]

GENERAL MOTION.

Ex parte BROWNELL. { 1893. April 14th.

This was an application for an order to restrain the respondent, applicant's husband, from receiving certain moneys which were invested in a local bank pending an action which she was instituting for the restitution of conjugal rights. The petitioner stated that she resided at Salt River, and that she was married to the respondent in community of property, and that there had been no issue of the marriage. Recently, unhappy differences had arisen between her and her husband which had rendered it impossible for them to live together, and the petitioner was about to institute an action for the restitution of conjugal rights. There was a sum of £200 or more standing to the credit of petitioner and her husband, which had been largely raised through the savings of the petitioner during the subsistence of the marriage. Petitioner had reasonable grounds to believe that the respondent intended to return to his home in the United States, and that he would proceed to withdraw the money standing in the bank in their joint names.

On the motion of Mr. Alexander, the Court granted a rule *nisi* calling upon the respondent to show cause on the 1st May why an interdict should not be granted against him.

APPEAL.

VICKERS v. MASON AND CO. { 1903. April 14th.

Review — Irregularity — Resident Magistrate.

In a civil case, tried in a Magistrate's Court, a document in the possession of the defendant to which great importance was attached was shown by his agent to a witness, who acknowledged having previously seen the document in the possession of the defendant. The document was not, however, put in as evidence, and after judgment of absolution from the instance had been given, the Magistrate obtained a certain document from the defendant as being the document which had been shown to the witness. The document thus obtained was inserted in the record as being part of the evidence On review, the Clerk of the Court and the witness denied on oath that the document thus inserted had ever been shown to the witness.

Held, *that the irregularity was such as to entitle the plaintiff to have the proceedings set aside.*

This was an application for review of certain proceedings of the Court of the Assistant Resident Magistrate of Lady Grey, in the district of Aliwal North.

In the Court below the plaintiff had brought an action in which he claimed the sum of £38 as damages, reduced to £20, to bring the case within the jurisdiction of the Court, for alleged illegal possession, detention, and so forth of certain two oxen which were the property of the plaintiff. The judgment was absolution from the instance. The application for review was made on the ground of gross irregularity in the proceedings in that in the first place a certain receipt was annexed to the record which was not put in during the hearing of the case and upon which the Magistrate appeared to have based his judgment, and in the second place that the Magistrate gave absolution from the instance without calling upon the plaintiff's agent at all or giving him an opportunity of being heard, and generally that the proceedings were otherwise irregular. In support of the application, counsel read the affidavits of

applicant and other witnesses called on his behalf at the trial.

The following were the Magistrate's reasons in giving judgment: In this case damages were claimed because of the alleged illegal detention of two oxen. I find that the plaintiff in no way proved that the possession had been other than bona fide, and that the evidence of plaintiff's witnesses, except Booi, the native witness, on whom I could not rely at all, went to support the defence as stated during the proceedings by the defendant's attorney, and shown in the receipt put in marked "B." The attorney for the plaintiff, when informed that he had not disposed of the receipt "B," or proved male fide possession, said it was impossible to disprove a bogus receipt, and he must close the case; with that he sat down. The defendant's attorney was then about to place his witness in the box when he was stopped by the Court, and absolution from the instance was granted. The attorney for the plaintiff is conscientiously under the impression that but for some interruption of the Court he would have, in closing his case, reserved the right of calling further evidence. I am quite convinced, however, that he closed his case absolutely. All through the case the contention of the plaintiff's attorney was that even if the possession was bona fide, defendants were liable to damages; further that the bona fides of the receipt should be proved by the defendant. The plaintiff's attorney now demurs to the admission of the exhibit "B." It was openly put in by defendant's attorney when Roberts mentioned the receipt seen by him, referred to, to the end of the case. At the time of its being put in, I read it out to the parties, and no further notice was taken of the admission of it as an exhibit, and I understood the acceptance of it by the witness and plaintiff's attorney. I did not at the time in Court mark it or note on the record the letter "B." This I did immediately the case was over, when putting the record together, and then found that the Clerk of the Court had allowed it to remain in the possession of the attorney for the defendants after the case was over. When demanded, it was restored to the record within a very few minutes after the case ended.

Mr. Upington for the appellant; Mr. Gardiner for the respondents.

Mr. Upington submitted that it was a very important point that the statements made by the witness Roberts and the Clerk of the Court were not specifically controverted, or controverted in any way by the Magistrate in his reasons.

Mr. Gardiner read several affidavits, in which it was asserted that reference was made in open Court to the receipt, which the Magistrate remarked appeared to be perfectly valid.

The Chief Justice: Who gave evidence as to the receipt?

Mr. Gardiner: It was put to the witness Roberts in cross-examination.

The Chief Justice: What did he say?

Mr. Gardiner: That it was the same receipt that was shown to him at Lemoenfontein.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: It appears to me that there has been very great irregularities in this case. Both parties seem to attach considerable importance to the receipt for the purpose of proving *bona fides*. It was important, therefore, for the defendant to have this receipt produced, but there was no production of it by the person in whose custody it was. No attempt was made to produce it, but when a witness for the plaintiff, called Roberts, was put into the box, it is said that a receipt was shown to him, and that this was the receipt shown to him as having been the one previously shown to him by one Mason, a partner in the firm. The receipt was not, however, recorded as evidence, but it seems that the Magistrate afterwards went to the office of the attorney for the defendants, and obtained the receipt from him, then amended the record, and marked it "B," and said, "That is the receipt." Then we have got the evidence of the Clerk of the Court. He makes an affidavit that, as Clerk of the Court, he was present during the hearing of the evidence of the witnesses. He says: "I saw no document of any description, including receipt marked 'B,' and attached to records in the case, handed to the said witness for inspection. The receipt 'B' was not attached to the record, but it was removed by the defendant's attorney to his office, when it was brought back by the presiding Magis-

trate some time after the rising of the Court. The letter 'B' on the record in Roberts's evidence was inserted by the presiding Magistrate only after the rising of the Court, and not during the hearing of the case." Moreover, we have the evidence of Roberts. He is the witness who was supposed to have identified this document. This is what he says: "I was a witness on the 7th March, 1903, in the Court of the Assistant Resident Magistrate of Lady Grey, in the case of Vickers v. Mason and Co., for damages. My evidence, as appearing on the records of the said case, alleges me to have said that Messrs. Mason and Co., at the time I claimed the oxen in question, showed me a receipt 'B' now attached to the said record. No document of any description, including the said receipt 'B,' was ever handed to me during the hearing of the case by the Bench, defendant's attorney, or anyone else, and any declaration to the contrary is absolutely false. The receipt shown to me by Mason and Co. at Lemoenfontein was an old one, and is not the one now attached to the record marked 'B.'" Now, I must confess I attach much more weight to the evidence of Roberts than to the evidence of other witnesses who said that the receipt was shown to him, but could not positively swear that this was the identical receipt. Roberts says that that receiptwas never shown to him, and the Magistrate has made no affidavit to contradict the statements on oath made by Roberts and the clerk. Under these circumstances, the Magistrate had no right to admit an important document of this kind. He had no right after the case was closed to go to the agent of one of the parties and obtain this document, which, for all we know, might have been quite another document from the one which had been shown to Roberts. The plaintiff could not well appeal against the judgment of absolution from the instance so long as the document formed part of the record, and if the record were corrected by merely removing the document from the record the defendant might be prejudiced on appeal. The better course, therefore, will be to set aside the proceedings, with costs against the defendant.

[Appellant's Attorneys: Scanlen and Syfret; Respondent's Attorneys: Godlonton and Low.]

DE VRIES V. MERSELDEN AND CHETTI. { 1903. April 14th.

Mr. Buchanan mentioned that this case had been omitted from the roll through a misunderstanding on a clerk's part, and he asked for provisional sentence for the sum of £155 10s. for rent.

Granted.

REHABILITATIONS.

Ex parte BARNARD.

Mr. Joubert applied for the rehabilitation of applicant. The estate was compulsorily sequestrated on the 30th October, 1890.

Granted.

Ex parte TRUTER.

Mr. J. E. R. de Villiers applied for the rehabilitation of applicant. The estate was sequestrated on the 13th February, 1899. The assets shown on the schedules amounted to £1,536, and the liabilities to £2,233. The assets realised £1,186, and the debts proved amounted to £2,125.

Granted.

Ex parte FREEMANTLE.

Mr. Upington applied for the rehabilitation of applicant. The estate was compulsorily sequestrated on 19th April, 1898. On the 22nd April, the first and second meetings were held before the R.M., Cala, when no creditors appeared and no debts were proved, nor was a trustee appointed.

Granted.

Ex parte BOTHA.

Mr. De Waal applied for the discharge of applicant under Section 117 of the Insolvency Act, the creditors having consented to his discharge

Granted.

Ex parte ZONDAG.

This application for rehabilitation was granted, on the motion of Mr. Close.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.].

GENERAL MOTIONS.

RUSSOUW v. RUSSOUW. { 1903. April 15th.

This was an application on behalf of one Martha B. J. Russouw for the appointment of a *curator bonis* to her husband, Paul J. Russouw, on the ground that he was of unsound mind.

Mr. J. E. R. de Villiers appeared for the applicant; Mr. De Waal appeared in his capacity as *curator ad litem*.

Mr. De Villiers stated that the doctor was not in attendance to give evidence as to the state of mind of the respondent.

Mr. De Waal mentioned that he had been to Robben Island, and had had a conversation with the alleged lunatic. From his own observations he should not like the man to be declared of unsound mind. He seemed depressed and melancholy, but his answers were fairly coherent. He was confined on Robben Island as a leper. He said he felt unable to manage his affairs, and would like to have his wife appointed to look after his estate.

The Chief Justice said that the man had written a letter to the Court, in the course of which he said that he had all his senses, and felt capable of managing his estate. He also pointed out that no doctor had yet examined him.

The case was ordered to stand over for the attendance of the doctor until to-morrow (Thursday).

Postea (April 16):

Dr. Black, medical superintendent of Robben Island, said that the defendant had been on the island about five months as a leper. Witness noticed when he arrived that he was suffering from acute melancholia, with delusions. The man had very much improved of late. One of his delusions had been that his children were dead, and witness had to grant him leave so as to satisfy him of the contrary. He had thought it desirable to have another patient to specially watch the defendant, inasmuch as he did not consider that it was safe for him to be left alone. The defendant now spoke quite coherently, and was practically free from delusions. He thought the defendant might recover, but it would be some months yet. He believed the melancholia had some connection with the leprosy. He did not think that the defendant was likely to recover from his leprosy. He was in such a condition at present that he could not give directions as to the management of his affairs.

Mr. De Villiers, replying to the Chief Justice, said that the defendant's estate was worth about £1,200 or £1,300.

The Chief Justice was at a loss to know why the defendant was not dealt with under the terms of the Lunacy Act.

Dr. Black said he had no power to certify the man as a lunatic.

An order was made declaring the defendant of unsound mind and appointing his wife as curator of his property, and also directing that the interest from the property be applied to wards the maintenance of his wife and the maintenance and education of his children, and if such interest be insufficient for that purpose to supplement it by appropriating so much of the capital as may be found necessary.

Costs out of the estate.

Ex parte KOK.

Mr. Benjamin moved to make absolute a rule *nisi* under the Derelict Lands Act.

Granted.

Ex parte MCGREGOR.

Mr. Benjamin applied to have a rule *nisi* under the Derelict Lands Act made absolute.

Granted.

Ex parte WARREN.

On the motion of Mr. Close, a rule *nisi* under the Derelict Lands Act was made absolute.

Ex parte PIKE.

Mr. Close applied to make absolute a rule *nisi* under the Derelict Lands Act.

Granted.

Ex parte MABUNYA. { 1903. April 15th.

Pledge—Sale—Condition.

A. borrowed from M. the sum of £20 and, in order to secure the loan, he let to M. a small

erf for a period of two years at a rent equivalent to the interest on the loan, and further agreed that should he fail to repay the amount within that period the land should become the property of M., and the amount of the debt should be considered to be the purchase price thereof. A. failed to pay the debt within the two years, and M. remained in possession of the land for several years, paid the rates and taxes, and was treated by A. as the owner in every respect except that transfer was not passed. After the death of A. a rule was obtained by M., under the Land Titles Act of 1881, for the registration of the land in M.'s name. The rule was opposed by A.'s heir, who tendered the amount of the debt, but did not allege that the price agreed upon was in any way unjust or unreasonable at the time when the sale was to take effect. The Court, finding under the circumstances that the price must be considered to be fair and reasonable, made the rule absolute.

This was an application to make absolute a rule *nisi* under the Derelict Lands Act.

The application was opposed by one Sarah Schwandler.

The opposition only concerned two of the lots, in connection with which the application was made. In respect to these two, the petition stated that in or about the month of July, 1886, the petitioner advanced money to one Moss in terms of of certain transfer deeds. In terms of that agreement, upon the non-payment of the money advanced within the stipulated time, the two lots became his. He had paid all the rates and taxes due thereon. Moss died several years ago. The agreement was to the effect that petitioner should have full, free, and undisturbed possession of the lots for a period of two years; that the consideration as and for hire to be paid to Moss by petitioner should be the interest payable to Moss by petitioner, and that, if during the term of the agreement Moss should fail to pay Mabunya the money advanced, the lots should become the property of Mabunya absolutely and forever, and the sum of money advanced should be considered the entire and full purchase amount thereof.

The affidavit of Sarah Schwandler stated that she was the sister and heir to Moss, who died suddenly in December, 1890. Shortly before his death he borrowed £20 from petitioner, and handed over the title deeds of the two lots as security. On two or more occasions since her brother's death, she had tendered petitioner the £20, but he had refused it, and would not return the title deeds.

Mr. Close for the applicant; Mr. Buchanan for Mrs. Schwandler.

Mr. Close: It would seem that the attorney had a lien on the title deeds, and, of course, the applicant cannot get transfer without these. One of the conditions of this sale was that if the money was not paid on a certain date the sale should be cancelled. It is not denied that the applicant has been in possession of this land some seventeen years.

Mr. Buchanan: This case does not fall under the Derelict Lands Act. It is clear that a loan of £20 was made to the applicant, and that this land was given in pledge on condition that it should become the property of the lender of this money in the event of the loan not being repaid within two years.

[De Villiers, C.J.: It is quite possible that that was a fair value for the property.]

It does not appear on affidavit that it was so, and there is, moreover, nothing to show that the parties contemplated a sale. What they did contemplate was a pledge, and a pledge cannot be sold without an order of Court. *Wilson* v. *Shaw* (1 Sheil, 299).

[De Villiers, C.J.: But here the agreement is, that if the money is not paid within two years, the land is to vest in the lender.]

But suppose that the land was worth £100, and the borrower was in such urgent necessity that he agreed to accept £20, surely the Court would not hold him to such an agreement?

Mr. Close was not heard in reply.

De Villiers, C.J.: The intention of the parties is perfectly clear. By an agreement in October, 1886, Moss agrees that the applicant "shall have full, free, and undisturbed possession of this land for a term of two years. The consideration as and for hire to be given by the said Mabunga shall be the interest payable by the said Moss to the said Mabunya during the term of this agreement on the money lent by the said Mabunya to the said Moss." If the agreement had ended here then Mr. Buchanan's argument would have been conclusive; the agreement would not have been a pledge or a mortgage in the proper sense of either term, but the applicant would have had no greater rights in respect of the land than a pledgee has in respect of any article pledged to him. But then the parties deliberately entered into a further agreement: "Should Moss fail to pay the said Mabunya within the term of this agreement the sum of money due, then in such case the said land shall be and become the property of the said Mabunya absolutely and forever, and the sum of money payable by Moss to Mabunya shall be considered the entire and full purchase amount thereof." Moss failed to pay the debt within the two years, and Mabunya remained in possession of the erf for several years; he paid all the rates and taxes, and was treated by Moss as the owner in every respect, except that transfer was not passed. It is only after the death of Moss and after the applicant has obtained a rule for the registration of the land in his name that a tender is made by Moss's heiress to pay the debt. She does not allege that the price agreed upon was in any way unjust or unreasonable at the time when the sale was to take effect; on the contrary, I am inclined, under all the circumstances, to hold that the price was fair and reasonable, and was not agreed upon by way of penalty, as contended for on her behalf, but for the mutual benefit of both parties. An agreement that in case of non-payment of the debt the applicant should be entitled to buy the land for a reasonable price, to be estimated, say, by arbitrators, would have been valid. (See *Dig.* 18, 1, 81; *Voet* 20, 1, 21.) The actual agreement appears to me to have been equally valid. For these reasons I am of opinion that the petitioner is entitled to have the rule made absolute. The affidavits for the respondent do not carry the case much farther. She says that on divers occasions she has tendered the sum of £20 to the petitioner, but this tender seems to have been made many years after the right of the applicant to claim this as a sale had accrued. The rule must be made absolute, with costs of opposition.

[Applicant's Attorneys: Syfret, Godlonton & Low: Respondent's Attorneys: Silberbauer, Wahl, and Fuller.]

HENRICK CHRISTIAN BECKER.

Mr. De Waal applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

The order was made absolute.

CRAGG V. BOLTON. { 1903. April 15th.

Insolvent estate — Trustee — Accounts — Delay in filing liquidation and distribution account.

Where there is an undue delay on the part of the trustee of an insolvent estate in filing his final account of distribution, the insolvent is entitled to call upon him to file such account.

The fact that the trustee alleges that he has a claim against the wife of the insolvent is no justification for undue delay if the trustee has had ample time for enforcing such claim.

This was an application for an order compelling respondent to file a final liquidation account.

In his affidavit the applicant stated (1) that his estate was sequestrated as insolvent in or about the month of February, 1897, the exact date whereof he was uncertain. (2) That the principal outstandings due to him were book debts, the majority of his debtors living in the vicinity of East London. (3) His insolvent estate could have been liquidated long ere this, and he said that the same had not been finally liquidated owing to the negligence of the trustee, the above respondent. (4) That he was desirous of applying for his rehabilitation, and had instructed his attorneys, Messrs. Yates

and Murray, of King William's Town, to call upon the respondent to file the final liquidation and distribution account, and although he (respondent) had promised to do so, he had failed to do the same.

Respondent's affidavit stated that he admitted clause 1 of the applicant's affidavit, but denied all the other allegations contained in the said affidavit. The principal assets in the estate consisted of (a) stock in trade; (b) a claim against Mrs. Cragg for about £400; (c) book debts. The stock-in-trade was old, and some of the book debts had been collected and an account rendered. There were at present no funds in hand belonging to the estate. He had endeavoured to collect the few remaining accounts, but owing to the fact that many of the book debtors did not reside in East London, and no addresses were available according to the applicant's books, nothing had been collected on that head. The applicant left the Colony shortly after his surrender, and did not in any way assist the trustee in liquidating his estate. He (respondent) could not file a statement of no assets, as the claim against Mrs. Cragg amounted to nearly £400, and he could not file an account until that claim had been settled, or, by leave of the principal creditor, abandoned. That claim arose owing to the insolvent having, as he (respondent) believed, improperly handed monies and goods to his wife to the detriment of the estate. Mrs. Cragg sold those assets, and left the country before an interdict which was obtained by him could be served upon her. Mrs. Cragg was at present at King William's Town. He had asked the chief creditor (Mr. Pascoe) to abandon the claim or guarantee the expenses of a suit against Mrs. Cragg, but he had not yet decided either course. The insolvent, in or about June last, made an offer of compromise, namely, £15 in settlement of the claim against his wife, which offer was submitted by him (respondent) to the principal creditor, who did not accept it. There had been no negligence on the part of the trustee, and he was convinced that it would be detrimental to the interests of the creditors to close the estate without pressing the claim against Mrs. Cragg.

In his answering affidavit, applicant stated that the principal assets in his estate consisted of stock and book debts, and he affirmed that the claim which the respondent stated the estate had against his wife was a fictitious one. A final order for the sequestration of his estate was granted in March, 1897, and at that time most, if not all, of the debtors lived in East London; and if the trustee had used due diligence in the liquidation of the estate the whole of the good debts could have been collected and the whereabouts of all the debtors ascertained. He left the Colony in October, 1897, and up to the time of his departure he rendered the respondent all the assistance that he could. His wife remained in East London and King William's Town until March, 1898, and during part of that time she possessed considerable landed property in East London, but no steps were taken by the trustee of his estate or by any of the creditors to bring an action against his wife for the recovery of the alleged debt of £400, and his wife had since returned to the Colony, and was now living with him in King William's Town, and still no action had been taken by the respondent against his wife in connection with the said debt. He denied that there were any further assets in his estate as stated by the respondent, and in a letter written to Messrs. Yates and Murray he (respondent) admitted himself that there were no further assets, but that the principal creditor was the person who objected to his certifying to that effect. He denied that, in or about the month of June last, he made an offer of compromise, offering £15 in settlement of the claim against his wife; but in or about the month of June last, he called upon the respondent at East London and asked him for a cheque for the sum of £35, which was due to his wife out of the said estate for rent. The respondent thereupon asked him if he claimed the whole of the £35, and he replied that he did so. Respondent thereupon asked him whether he would not accept a portion in settlement, as he considered the estate had a claim against his wife, the amount for which an account had already been rendered, and respondent suggested that he should accept £20 in full settlement of that claim. He (applicant) replied that if his acceptance of £20 would close the whole matter of his estate, and if his attorneys agreed for him to accept such amount, he would do so, but as his attorneys did not advise him to accept such amount, he had not done

so. He most emphatically stated that the respondent had been guilty of negligence in the liquidation of his estate, and that the account of claim against his wife had been set forth as merely a fictitious one, and only set forward in order to delay his rehabilitation, as if such claim had been a bona-fide one the principal creditor would have instructed the trustee, and it would have been the trustee's duty to have instituted proceedings against his wife when she was possessed of landed property, whereas at present she had absolutely nothing.

Mr. Rainsford for applicant; Mr. Upington for respondent.

Mr. Rainsford: Under section 108 of the Insolvent Ordinance the trustee must file his account and plan of distribution within six months after the final sequestration, and this is so even if the funds are small. *L. and S. A. Bank* v. *Stratford's Trustees* (Buch., 1875, p. 123); *Norden* v. *Brink* (3 Menz., 270.)

[De Villiers, C.J.: The trustee has filed his account.]

Not such an account as will satisfy the terms of the Insolvent Ordinance.

[De Villiers, C.J.: How much money has the trustee in his hands?]

He says that he has no funds whatever.

[De Villiers, C.J.: Then what account do you want?]

A plan showing in what way the estate has been distributed. The applicant cannot be rehabilitated till such an account and plan is filed. *Ex parte Nannucci* (4 Juta, 171). I submit that it is clearly the intention of the principal creditor to do everything in his power to hinder the applicant's rehabilitation.

Mr. Upington: The account mentioned in section 108 of the Insolvent Ordinance is the first account. See *Re Matthews' Estate* (3 H.C., 63). In this case the trustee has filed an account, and that account has been confirmed by the Court. The insolvent is, therefore, at liberty to apply for his rehabilitation at any time, but clearly the trustee cannot close his account as long as this claim against Mrs. Cragg is outstanding.

[De Villiers, C.J.: When was the estate finally sequestrated?]

In 1897.

[De Villiers, C.J.: Six years ago, and yet nothing final has been done!]

Mrs. Cragg left the country,

[De Villiers, C.J.: Why was not the matter settled before she left? And then she has been back some time.]

The trustee is in the hands of the principal creditors.

[De Villiers, C.J.: But he must use his own discretion.]

In all the cases cited for the applicant the trustee had filed no account: here he has filed an account, and I therefore submit that this is quite a novel application.

De Villiers, C.J.: I have seen the accounts from the records in the Master's Office, and it appears that the first account was filed in 1898, and that after that there was some difficulty experienced by the trustee in collecting the outstanding amounts. They did not amount to much, but the trustee stated that was an amount of £14 for goods sold by private sale, and an amount of £38 17s. 2d. in book debts, which he considered to be good and recoverable. The date of this is not given, but it could not have been long after 1898. Now, the estate was rendered insolvent in 1897. Subsequently to that date, the insolvent, the present applicant, has repeatedly requested the trustee to file his final account. Time was repeatedly given to him to do so, but notwithstanding that, up to the present time nothing has been done by the trustee. There has been no summons issued against Mrs. Cragg, against whom he alleges he has a claim. He says that there is a creditor—that one of the creditors objects to the account being filed unless Mrs. Cragg is first sued. In my opinion the trustee has had ample time to sue Mrs. Cragg—ample time before she left for England, and he has had ample time since her return. Up to the present not a single step has been taken to sue Mrs. Cragg for the recovery of the amount which she is alleged to owe to the insolvent's estate. I consider there has been undue delay on the part of the trustee, and that the applicant—being the insolvent interested in this estate, and being likely to have a difficulty in obtaining his rehabilitation unless there is a full and final account of the estate filed—is entitled to call on the trustee that he should forthwith file the account. The judgment will be as prayed, with costs, and the trustee is ordered to file his accounts within six weeks from this date.

Ex parte WILSON.

This was an application by one Harriet Ann Wilson (a) for an interdict restraining her husband from parting with certain property (b) for alimony, pending an action for divorce instituted by plaintiff against the respondent.

Mr. Benjamin appeared for the applicant, and Mr. Close for the respondent.

Mr. Benjamin moved in the first place to make absolute a rule *nisi* to restrain the respondent from parting with certain property, pending the action to be instituted for judicial separation, and in the second place for an order on the respondent to make a contribution to enable applicant to bring an action for judicial separation, and to pay her a certain sum of money, by way of alimony, sufficient to enable her to maintain herself pendind the said suit, and also to show cause why he should not be ordered to pay the costs of this application.

Counsel read the original order granted by the Supreme Court, in the matter of the present applicant's petition for an order restraining respondent from alienating or in any way disposing of the property in the joint estate, pending the result of an action for judicial separation, when the Court granted a rule *nisi* calling upon the respondent to show cause on the 14th April, 1903, why an order should not be granted as prayed.

In her affidavit the applicant set forth that (1) she was married in community of property to John Edwin Wilson, of Kenilworth, on 9th November, 1902; (2) that there was no issue of the said marriage; (3) that she intended to institute an action against her husband for judicial separation on the ground of her husband's peculiar and eccentric habits, in consequence of which she suffered great ill-treatment at his hands, so much so that her living with him was seriously endangering her life, but that she had no means wherewith to carry on her action, nor to maintain herself pending this suit; (4) that her husband was in possession of considerable immovable property at Second-avenue, Kenilworth, and other movable property, and she estimated his annual income to be about £240, in addition to which the respondent had about £150 in ready cash at the P.O. Savings Bank, Kenilworth.

The answering affidavit of the respondent stated: (1) That he had read the affidavit of applicant in the above matter. (2) Since his marriage with applicant, on 9th November, 1902, they had on the whole lived happily together, he denied that he had ever ill-treated her or used violent conduct toward her, nor had he ever endangered her life; on the contrary he had always been kind and considerate to her. (3) In September last he got to know applicant's mother; he had seen applicant before, but had never spoken to her; he spoke to applicant's mother about marrying applicant, and she wrote to the latter, who was then at Port Elizabeth; applicant thereafter came to Kenilworth, and shortly afterwards they became engaged and within a month thereafter they were married. (4) He was 50 years of age, and used to be a mariner, but for some years and until about twelve months ago he was a chimney sweeper; applicant was about 32 years of age. (5) At the time of his marriage with applicant he possessed nine houses and land and other movable property, as stated by the applicant. Applicant and her mother were well aware of this fact, as he had informed them both of his position before they were engaged and married. (6) About a month after their marriage applicant's mother persistently asked him to get his will drawn up, and subsequently applicant and he went to Mr. Wolfe and instructed him to draw up their will, by which they agreed that on his death all his property should go to her, with the exception of certain two houses, which were to go to his son. Applicant, however, left him before this will was signed. (7) Applicant brought no property whatever into the community. In the four months during which they lived together he gave her about £70, out of which she was to pay the household expenses. He considered that amount to be twice as much as people in their position and circumstances ought to spend. (8) Applicants mother lived with them in the house free of charge; her brother also lived in one of his (respondent's) cottages at a lower rent than the other tenants. (9) On 26th February last, after applicant and he had had some words about his treatment of a kitten he went to his agent, Mr. Wolfe, and instructed him to give applicant's mother and brother notice, which he did. (10) About noon on the following day (27th) applicant and her mother, after the latter had received notice to quit, left the house, and applicant had not returned to him, nor had she been to the house

since. (11) He had always been, and still was ready and willing to receive applicant and take her back as his wife. (12) Applicant left him of her own accord, without lawful cause and against his wishes, and he declined to pay her any sum to enable her to institute proceedings for judicial separation, or to contribute anything towards her support. He intended applying to the hon. Court for restitution of conjugal rights or for a decree of divorce on the ground of applicant's unlawful desertion, and for an order declaring her to have forfeited her half share in the community of property.

The affidavits of Jane Barnett and George Bowes, neighbours of the parties to the cause, stated that, so far as they could see, respondent treated his wife very well indeed, and applicant and respondent were on the very best of terms with one another.

The answering affidavit of the applicant denied that they lived happily together, or that her husband never ill-treated her. About one month after their marriage respondent commenced using the most violent and obscene language towards her, and they quarrelled very frequently, the quarrels being due to his bad conduct and austere habits. She admitted paragraphs 3, 4, and 5 of the respondent's affidavit, excepting that she verily believed the respondent's age to be about 57 years of age instead of 50. She was not aware that her mother ever induced or persuaded respondent to have his will drawn up, but she admitted the rest of paragraph 6. She received the rent from the houses, and received in all the sum of £48 15s., out of which she paid for furniture and interest on the bond on the property and other necessaries the sum of £28 12s. 9d., leaving a balance of £20 12s. 5d. for actual household expenditure during a period of four months. On the night of 26th February last respondent caught hold of her round the throat and inflicted injury on her neck. She was in a perpetual state of terror owing to the fact that respondent frequently slept with a knife under his pillow at night. Respondent further had a revolver, with which he repeatedly threatened to shoot her. She considered her life was not safe with him, and, consequently, she was compelled to leave him. She refused to go back to respondent, as living with him was dangerous and intolerable. She denied that she left of her own accord; it was respondent's ill-treatment of her that drove her away. She was now informed and verily believed that respondent ill-treated his former wife, who left him with some members of her family, and resided for some years away from him, and that he had quarrelled with his children, his daughter deserting him, the cause of this being due to his intemperate and violent habits.

The affidavit by David Romans, brother-in-law of the applicant, stated that shortly after the marriage respondent became very abusive towards the applicant, and at times used the most obscene and violent language towards her. They did not live very happily together. One day in December applicant brought him a knife, which she informed him respondent kept under his pillow at night, and asked him to destroy same. On the 27th February the applicant came to him and showed him some marks on her neck, which she informed him, and which he verily believed, had been inflicted by the respondent. He considered that living with the respondent was dangerous and intolerable, as he had very austere habits. He remembered on one occasion that respondent visited his house, and while there fired off a revolver, the bullet passing through the kitchen door of his house; that was done because respondent thought his son had thrown some stones on the roof of his (Romans') house. To his knowledge respondent did not live happily with his former wife, and he quarrelled with various members of his family, and his daughter also left him.

The affidavit of Harriet Ann Wilson, mother of the applicant, stated that shortly after the marriage respondent became very abusive, and frequently used the most obscene language towards his wife. She remembered on the evening of the 26th February, 1903, respondent caught hold of his wife round the throat, and inflicted injuries on her neck. Respondent frequently slept with a knife under his pillow, and also had a revolver, with which he threatened to shoot his wife. She considered living with him was intolerable and dangerous. She denied ever having induced or persuaded respondent to have his will drawn up.

The further answering affidavit of the respondent stated that the affidavits of applicant and Romans

and H. M. Rodgers were only served on his attorney at eleven o'clock on the morning of the 14th inst., and he had not had time to reply fully thereto. He admitted that he kept a revolver and a sailor's knife in his bedroom, but he emphatically denied that he ever threatened applicant therewith on any way. On one occasion, and one only, he slept with the knife under his pillow. That was one night when he heard some one about the house, and as he could not find the key of the drawer in which his revolver was locked, he took his knife out and left it under his pillow, whence it must have been taken by applicant, as he had not seen it since. On the evening of the 26th February, applicant wanted to leave the bedroom, so he rushed to the door and stopped her. She then rushed to the window, and he then said: "If you want to go out so badly, I will let you," and opened the door and she went out. He never ill-treated his former wife, and they lived together for thirty years. He admitted firing off a revolver to frighten off some people who were throwing stones on the roof of Romans' house.

Mr. Benjamin for the applicant; Mr. Close for respondent.

After argument on the facts,

De Villiers, C.J.: There has undoubtedly been some slight degree of violence shown by the respondent towards the applicant. I think it is a case in which the parties should come to terms and live together, but if they do not, then the action to be brought must be instituted forthwith, and brought to trial during the May term. As to alimony, I do not think alimony should be granted, but the sum of £50 must be paid by the respondent to the applicant's attorney to enable her to bring an action. The costs of both applications must be paid by the respondent. I repeat that in the interests of applicant herself, it would be well for her to consider the advisability of being reconciled, because it is not likely that she will succeed in her action unless the cruelty is shown to be of such a nature that it is impossible for her to live with him.

[Applicant's Attorney: D. Tennant; Respondent's Attorney: E. J. Wood.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ILLIQUID ROLL.

SMITH AND CO. v. DIXON. { 1903. April 16th.

This was an application under rule 329d, on the motion of Mr. Upington for judgment under rule 329d for £251 9s. 8d.

Order granted.

LYONS v. CUSHING.

This was an application to have a rule *nisi* granted by the Court made absolute, restraining the respondent or any one acting on his behalf from disposing of or alienating certain twenty shares in the Frank Cushing Syndicate, pending an action to be brought by the applicant against the respondent for the 20 shares to which he claimed to be entitled.

The affidavit of the applicant stated that in 1902 a syndicate was formed by the respondent, Paul Frank Cushing, whose interest was to extend to 40 shares and in consideration of services rendered by the applicant, the respondent agreed to give him a full half share of all his interest in the said syndicate and any further interest that he might acquire by way of options or be in any way whatsoever possessed of. The petitioner said that the respondent had left Cape Town, and that he had no knowledge of his present whereabouts, and that the respondent had granted power of attorney to one John St. Leger. He had presented the said agreement, but he had not received the shares that he was entitled to. The said shares, owing to the discovery of tin on the property of the said syndicate, had risen considerably in value.

The affidavit of John St. Leger stated that he was chairman of the syndicate, and he had perused the affidavit of the applicant. He held power of attorney from the respondent, Paul Frank Cushing. The latter was entitled to 40 shares from the syndicate. On the 30th January deponent purchased 17 of the said 40 shares for £400, and respondent duly executed a cession of the said

shares in his favour. On the 12th February the respondent left this colony for America. On the 6th March it was resolved at a meeting of the syndicate that all certificates should be made out, audited, and scrip issued forthwith. The applicant was present at the meeting. Seven shares belonging to the respondent which had been sold were transferred to the purchasers by the directors. Applicant did not tell deponent or the board of directors that he held a cession until the 16th March, 1905, but he called upon witness on the 19th March and demanded that the shares to which he alleged he was entitled should be transferred to him The respondent was still absent from the Colony, and was not expected to return for about three months. Deponent had received a letter from him dated Southampton, in which he asked Mr. St. Leger not to let S. A. Lyons have any of his stock when he showed him a paper that he (respondent) had given him. "He told me," the writer proceeded, "if I did not give him half of my stock he would not vote for me to get any pay for my work; he got this stock by fraud, so if you give him my scrip I will go to Court and show why he should not have it, as he got it by false pretences.

In an answering affidavit, the petitioner said that in regard to what took place as to the purchase of shares he said John St. Leger said that he had 15 shares for sale, and that he offered them for sale, and that he (deponent) agreed to take half. He cautioned the said John St. Leger not to sell above 20 of the shares belonging to the respondent as he had an option upon half. Very shortly afterwards he found that the said John St. Leger was seeking to get a very large number of shares in the name of the respondent registered in the name of others. It was at the express wish of the respondent that he did not produce the document as the respondent said that it might prejudice him in his business.

Sir H. Juta, K.C., for the applicant; Mr. Benjamin for the respondent.

After hearing counsel in argument on the facts,

De Villiers, C.J.: I am of opinion that this rule must be made absolute. The respondent had entered into an agreement under date 31st October, 1902, in which he undertook in consideration of services rendered and cash advances to give and grant to the applicant a full half share of all his interest in the Frank Cushing Syndicate, inclusive of his shares in the said syndicate, and any further interest that he might acquire by way of options or in any way whatsoever. It is common cause that Cushing was possessed of 40 shares, and, consequently Cushing had no right to transfer more than 20 shares, and in point of fact he had not actually transferred more than 20 shares. But it appears that he has sold 24 shares, and as to those remaining 4 shares I am of opinion that he should not be allowed to register those in the name of the purchaser. It appears that the purchaser of them is Mr. St. Leger himself, who has the general power of the respondent, and who has already purchased 17 shares from the respondent, which have been registered in his name. It is not proposed to touch those 17. They have been duly registered in Mr. St. Leger's name, and they will remain so registered. Three more shares have been registered in the name of other purchasers. They will remain so registered. As to the remaining 3, which are still in the name of the respondent, I am of opinion that applicant is entitled to an order that they shall not be registered in the name of any other person, pending the action to be brought by applicant against respondent. It is said there has been a letter by the respondent to Mr. St. Leger stating that this arrangement had been obtained by fraud. A vague allegation of that kind cannot be allowed to prevail as against the express statement made on oath by the applicant. He affirms this arrangement, which on the face of it appears to be bona fide, and until the a Court of Law has declared the transaction to be a fraudulent one the Court must assume it to be a honest one, and act upon it. The rule must be made absolute with costs.

[Applicant's Attorneys: Tredgold, McIntyre and Bissett; Respondent's Attorneys: Reid and Nephew.]

LOXTON BROS. AND CO. V. DE KLERCK.

Mr. De Villiers said that that was the return day of a rule *nisi* granted on the

27th January, calling on the defendant to show cause on the 12th February why the surplus realised from the sale of certain property should not be declared executable in part satisfaction of judgments obtained by the plaintiffs against the defendant, together with costs of the application. On the 12th February the return day was extended to give an opportunity of serving notice by registered letter, he believed, upon the defendant, who appeared to have gone to German South-West Africa.

Order granted.

WERNER v. KUKARD. { 1903. April 16th.

Transfer of property sold—Contempt.

Where the vendor of certain property had been ordered to pass transfer, but stated that the title deeds were not in his possession, the Court ordered him to pass transfer by a certain date or to show cause on or before that date why he should not be committed for contempt of Court.

Mr. J. E. R. de Villiers moved for an order authorising the transfer of certain property. He said that the applicant sought an order authorising the Registrar of Deeds at the British-German village of King William's Town to pass transfer of certain two pieces of freehold land or quitrent in the possession of the respondent. The application was in terms of a judgment, the applicant to pay the respondent the sum of £225, being the purchase price of the said property, subject to certain deductions.

[De Villiers, C.J.: You have already judgment to pass transfer.]

Yes, but the defendant refuses to pass transfer, or rather the defendant is willing, but he has not got the title deeds.

[De Villiers, C.J.: Where are they?]

They are in the hands of his wife, who is not living with him, and who declined to give them up.

[De Villiers, C.J.: He must get them from the wife.]

Mr. De Villiers: Of course, the notice of motion could have been served on the wife also.

De Villiers, C.J.: We have had previous cases in which defendants have refused to transfer property which they had lawfully sold, and the Court has authorised the Sheriff in such cases to pass the transfer. But in the present case it would appear that there is no absolute refusal by the respondent to pass transfer and that he alleges impossibility. If it had been clear that the respondent was in possession of the title deeds and refused to pass transfer, the Court might have appointed the Sheriff to pass transfer. But that is not clear, and, in fact, it is suggested that the wife has the deeds. Anyhow, there is an order as I understand that he is to pass transfer. The Court will now reiterate that order. He will be allowed until the last day of next term to pass transfer, and if he does not do so within that time, he must show cause in the Supreme Court why he should not be committed for contempt of Court. He will have ample time now to take all the necessary steps to get the title-deeds from his wife and to pass transfer. If this is not done by the last day of the next term, then he shall show cause why he should not be committed for contempt, the respondent to pay costs of the application.

[Applicant's Attorneys: Godlonton and Low; Respondent's Attorneys: Innes and Hutton.]

REDELINGHUYS v. COLONIAL GOVERNMENT. { 1903. April 16th.

Arbitration—Award – Expropriation for railway purposes.

In deciding upon the amount of compensation to be paid to the owner of a farm for the expropriation for railway purposes of a portion of the homestead arbitrators are justified in estimating such portion at a much greater value than the rest of the farm.

This was a motion to have an award of arbitrators made a rule of Court.

The affidavit of the applicant showed that the main line of the Cape Government Railways Western System) passed over a farm in the district of Tulbagh belonging to the respondent. With a view of

easing the gradient of the said railway line, the respondent, who was the General Manager of Railways, gave notice to the applicant that they proposed to expropriate certain of his land for railway purposes. This was done. The applicant then claimed compensation, on the ground that the land expropriated formed part of land which had been "improved by cultivation, irrigation, or otherwise." The respondent offered £275 in satisfaction of any claim that the applicant might have for damage. This was refused by the applicant as wholly insufficient, and in the end it was agreed to refer the matter to arbitration. The arbitrators appointed took evidence, and awarded the applicant £965 as compensation, along with costs. The terms of the award were communicated to the department's solicitor. Mr. Maasdorp, who, in reply, objected to the form of procedure, saying that he ought to have been present when the award was opened, and declining to attend at the offices of the applicant's attorney to inspect the award, and claiming that he had a right to inspect the award at his own office. He stated further that he intended to contest the validity of the award, because (1) the damages were not specified therein, and (2) if, as he presumed, prospective damages were awarded, on that point also. The applicant's attorneys replied that they were not prepared to give up the award, and that the award could not be held by both parties, and they submitted that the applicant, as the successful party, was entitled to hold it. They, however, would give facilities to the department's solicitor to inspect the award.

The affidavit of Mr. Maasdorp stated that originally the applicant claimed £1,250, of which £240 was set down for actual damage, and the rest was claimed for prospective damage. It was obvious from the figures given that the arbitrators included prospective damage, which the award stated was not a matter submitted to them. The department's representatives objected at the time to any evidence being given as to prospective damage, but the objection was overruled. The award was vague, and it should disclose how the damage was arrived at. As it now stood, it contained nothing that would prevent a further claim being made. The arbitrators had gone beyond the terms of the reference, inasmuch as they had not confined themselves to damage to land which had been "improved by cultivation, irrigation, or otherwise."

The answering affidavit of G. M. Walker stated that he was present at the arbitration proceedings, representing applicant. The tract expropriated cut through the applicant's homestead, which was situated on the hillside. At the inquiry evidence was lead to show that land prepared by the applicant for planting trees had been expropriated; that the applicant's private road leading to Tulbagh village had been destroyed for some distance; that his stone kraal had been wholly cut through, and that its material had been almost wholly removed and converted into concrete for railway culverts; that his dwelling-house would crack from top to bottom so soon as the train commenced running, and would be uninhabitable; that his outbuildings would also be damaged, and would have to be materially strengthened to stand the shock of passing trains; that his yard had been so narrowed that he would not be able henceforth to turn his wagon and team therein; and that the homestead generally had been materially injured and lessened in value. It did not appear in the official shorthand writer's record of evidence, but the applicant gave evidence on oath to show that the wall of his residence had already been cracked as the result of a dynamite charge exploded by the respondent's servants in the course of their operations. The crack, an extensive one, was pointed out by him. He (Mr. Walker) was not aware that the arbiters in making their award took into consideration any matter outside the scope of the reference committed to them.

Sir H. Juta, K.C., appeared for the applicants, and Mr. H. Jones for the respondent Government.

Sir Henry Juta, in argument, said there was the award, and it was difficult to see on what ground the award should not be made a rule of Court. The first objection made was on the ground that the damage was not specified. There was no need to specify the damage. The second ground appeared to him to be that the respondent surmised prospective damage was allowed. That was not in the award, and he did not know what respondent meant unless he meant damage to the

house and outbuildings, which was certainly not prospective damage. The respondent seemed to go on the ground that the award was vague. The land being improved land, the applicant was naturally entitled to compensation, and if the Government built their railway so close to his house it would tumble down when trains were running that was not prospective damage.

Mr. Howell Jones, in argument, said the opposition to the award being made a rule of Court was based on the principle that the arbitrators exceeded their scope of jurisdiction in the deed of submission, and they went on wrong principles in assessing the amount of compensation. Evidence was given upon certain items, and those items did not amount to anything like the £965 which they awarded. It seemed to him perfectly clear that the Board went into the question of the reduction of the value of the farm, owing to the railway being brought across it, although the arbitrators did not say so. Evidence was allowed to be taken and recorded about the value of the house and the general inconvenience caused to the applicant. It seemed the Board went on the principle that they had to value the whole of the farm, and compare the value of the farm when having a railway across it with its value without a railway. He submitted that was a wrong principle. They ought to have valued the 2½ morgen taken by the Government. The present proceeding was really under an old Ordinance, No. 9, of 1858, and he submitted the Government had a perfect right to take that land for railway purposes if not improved. It appeared that the 2½ morgen were improved land, and that a certain amount of clearing had been done, on which about £20 was spent. The Government would clearly have been bound to compensate the owner for damage done in connection with his improvements, but though the Government was bound to give the applicant compensation for the strip of improved land they took, they were not bound to give him compensation for alleged damage done to his whole farm. That was not the intention of section 12 of Act 9 of 1858. It was perfectly clear that if the 2½ morgen which the Government took to run their railway over was not cultivated or had not been improved in any way, they would not have had to pay compensation, although the rest of the applicant's farm might have been very valuable, and his house shook ever so much by reason of the railway, and if his house was a most valuable house. Besides the 2½ morgen that had been expropriated and the £20 expended on clearing ground, there was a kraal which had been demolished, and there was a road which the Government had cut through, and some damage to applicant was caused through the road being no longer there, and the Government was perfectly prepared to pay for those things. He contended it was perfectly competent for the Court to remit the case to the arbitrators for a detailed statement in connection with this award, and he submitted that the case be remitted for the arbitrators to show how they awarded the damages, how much in respect of the 2½ morgen of land which had been actually taken, and whether they awarded anything in respect to actual damage done to the house. The award was vague. The deed of submission was for the arbitrators to value 2½ morgen of land expropriated. He applied that the case be remitted to the arbitrators to state the amount they placed on the piece of land expropriated, and if any amount was awarded for damage to the house to state it; and the arbitrators to be asked if they took into consideration prospective damages.

Sir H. Juta was not heard in reply.

De Villiers, C.J.: The terms of the deed of submission are very wide, and they leave the question of compensation to be paid to the applicant entirely in the hands of the arbitrators and the umpire. The deed recites that it had been decided to expropriate part of this farm, measuing 2½ morgen, for the purpose of constructing a railway. That differences had arisen as to the amount of compensation to be paid to the said applicant by the Cape Government Railways, and that the parties had agreed by these presents in the most absolute and irrevocable manner to submit the amount of recompense and compensation to those arbitrators and to the umpire. Now the arbitrators and the umpire have met and, as far as I can judge, this verdict is a unanimous one. The arbitrator suggested by the Government agrees with the arbitrator suggested by the applicant and with the umpire in awarding the sum of £965 to the applicant, and this Court is now asked to

say that they ought not to have done it, that they have taken prospective damages into consideration, and that their verdict is too vague. It does not appear that they have been taking prospective damages into consideration. All that appears is that "the subject matter of the written reference having been gone into by us and having heard the parties, witnesses and attorneys present, and considered the correspondence and documents, we hereby award as follows—to the claimant in respect of his claim the sum of £965 sterling and costs." It is admitted that 2½ morgen of the land were taken, and it is admitted that a portion at all events of the land so expropriated passes in the immediate proximity of the applicant's residence. To my mind the arbitrators are quite justified in attaching a high value to this land which goes through his kraal, and is in immediate proximity to his house, and it is not reasonable for the Court to suppose that prospective damages and other matters were taken into consideration. It is quite likely that they attached a high value to this land, improved in the way in which it has been, being part of the land of the applicant passing in the immediate proximity of his residence, crossing his kraal, and in other ways injuring his property. No doubt the amount does appear to be high, but that is not a question for this Court. It is for parties who appoint arbitrators to see that proper persons are selected. If the arbitrator selected by the Government has been weak and yielded to his co-arbitrators, then I suppose the Government in future will avoid appointing him as arbitrator. But has he yielded? He has agreed with the other arbitator, and this Court should not constitute itself a Court of Appeal to inquire into decisions of arbitrators. So long as they act honestly and impatially, and there is no proof in the present case that they have not acted honestly and impartially, and so long as they act within the scope of the powers conferred upon them, their award should not be interfered with, even though the Court should be of opinion that a smaller amount would have been sufficient compensation. It appears that the attorney for the respondent was not present when the award was delivered, but that was his fault, as he left before it was delivered. It must have been known that the award was to have been delivered at that time. There appears to me to be no reason for overriding this verdict, and the award must be made a rule of Court.

[Applicant's Attorneys: Walker and Jacobsohn; Respondent's Attorneys: Reid and Nephew.]

WALPOLE V. PALMER AND OTHERS.

Mr. Upington applied for an order for trial by jury in a pending action for libel.

Sir Henry Juta, representing the defendant, Palmer, said he was instructed to oppose the application on the ground that certain costs had not been paid. He admitted that the plaintiff had a right to demand trial by jury in an action of this nature. He would, however, point out that the Court had, in a previous application in connection with this matter, on certain exceptions taken to the declaration, given judgment in favour of the respondent in certain respects, with costs; those costs had not been paid, and on behalf of his client he was briefed to object to anything further being done till they were paid. He understood those costs had been paid since he was instructed in the matter and after counsel had appeared. He held that plaintiff was liable for the fresh costs incurred.

Mr. Upington suggested that the costs might be costs in the cause.

[De Villiers, C.J.: I think the costs should be costs in the cause. The Court orders the case to be taken by trial by jury, and the costs to be costs in the cause.]

Sir Henry Juta pointed out that the Court had decided more than once that where judgment in previous proceedings had been given against the applicant, the applicant could not go on till he had paid the costs adjudged; that was a rule that had been acted on for many years. His client was entitled to come here and say the action for libel could not be gone on with till the costs were paid.

[De Villiers, C.J.: I have nothing to add to what I have said.]

Mr. Upington: I do not see what payment of costs has to do with the question whether this case should be tried by a jury or not. I would ask the Court to fix a day for trial by jury.

De Villiers, C.J.: Perhaps I may add this, that the question now is not whether the plaintiff shall be allowed to proceed; it is simply as to the mode of procedure for the future. In case he had not satisfied all the requirements, it would be quite competent for the defendant to object to the case being set down for trial by jury until the costs had been paid. But that is not the point now. I think the suggestion was made previously that it was a case in which the trial should take place by jury, and all I decide now is that in case the plaintiff proceeds further with his action that action should be tried by jury and not by the Court. That is all that I can say. As for the question of costs, that is a matter to be decided later. The date of trial will be fixed for Wednesday, 27th May.

KRAMER AND BIGLEY.

Sir Henry Juta, K.C., moved that a rule *nisi* ganted by the Court, on February 26, restraining the bank from parting with a sum of £146 11s. 5d., standing to defendant's credit, be made absolute.

Rule made absolute.

DUNN V. CLARK.

Mr. Close applied for leave to sign judgment against plaintiff in a cause in which his client was the defendant, the period fixed by the Court within which plaintiff was to file process having elapsed, and the plaintiff being barred from proceeding further under rule of Court 105; also for a refund of £6 paid in to the High Sheriff.

Order granted as prayed.

MCKENZIE AND CO. V BAGLEY.

Mr. J. E. R. de Villiers applied for a rule *nisi* to be made absolute. A rule *nisi* was granted by Sir John Buchanan in Chambers on 2nd April, calling upon the manager of the Standard Bank, Cape Town, to show cause on the 14th April why an order should not be granted interdicting him from parting with a sum of money standing to the credit of the defendant, and declaring the said sum executable in satisfaction of a judgment of the Court obtained by plaintiff against the defendant on 26th February, 1903, for the sum of £154 13s. 11d., with interest *a tempora morœ* and costs of suit, the rule to operate as an interdict in the meantime. Counsel also applied that this sum be executable for the costs of the present application, and of the judgment given under rule 329 d.

Rule made absolute, with costs as prayed.

DAY V. DAY.

Mr. Buchanan applied for leave to sue by edictal citation. The petitioner (D. S. Day, of Victoria West) was married to the respondent at Bloemfontein on 14th June, 1898, in community of property. Application was made to sue the wife for restitution of conjugal rights, or for a divorce on the grounds of desertion, and forfeiture of the benefits under the community, also for notice of trial to be served together with the edictal citation.

The Chief Justice said he would like to have further information as to the domicile of the plaintiff before making any order.

Ex parte ARROWSMITH AND WIFE.

Mr. Buchanan applied for leave to register an antenuptial contract. James A. Arrowsmith and Bertha M. Arrowsmith (born Day) were married on 5th June, 1895. Before that date a contract was signed by both petitioners, under which the wife (who was at that time under age) received substantial benefits in consideration of the marriage. Five days after the contract was handed to the Registrar of Deeds, Cape Town, who rejected the document on the ground of the petitioner being a minor, required the assistance of her father. The father was now in a lunatic asylum. Application was made for the ratifying of the signing by the second petitioner, assisted by her mother, and for the registration of the contract.

Application granted.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

Ex parte POSTMA. { 1903. April 17th.

Mr. Buchanan moved, on behalf of the petitioner, in his capacity as secretary of the fund for the past ministers of the Dutch Reformed Church and their widows and orphans for an order authorising the Registrar of Deeds to issue certified copies of certain bonds which, it was supposed, had been destroyed by fire. The bonds related principally to property in the district of Albert and of Steynsburg, and had been in the custody of the Rev. Mr. Kotze, who was formerly the secretary of the fund. The amounts were: £175, £250, £125, £100, £400, and £175. It appeared that the Rev. Mr. Kotze was removed by the military authorities from Pietersburg, and that he had placed in a satchel the bonds in question, along with other papers, and had placed the satchel on a table in the parsonage. The authorities, however, refused permission to remove the documents, and Mr. Kotze left them behind. While he was in Kimberley, in March, 1901, the parsonage was destroyed by fire, and the petitioner believed that the documents in question perished at the same time Diligent inquiry had been made, but the bonds had not been traced. The only difficulty, said counsel, was in regard to a bond, which had undergone one or two cessions, which had not been registered, but in regard to this an attorney could speak as to executing the cessions.

De Villiers, C.J.: It is clear that some relief should be given in the present case. There is no doubt that Mr. Kotze was in possession of these bonds, that the military refused him permission to remove them, that the parsonage in which they were kept was destroyed by fire, and that, consequently, there is reason to believe that these bonds have been destroyed by the fire. That seems also to have been the opinion of the Colonial Secretary of the Orange River Colony, who says that a thorough search has been made, but no trace has been found of the missing documents. The parsonage was, he says, destroyed by fire in March, 1901, and it is clear that the documents were destroyed by fire at the same time. I think that there should be a rule granted so that the persons interested may be able to show cause. You may take a rule, calling on all concerned to show cause on the 1st May, the rule to be once published in "Ons Land," once in another Cape Town newspaper, and once in another Dutch newspaper, circulating in the district of Albert

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STOTT V. SMITH.

Mr. Close moved for an order requiring the plaintiff to find security for the costs of an action. Mr. Close suggested that the amount should be fixed at £100.

Mr. Rainsford, for the plaintiff in the action thought that £40 would be sufficient.

An order was granted, the amount of security being fixed at £40, costs to be costs in the cause.

GOLDSTEIN V. GOLDSTEIN.

This was a motion for a rule *nisi* to be made absolute. The rule *nisi* had been granted restraining the Standard Bank from parting with any funds standing in the name of the late Bertha Goldstein, and also restraining her daughters from disposing of any moneys or property belonging to the estate of the said Bertha Goldstein pending the appointment of an executor according to law. The affidavit of Mr. Syfret, of Cape Town, attorney-at-law, set forth that he had received a cablegram from Mr. Edmonds, solicitor, London, asking him to stop payment of any moneys in the estate and to look out for the arrival of one, Emily Scott. He had caused inquiries to be made at 3, Orange-street, Cape Town, with regard to the alleged death of Bertha Goldstein, and he had obtained confirmation of the fact. The mail boat Norman, which he presumed was the boat referred to, was not due until the 14th inst. He had examined the records in the office of the Master of the Supreme Court, and he was unable to find that any death notice or any inventory had been filed in connection with the estate of the said Bertha Goldstein. He desired to take steps to prevent the disposition of the effects of the said Bertha Goldstein until an execu-

tor had been appointed according to law. The affidavit of John Toerien, master boot maker, 8, Orange-street, stated that on or about the 20th February, 1903, Bertha Goldstein hired two rooms in his house for herself and two daughters, whose names he subsequently learnt were Ida and May. When in conversation with the said Bertha Goldstein he learnt that she was possessed of considerable property, which included a large cash balance in the Standard Bank and also some shares. Whilst residing with him she opened a milliner's shop and registry office in Orange-street, and for this purpose disbursed considerable sums of money. She told him she was not compelled to do this, but, owing to constant disagreements between herself and her two daughters, she desired to have something to occupy her time. There were frequent altercations between mother and daughters, the said Bertha Goldstein openly stating that her daughters desired her death in order to succeed to her property, but in this they would be disappointed, for everything had been left to her second son. On or about the 9th March she was taken ill, and, during the few days she was ill, she on several occasions repeated the statement. On the 14th March she was seized with a fit and died, and thereafter the two daughters left his house. In consequence of arrears of rent, he detained certain articles, including gold bracelets, which had been worn by the deceased, but he afterwards received a letter from Messrs. Herold and Gie, requiring him to return the said articles to the two daughters, and with this he complied.

Mr. Buchanan for applicant; Mr. Upington for respondent.

Mr. Upington said that, before he read the answering affidavit, he would point out that they did not know who was the applicant. There was an affidavit from Mr. Syfret saying that he had received instructions from one Edmonds, a solicitor, but they really did not know who was appearing to make this application.

[De Villiers, C.J.: It does seem extraordinary.]

Mr. Buchanan: The cablegram is what is depended upon. It is from the solicitor in London who seems to be acting for Emily Scott, who is one of the daughters of the deceased. The cablegram when decoded reads "Willie Scott," but that is a mistake. She is a married daughter of the deceased.

[De Villiers, C.J.: Her son, she said, was her heir. Is he a party at all?]

Mr. Buchanan: We have no instructions from him.

[De Villiers, C.J.: When will you have the particulars?]

Mr. Buchanan: Mrs. Scott has come out. She has had an interview with the attorney, Mr. Syfret, but she has not been seen since. She came out by the Norman.

[De Villiers, C.J.: I think I should postpone this application.]

Mr. Buchanan: It seems to me a peculiar state of affairs. There has not been time really to hear from Mr. Edmonds, the solicitor. The cable was dated Thursday, the 2nd April.

[De Villiers, C.J.: How much is there in her name in the bank?]

Mr. Buchanan: Of that I have no information. I may point out that no inventory or death notice has been filed in this matter by the two daughters.

[De Villiers, C.J.: It appears to be a case that requires further investigation.]

Mr. Upington said he was instructed by his attorneys that Mrs. Scott had returned to England by the Dunvegan Castle, and that the two respondents had cabled Home for a copy of the will. Counsel proceeded to read the copy, and said that it was clear from that document that Mrs. Scott had only at the most a reversionary interest, and that she had no interest at all if Marion and Ida were living. He was bound to add that it was only a certified copy that he was reading from, sent in reply to a cable, and that it was dated the 25th March, 1897.

De Villiers, C.J.: I think the case must be postponed *sine die*, interdict to continue in operation, with leave to either party to move the Court. At present we have no information, but as soon as either party gets sufficient information, he may move the Court further.

Ex parte HOLDERNESS. { 1903. April 17th.

Attorney — Admission — Rhodesian examiner.

On the application of an attorney who after examination in

Rhodesia had been admitted to practice there, the Court admitted him to practice as an attorney of the Supreme Court.

Mr. Buchanan moved on behalf of applicant for leave to be admitted as an attorney-at-law and notary public, or in the alternative, for the appointment of examiners to examine him as to his fitness to practise as an attorney-at-law and notary public.

Mr. Upington watched the case in the interests of the Law Society.

The affidavit of applicant showed that he had been articled to Mr. Patrick Charles John Coghlan at Kimberley, and, with the exception of a short period during which he had served with His Majesty's forces while he was at Kimberley, he had continually devoted himself to the study of the law. He had been admitted, after examination, in the High Court of Southern Rhodesia.

Mr. Upington said that the Law Society had no objection to this application, and he was instructed to suggest to the Court that the petition be granted, in the terms of the alternative prayer, *i.e.*, that examiners be appointed.

Mr. Buchanan thought that the examination of the Court of Southern Rhodesia ought to suffice.

[De Villiers, C.J.: I have no doubt that he is quite competent, but this Court has had no opportunity of judging as to his competency. You may take your order, on condition that he be examined by the examiners of this Court. He is here, is he not?]

Mr. Buchanan: No, he is in Bulawayo.

[De Villiers, C.J.: I suppose he is going to practise here?]

Mr. Buchanan said the applicant was at Kimberley for a number of years, and he might wish to come back to Kimberley to practise, and so be an attorney of the Supreme Court.

De Villiers, C.J.: I think, under the special circumstances, the Court will amend the order, because if I were to appoint an examination in Southern Rhodesia, I would probably appoint the same gentleman as have already examined him. It is no use having a second examination. The order will be granted as prayed.

Mr. Buchanan said he had omitted to ask where the *oath* was to be administered.

De Villiers, C.J.: The oath can be taken before the Registrar of the High Court of Southern Rhodesia.

Ex parte BADENHORST.

Attorney—Reinstatement.

Mr. Benjamin moved on behalf of petitioner for his reinstatement as an attorney and notary. Petitioner, he said, was suspended from practice on the 13th February, 1902, on being convicted of treason. He was sentenced to 18 months' imprisonment but now, before the full term had expired, he had been set at liberty under the amnesty granted by the Government.

Mr. Upington said that, as representing the Law Society, he did not oppose the application.

De Villiers, C.J., said that he consulted with his brother Buchanan before he left, and he had consulted with his brother Maasdorp, and they had come to the conclusion that under the circumstances, if no further objection were raised by the Law Society, readmission should be granted. The application would be granted.

Ex parte SCHOLTZ

Attorney—Reinstatement—Costs.

Mr. De Waal moved on behalf of the petitioner for leave to be reinstated as an attorney and notary.

Mr. Benjamin, as representing the Law Society, said that he had no objection to raise except that when the applicant was suspended his lordship awarded costs to the Law Society, and these costs had not yet been paid.

Application granted subject to petitioner first paying costs due to the society.

Ex parte DREYER AND OTHERS.

This was an application for leave to sell certain property known as Riverside, Main-street, Newlands. From the affidavits of the applicants it appeared that the three first named petitioners, who were unmarried, were the surviving beneficiaries under the will of their sister, Bessie Coburn, who had died in Ceylon. They were unable and had not the means of keeping in

repair and order the property, and it was suffering from neglect, and would deteriorate in value. They asked to be allowed to dispose of the property by public auction, the proceeds to be invested under proper security. Otherwise there was a sum of £3,500 in the hands of the General Estate and Orphan Chamber, who were administering the estate of the said Bessie Coburn in the terms of the said will, the interest of which the three first named petitioners were entitled to, and they asked to be allowed from this sum £200 towards their maintenance and support, and keeping the house in a proper state of repair. Mr. Benjamin (for applicant) stated the matter had not been before the Master. Under the will, unborn issue might be interested, the children of the petitioners. The position of the Master was that inasmuch as there were no *de facto* minors interested it was not necessary for him to consider the matter.

[De Villiers, C.J.: What is the provision with regard to the money in the Orphan Chamber?]

Mr. Benjamin: The money in the Orphan Chamber is invested in the interests of the three sisters, and then, after their death, the heirs of Dreyer, who is dead.

[De Villiers, C.J.: I should have thought the best course would be to borrow £200 on mortgage on this property and place it in repair, and if it is too large for the petitioners they may let it, and let it very well, and they can occupy a smaller house.]

Postea, April 22.

The Court granted an order as prayed.

Ex parte MARINUS.

Mr. Benjamin moved for leave to join in the partition of certain property at Mowbray in which the petitioner had a life interest to the extent of one-eighth share, and to raise sufficient money on his share to repair his house and bear the costs of the application and subsequent action. Petitioner's children also had an interest in the property, and he could not join in the partition without an order of Court. An action had been commenced by one Wooley to compel a partition of the property in question.

Order granted in terms of prayer.

Ex parte CLOETE AND ANOTHER.

Mr. Buchanan moved for an order authorising the proposed sale of certain property in the district of Cradock, in which five minor children were interested. The Master reported favourably on the proposed sale, and said that a number of beneficiaries were interested in a farm of 33 morgen, and it would be better to sell the farm and retain the proceeds, the shares of the minors to be paid into the Guardians' Fund.

Order granted in terms of the Master's report.

SAUNDERS V. SAUNDERS { 1903. April 17th.

This was an application for leave to sue by edictal citation for the restitution of conjugal rights, or failing that, divorce, on the ground of malicious desertion, and also for the forfeiture of respondent's half-share of the community of property.

Mr. Benjamin, for the petitioner, said that she was born at Graham's Town, and she was married to the respondent in 1888. The parties afterwards resided at Kimberley, and the petitioner found it necessary to travel for the benefit of her health in 1897. While absent from home, she received a letter from her husband declining to support her or the three children of the marriage. She subsequently saw the respondent, and he again refused to support her, and since that interview she had heard nothing from him. The husband was presumed to be in London, England, and had not been heard of during the last four years.

An order was made calling upon the respondent to show cause by the 1st August, personal service to be effected if possible, failing which, citation to be published once in the "Daily Telegraph."

Ex parte JOUBERT AND OTHERS.

This was an application by the executors under the will of the late Daniel Johannes van Wyk for leave to sell certain property in the Riversdale district, which had been bequeathed, firstly, to the children of his first marriage, and secondly to the children of his second marriage, both his wives having predeceased the testator. The ground of the application was that, after rates

and taxes had been paid, only a small sum remained from the estate to be divided among the ten participants, of whom four were minors, and the property was too small to allow of being split up. It was proposed to sell the property by public auction, and divide the proceeds among the heirs. The Master's report was favourable.

On the motion of Mr. Benjamin, an order was granted as prayed.

HICKMAN V. HICKMAN.

Mr. Upington moved, on behalf of petitioner, who resides at Kimberley, for leave to sue for divorce from his wife by edictal citation, on the ground of adultery. The parties were married at Queen's Town in 1891. There were two children of the marriage. They had lived at various places in the Cape and the Orange River Colonies. In 1896 respondent went to East London to her mother, but after an absence of eight months, she returned to petitioner, who was then living at Kroonstad. They afterwards went to Bloemfontein. In 1898 petitioner received a letter from the respondent's mother, saying that she had gone to Natal. Petitioner heard nothing from the respondent for a long time, and he sent to the respondent's mother for the children. Petitioner afterwards met the respondent at King William's Town carrying a child nine months old, which she said was her own, by a man named Griffiths, with whom she had cohabited in Natal. Respondent, since the above-named date, had had another child by a man named Evans. Both the illegitimate children were still alive.

An order was made calling on the defendant to show cause by the 31st May, personal service to be effected if possible, failing which, citation to be published twice in an East London newspaper.

GUARDIAN ASSURANCE CO. V. INSOLVENT ESTATE LIPPERT. 1903. April. 17.

Liquidation account—Amendment—High Sheriff—Dead bond.

Judgment for the sum of £500 due on certain two mortgage bonds had been granted to the G. A. Company as against one B. The property specially hypothecated having been also declared executable, had been sold in execution, and the High Sheriff had framed a distribution account. It appeared that there was a third uncancelled bond in the office of the Registrar of Deeds on the same property in favour of one L. for £500. The estate of L. had been finally sequestrated, but the trustees had not brought up this bond for £500 as an asset in his estate. The High Sheriff had, however, awarded a balance of the money which the property realized after the other two bonds had been paid off, together with interest for a year and a current year as an asset in L.'s estate in repect of the £500 bond. On the application of the G. A. Company the Court granted an order directing the High Sheriff to amend his account, and to award to the Company the entire balance of the moneys realized by the sale in execution of the said property. The case of Brink *v.* The High Sheriff *(12 S.C.R., 414) distinguished*———

This was an applicantion for the amendment of the first and final liquidation account and plan of distribution in connection with the proceeds of landed property, sold in execution of a judgment of the Supreme Court on 1st November, 1902, in the matter between the Guardian Assurance and Trust Co., of Port Elizabeth, and Charles Howard Bush.

Notice of motion had been served on the Acting High Sheriff and on Messrs. G. W. Steytler, H. Gibson, and W. A. Currey (trustees in the insolvent estate of W. A. Lippert, trading as W. A. Lippert and Co.), respondents in the present case, that the Supreme Court would be moved for an

order upon respondents to show cause why the petition of the said applicants should not be granted.

The petition of the applicants set forth that recently the petitioners sued one, Charles Howard Bush, by edictal citation for the recovery of £500 due on certain two mortgage bonds for £250 each, being a first and second mortgage bond on the same property passed by Bush in favour of the petitioners, and that on 1st November last the Court granted provisional sentence for the amounts of the two bonds, with interest at 8 per cent. from 1st July, 1892. The landed property specially mortgaged in the said bonds was thereafter sold in execution, and realised £800. The Acting High Sheriff framed a distribution account of the said amount, in which he awarded the petitioners £500 as the capital of the said two bonds, and £94 2s. 8d. interest for a year and the current year, the actual amount of interest on the two bonds being over £380, leaving a balance of £152 6s. 8d. for distribution. There was a third bond for £500, open and uncancelled, on the said property, according to the debt registry in the office of the Registrar of Deeds, in favour of W. A. Lippert and Co., although no such bond had been produced to the Acting High Sheriff, and the balance of £152 6s. 8d had, in the distribution account, been awarded to the third bond. On 17th August, 1890, the estate of W. A. Lippert and Co. was finally adjudicated as insolvent by order of the Court, and Messrs. G. W. Steytler, H. Gibson, and W. A. Currey were appointed joint trustees of the insolvent estate, and framed several accounts and plans of distribution therein, and in none of those accounts was the bond for £500 in favour of the estate brought up as an asset therein, and there was a statement at the foot of one of the latter of the accounts that there were no more assets in the said insolvent estate available for distribution. The petitioners took exception to the account framed by the Acting High Sheriff in execution on the ground that the estate had been insolvent for more than a year and the current year, and that they were therefore entitled to preference for the whole of such period, but, even if not so entitled as preferent creditors, they were entitled to the whole of the balance of £152 6s. 8d. on the ground that no claim had been made by the only parties indicated by the debt registry as entitled to the same. The petitioners, therefore, prayed that the Acting High Sheriff be directed to amend the said account and plan of distribution of the proceeds of said property sold in execution, by awarding them, in addition to the sum already awarded, the said sum of £152 5s. 8d., or for further or other relief, with costs of the application.

Mr. Close for applicants.

Mr. Close said in the present case he presumed the Master had acted on the lines of a case *Brink N.O.* v. *the High Sheriff* (12 Sup. Ct. reports, p. 414). He in view of his lordship's remarks in giving judgment in that case (p. 418), did not know that it could be contended that there was very much difference in the preference allowed in such sale and the preference in an insolvent sale. In the present case no claim had been made on Lippert's bond, and he submitted that the Master should have taken no account of the registry beyond what he was required to do under the rules of Court (Rule 105, new edition, p. 56, and Rule 107). The Sheriff was not entitled to award to persons simply nominally entitled to a bond who did not claim, but to the strong, living claims made to him. Counsel quoted Section 2 of Ordinonce 3 of 1844, and said in the present case they had not a living debt, but a dead debt. Lippert and Co.'s trustees naturally could not bring up a bond that had been written off in their books. As a further point, the former bonds themselves were put in, and those bonds gave a preference against the assets from the property sold in execution. He therefore asked the Court to authorise the payment of the balance to the petitioners.

The High Sheriff, called, said the objection was raised to the award made to the estate of Lippert and Co., or the bond-holders of the balance of the purchase money on the property. But Lippert and Co. did not exist any more, and that bond still stood open in the Deeds Office. The bond might have been ceded by Lippert and Co., and might still be held by some absent person.

In reply to the Chief Justice, the High Sheriff said that notice had been given in the "Gazette."

[De Villiers, C.J.: Well, surely if there is a cession of the bond, the holder can come forward and file his claim?]

Yes, my lord, unless he is absent from the Colony. The bond is still open in the Deeds Office.

[De Villiers, C.J.: has the Master to take notice of bonds which are not brought forward?]

Yes.

[De Villiers, C.J.: Supposing there is a bond-holder and he does not appear, do you still award him the amount?]

Oh, yes, my lord. Of course, this is rather an exceptional case; as a rule, bond-holders come forward and claim.

[De Villiers, C.J.: Have you ever had a case where the bond-holder has not come forward?]

I do not think so; I am not just now aware of one.

[De Villiers, C.J.: You say notice is given to the bond-holders?]

Yes, notice is given. It is quite probable there is no such bond in existence, and that it has not been written off in the Deeds Office.

[De Villiers, C.J.: It seems to me it it extremely unlikely, and that there is no such bond in existence. What is the date of the bond?]

26th June, 1883.

[De Villiers, C.J.: Well, that is twenty years ago. What is the form of notice given?]

It is published in the "Gazette" that a meeting of mortgagees and other creditors will be held on a certain date before the High Sheriff. It is published two or three times, as a rule a fortnight or three weeks, or sometimes a month, before. I must say that it appears to me that this bond is no longer in existence. At the same time, there it is open at the Deeds Office, and it is quite possible that some one else may hold the bond still.

De Villiers, C.J.: The case of Brink against the Sheriff differs from the present case. Where there are competing preferent creditors, then, in that competition, the holder of the bond—in the form, at all events, of the bond in Brink's case—is not entitled to more than preference for a year and the current year; and, therefore, if in the present case the bond was in the same form, and there had been any competition in the case at all, the Court would have upheld the rule there laid down. But, in point of fact, there is no competition whatever in the present case. Due notice has been given by the Sheriff as to the meetings of mortgagees, and none have appeared in competition with the applicant. Moreover, in this case, notice of the present application was given, not only to the Master, but to the trustees of the insolvent's second mortgagee. They have not appeared, and they have made no objection to the present application, and therefore, under these special circumstances, I think the Court is bound to assume that their bond is no longer in force, and that the motion to cancel the bond on the ground that it is absolutely dead must be allowed. Under these special circumstances the Court will grant the application. The costs will be paid out of the estate.

[Applicant's Attorneys: Tredgold, Mc Intyre and Bisset.]

Ex parte ROSENBAUM AND ANOTHER. 1903. April 17th.

Mr. Benjamin appeared for the petitioner, and applied for leave to register an ante-nuptial contract.

The petition of Aaron William Rosenbaum and Annie Rosenbaum set forth that the petitioners came to the Colony in July, 1896, and became domiciled in the Colony. On the 30th April, 1902, they left for England, and a month or two later in the same year entered into a marriage contract, whereby a certain life policy for £1,000, effected on the life of the first petitioner, and £1,000 invested in certain securities was settled on the second-named petitioner. Their marriage was subsequently solemnised, on 8th July, 1902, in London. It was always the intention of the petitioners to marry without community of property, and they were informed in London that, so far as the Cape Colony was concerned, it was not necessary to register here an ante-nuptial contract. Petitioners returned to the Colony in November, 1902, and found they had been misinformed as to the requirements of the law with regard to having no community of property in their marriage. They applied for the registration of the aforesaid ante-nuptial contract in the Deeds Office in this Colony, each party to have a right to dispose of their private property by will, codicil, or otherwise, and neither party to be liable for the other's debts, all legacies or bequests left to either to be the property of that party.

Counsel in support of the application pointed out that the parties clearly in-

tended to marry without community of property.

[De Villiers, C.J.: Was the settlement made before marriage?]

Yes, but executed in England.

The application was granted.

INSOLVENT ESTATE MUSTERS V. VAN DER SPUY.

This was an application for the appointment of a Commission *de bene esse*.

Sir Henry Juta, K.C., for the applicant, moved for the appointment of a commissioner to take the evidence of the defendant, who was at present in the Transvaal, and had arranged to leave for England shortly. Counsel's attorney had suggested the name of Mr. Gardiner and the attorneys on the other side endorsed and concurred with the suggestion.

The application was granted Mr Gardiner being appointed commissioner.

Ex parte VAN DRUTEN.

Mr. Buchanan appeared for the petitioner, and applied for leave to sell certain property at Griquatown, Division of Hay.

The petition showed that the petitioner was appointed, on 14th February, 1902, *curator bonis* to the property of Nicholas Egidion Druten, a lunatic detained during the Governor's pleasure in the Robben Island Asylum. N. E. Druten had a daughter living, aged three years, whose mother was dead, and who was at present being maintained by her aged grandfather. The estate owed money to different creditors, amounting to the sum of £120 or thereabouts. N. E. Druten's life was insured in the South African Mutual Insurance Society for £500, and the policy was being kept alive solely by money borrowed from friends. He was also possessed of movable property at Griqua Town worth about £30, and of immovable property valued at £100, which latter brought in a small revenue to the estate of about £2 10s. a month. Petitioner was desirous of selling that property in order to liquidate the estate and provide for the payment of the premiums on the life policy of N. E. van Druten; and should there be a sufficient balance after the payment of the aforesaid debts, the petitioner was desirous of capitalising the premiums on the policy, so as to prevent the same at any future time lapsing.

The application was granted, with costs to come out of the estate.

Ex parte SMITH.

Mr. Upington applied for an order authorising the Registrar of Deeds to amend the title deed of a certain piece of land at Sea Point.

Counsel stated that on 28th February, 1903, the Court granted the petitioner an order, declaring him to be entitled to the land in question under the Derelict Lands Act. Through an error in the sketch, it was wrongly described, and the Registrar of Deeds refused to allow the transfer to be passed until the order was amended.

The application was granted.

Ex parte STEVENSON.

This was an application for leave to execute a certain agreement, in the matter of the estate of the late James Samuel Reed, of Port Elizabeth, and of that of his predeceased wife, Elizabeth Reed (born Elliott).

Mr. Benjamin appeared for the petitioner (Thomas Stevenson, manager at Port Elizabeth of the South African Association for the Administration and Settlement of Estates, in his capacity as the executor dative of the estate of the late J. S. Reed), and read the petition, which set forth, *inter alia*, that the late J. S. Reed and his wife, E. Reed, executed a joint and mutual will on 3rd November, 1858, whereby the survivor was entitled to remain in possession of the whole of the joint estate till his or her decease. Between the date of the death of Elizabeth Reed, on 24th February, 1898, and the death of James Samuel Reed, on 25th May, 1902, the joint and mutual will was not lodged or filed by the latter, the executor named, or proceedings taken to have the will proved, but the said J. S. Reed until his death remained in possession of all the assets of the joint estate, the value of which amounted to £88,000, but besides loose memoranda and accounts, no record was kept on the estate by him. As it was found practically impossible to assign to the estate and to the various children the exact ownership in the various properties; and to adjust the accounts between the estate and the children, petitioner, after prolonged investigation and discussion with the heirs (excepting two minors), obtained their agreement to the terms of the document it was now prayed the Court to order to be executed by

William Lloyd, the father and guardian of the minors, who agreed to its terms, in order that petitioner might duly a t upon it, and complete the liquidation and distribution of the estate.

The application was granted, with costs out of the estate.

LEVIN V. COCHRANE AND CHERRY. 1903. April 17th.

Mr. Upington appeared for the applicant.

Mr. Benjamin appeared for the respondent, the applicant in the original action.

Mr. Upington, in applying for a date to be fixed for trial by jury, asked that the costs be ordered to be costs in the cause.

The case was set down for trial by jury on Thursday, 14th May, costs to be costs in the cause.

Ex parte DOCKEL.

This was an application for leave to transfer certain property.

Mr. Close, for the petitioner, said that certain land at Salt River had been sold to one Alexander, and petitioner's name appeared on the transfer deed as Ludwig Dockel. He wished to have the deed amended by the substitution of his correct name, Ludwig Christian Dockel.

Application granted.

CLARK V. ESTATE BARRINGTON.

This was an application for leave to register a certain lease.

Mr. Benjamin appeared for the applicant.

Sir Henry Juta, K.C., appeared for the executor in the estate.

Sir Henry Juta said that Barrington was dead, and the applicant wanted to have a certain lease registered, and the executor said that there was no agreement to register. He maintained that, as there was no agreement to register during the lifetime of Barrington, it could now be registered.

Mr. Benjamin said a lease was entered into between John Clark and Barrington on 8th May, 1900. A notarial confirmation of the lease would be quite sufficient to comply with the requirements of the Deeds Office. It was true that no agreement was entered into between the applicant and the deceased that the lease should be registered, but even without registration, it was binding on the estate of deceased. Registration was not necessary to render a lease valid as against the person making it or against his executors; it was only necessary as against third persons, and even then, only if those persons took the land without notice being given them that there was no such agreement. The present lease was quite binding on the estate. He applied for a notarial confirmation by the executors.

[De Villiers, C.J.: If the Court makes an order in these terms, the executors will make no objection?]

Sir Henry Juta said they did not feel that it was in their power, having entered into the lease, to make any.

[De Villiers, C.J.: Now, what do you say about the costs of this application?]

Mr. Benjamin suggested there should be no order as to costs, each side to pay their own costs.

Sir Henry Juta held that the applicant should pay all costs. There was no law which could compel an executor to execute a notarial document.

De Villiers, C.J.: There seems to have been no agreement, Mr. Benjamin, at the time, that there was to have been registration. At the time of the execution of the lease it was not deemed necessary to register the same, though Barrington expressed no objection to registration. So that, I think, you will have to pay the costs of the respondent. If there had been anything binding on the estate he would not have been justified in opposing, but according to your own statement there was no agreement.

S.A. FISHERIES V. KAMP.

This was an application for the appointment of a Commission *de bene esse*.

Mr Upington appeared for the applicant.

Sir Henry Juta, K.C., appeared for the respondent.

Mr Benjamin applied for the appointment of a Commissioner to take the evidence of certain witnesses in Natal, and for the fixing of a date for the trial of the cause by jury. He would suggest the name of Charles William Povall, advocate and attorney, at Durban. There was no opposition to the suggestion.

The application was granted, the case being set down for trial by jury on Thursday, 28th May.

HALLER AND SOGWAQWA V. SOGWAQWA.

Mr Upington applied for the appointment of a Commissioner to take evidence in Tembuland. The action was one to set aside a will, and it was necessary to take the evidence of the two witnesses to the signing of the will. The affidavit of petitioners showed that under rule 319 evidence must be led. The estate was a very small one, of the value of £300, and the expense of bringing those witnesses to Cape Town would be very great. He suggested the name of Mr. A. Gladwin, Resident Magistrate of Quotimvaba, St. Mark's. A special messenger would be required to take the will and death notice to Tembuland, whose expenses would be paid by the applicant. It was necessary to submit the original document, the allegation being that it was not signed in the presence of the testatrix and was merely signed after her death by the witnesses.

Replying to the Chief Justice, Mr Upington said the original will was filed with the Master of the Supreme Court.

Mr. Gladwin was appointed Commissioner to take evidence, and his lordship authorised the Master to send the will and the death notice by registered letter to Mr. Gladwin, Resident Magistrate of Quotimvaba, St. Mark's.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

COLLISON V. PEW, TRADING AS EDWARD PEW AND CO. { 1903. April 21st.

Mr. Gardiner, on behalf of the petitioning creditor, moved for the discharge of the provisional order of sequestration.

Order granted as prayed.

Ex parte THE EXECUTORS OF THE ESTATE SIMEY.

Mr. Benjamin moved, on behalf of the executors testamentary, for leave to sell certain property, forming part of the estate Zonnebloem, situate between Caledon and Hanover streets. Mr. Benjamin said the matter had not been referred to the Master, who took up the position that where there were no minors in actual being interested it was not necessary that his report should be sought.

[De Villiers, C.J.: What is bequeathed to the issue?]

The proceeds of the estate, as set out in the first paragraph of the petition.

[De Villiers, C.J.: Not the property itself?]

I understand not from the petition. I have not a copy of the will.

[De Villiers, C. J.: You ought to see the will. It is most important to see the will. The case had better stand over until you get the will.]

At a later stage, Mr. Benjamin produced the will, and

De Villiers, C.J., after examining the document, said that the petition stated something quite different to what appeared in the will. He saw nothing in the will about enjoying the income from the estate. It was not clear whether the two properties referred to in the will were placed on the same footing. It looked very much as if the property went absolutely to the three children. The petition seemed to show that both stood on the same footing, but the will did not say so, at least it was not clear. He thought the petition had better be amended, and that the whole of the will had better be set out, so that they could see whether it might not be fairly held that the first party referred to stood on a different footing, and that the petitioners might be allowed to sell the first and not the second. Surely in cases of this kind it was a most important matter that the will itself should be before the Court.

Mr. Benjamin said the petition had been inaccurately drafted.

The case was, therefore, ordered to stand over for amended particulars.

DU PREEZ V. REGISTRAR OF DEEDS.

Mr. Rainsford moved for an order calling upon the respondent to pass the transfer of certain property, which pe-

titioner had purchased at public auction in the division of Mossel Bay. The Registrar of Deeds, in his report, said that the petitioner, having purchased property from the estate of which he was one of the executors, an order of Court for confirmation of the sale was essential. The property, it appeared, was sold by public auction after due notice had been given, and the purchase price apparently was a fair one. The necessary consent papers had been signed by the majority of the heirs.

Order granted as prayed.

Ex parte HOMMEL AND OTHERS.

Mr. Close moved for leave to draw a certain sum of money from the estate of Mattheus Hommel for the maintenance and education of certain minor children. The Master reported in favour of the application.

Order granted in terms of the Master's report.

Ex parte BROWN AND ANOTHER.

Mr. Close moved on behalf of petitioners, as executors testamentary in the estate of one Brown, for an order authorising the transfer of certain property which they had purchased from the estate.

Order granted as prayed.

Ex parte VAN DER MERWE.

Mr. Close moved on behalf of the executor for leave to raise a mortgage on the property in the estate, which was situate in the division of Ceres, and to apply the balance to the purchase of stock. The application was made in the interests of a minor.

Order granted in terms of the Master's report, costs out of the estate.

Ex parte BASSON.

Mr. J. E. R. de Villiers moved for an order authorising the Master to accept notice of death of the petitioner's brother, Jasper Smit Faculyn Basson, and to convene a meeting for the election of an executor dative to represent the estate of the said Jasper S. F. Basson. The affidavit of the petitioner set forth that on Saturday, the 14th February, he went with his brother to Gordon's Bay for the purpose of fishing, and that the latter was accidentally drowned. He saw his brother in the water about 40 paces away. The deceased only rose to the surface once. Deponent concluded that he had been stunned by the force of the waves. Immediately after he had come to the surface he sank, and he was not seen again. Deponent was wet through, and he was wearing his clothes at the time, and it would have been absolutely futile for him to have gone to his brother's assistance. The body had not been recovered, although diligent search had been made. Deponent had offered a reward of £100 to any one who recovered the corpse. He was informed by the inhabitants of Gordon's Bay that it was not likely that the body would be washed ashore. There was no one present when the accident occurred except deponent and his brother. Petitioner had forwarded to the Master the death notice, and inventory of the estate of the deceased, at the same time requesting him to convene a meeting for the election of an executor dative to represent the estate of the said deceased. The Master, however, replied that he could not accept the proof of death now before him, and that it was necessary for the petitioner to approach the Court with a view to obtaining an order authorising the Master to take the necessary steps for the appointment of an executor dative. An affidavit from the hotel proprietor at Gordon's Bay also stated that several persons had been drowned there, and as far as his knowledge went, in no case had the body been recovered. Deceased was seventeen and a half years of age.

Order granted as prayed.

WOGENCHOWSKI V. ROSE.

Mr. Benjamin moved as a matter of some urgency for an order setting aside an agreement which had been entered into between the applicant, Augustino R. Wogenchowski, and the respondent, Manuel Rose, and to have the keys handed to him of a certain building which he had been erecting for the respondent at the corner of Main-road and Milton-street, Sea Point. Counsel stated that an application was heard in that Court recently in which the respondent sought to compel the present applicant to deliver up the keys of the property, and the Court made an order calling upon the then respondent, Wogenchowski, to hand over the keys on the payment by the ap-

plicant, Rose, of £400. That order was never carried out. The present applicant said that he agreed to accept £300 in settlement of his whole claim—£150 in cash, and the balance in promissory notes on good security. It was agreed between them that the surety should be Aristo Constantine Yaxoglon, proprietor of the Aristo Cigarette Company, 12, Castle-street. Applicant, in his affidavit, declared that Euthemois Yaxoglon had been falsely represented to him as the party agreed upon as good security, and that he had so represented himself. When the settlement was being concluded, he did not particularly notice that the surety bore the signature of Euthemois, but on examining the notes, to his astonishment he discovered that they had been signed by Euthemois. If he had detected the mistake at the time of the settlement, he should not have concluded the settlement, but would have cancelled the whole arrangement there and then; but he was not aware that such a fraud would be perpetrated upon him.

Mr. Upington, on behalf of the respondent, read the affidavit of Manuel Rose, which set forth that he agreed at the office of the applicant's attorney to pay £150 in cash, and to deliver to the applicant two promissory notes for £25 each, and one for £100 endorsed by Aristo Yaxoglon. He thereupon left to fetch the said Aristo Yaxoglon, but could only find his brother Euthemois, who was a partner in the firm with Aristo. He returned, and told the applicant's attorney and the applicant, and at their request he fetched Euthemois, who, in their presence, endorsed the promissory notes in his own name. He repudiated the suggestion that he used any fraudulent representation in regard to Euthemois.

Mr. Benjamin read a replying affidavit by the applicant, in which he declared that it was not made clear that the man who signed was the brother of Aristo. Deponent did not know the brothers by name, though he had bought cigarettes from them.

[De Villiers, C.J.: I confess on these affidavits I would not hold these people to have been guilty of fraud. Are these people likely to expose themselves to prosecution in that way, committing a palpable fraud which any time might be exposed?]

The affidavits, I admit, are rather strong in using the word "fraud." It may have been that there really was a mistake between the parties.

[De Villiers, C.J.: But they are partners. Surely the security of one is as good as the other?]

Apparently not; apparently the one, E. Yaxoglon, is a man of straw.

[De Villiers, C.J.: Well, they allege that they are partners, and, therefore, in the face of that allegation, how can it be held now that one has more property than the other?]

The applicant was under the impression that the partner Aristo, who made the affidavit when the case was previously before the Court, was to be the surety.

[De Villiers, C.J.: Why did your client not examine the note before he took it. One of the men is named "E" and the other is "A." The signature does not look like an "A." Where are the notes?]

The notes have been unattached.

[De Villiers, C.J.: What is the use of coming forward without even attaching the notes that you rely on?]

The notes having been produced,

[De Villiers, C.J., said he thought this was a most extraordinary application. Here was a man, who took a promissory note signed by E. Yaxoglon, and yet the applicant came forward and said he thought it had been signed by Aristo. How could he suppose it was Aristo in face of that document?]

It does seem extraordinary that he should have been mistaken.

De Villiers, C.J.: I do not think that this application can for a moment be entertained. The man takes this note as it was signed by E. Yaxoglon, and then he comes forward and says he thought it was signed by A. Yaxoglon, and charges these people with fraud and substituting the wrong name. The application must be refused, with costs.

DAY v. DAY.

In this matter, which was an application for leave to sue for divorce by edictal citation, Mr. Buchanan said that when the case was last before the Court his lordship wanted further information as to whether Victoria West was the applicant's domicile. Counsel produced an affidavit from the attorney, sworn to in

Cape Town, to the effect that he knew from his own knowledge that the petitioner at present resided in the district of Victoria West, and that he intended that that should be his domicile for the future.

[De Villiers, C.J.: Would it not be better if the man himself stated his own intention, and not his attorney?]

Mr. Buchanan agreed that it would from one point of view, but the attorney knew that it was the applicant's intention to remain at Victoria West.

De Villiers, C.J.: I think it would be the best evidence of his intention if he made the affidavit and not his attorney. The case will, therefore, stand over again pending his own affidavit.

Ex parte MERWE.

Mr. Upington moved, on behalf of the petitioner, for leave to pass transfer of certain property of the petitioner without the consent and assistance of her husband, one Dan Merwe. Petitioner wished to close with an offer which she had received for the property. The parties were married in community of property, but the petitioner was deserted by her husband, and she had not heard from him for three years. She did not know his present whereabouts. The property was acquired subsequent to his desertion of her out of her own money.

[De Villiers, C.J.: Well, but if he returns he might claim his share of the property if they are married in community. Even if she acquired it after the desertion, she must first institute an action for the desertion and a division of the property.]

She asks for transfer of this property. She must have something to live upon. He is not supporting her in any way. Counsel read the affidavit of the petitioner, which set forth that her husband, after giving way to drunken habits, deserted her. She had contracted certain debts that she wished to pay. She was the owner of certain lots of ground forming part of the Rondebosch Extension Estate, in the Cape Division. She wished to sell the said property without the assistance of her husband, to whom she had been married in community.

De Villiers, C.J.: I cannot grant the order immediately. You must give the husband an opportunity of objecting to this application. The property is registered here, and I think notice of the rule should appear in a Cape Town newspaper. You may take a rule, calling upon Dan Merwe to show cause on the 1st May why the applicant should not be allowed to pass transfer without his assistance, rule to be published once in a Cape Town newspaper.

APPEALS.

REX v. RADASI. { 1903. April 21st.

Native Location—Act 37 of 1884.

One M. had been convicted of having established an unlicensed native location on his property. Thereafter one R. (a tenant of M.) was convicted for having aided and abetted the establishment of the said location.

Held, on appeal, *that as it appears from Sec. 20 of Act 37 of 1884 that if the owner of property on which a native location is situated does not take out a licence it is the duty of the occupier to do so, the appellant had been rightly convicted.*

This was an appeal from a decision of the A.R.M. of Uitvlugt.

From the record in the Court below, it appeared that the appellant had been convicted on a charge of contravening section 6 of the Native Location Act, which provided that the owner of any land not licensed for such location should be liable on breach of the section to a penalty not exceeding £25 for the first offence. The ground of appeal was that he was wrongly charged under section 6, inasmuch as the owner of the farm where the offence had, it was alleged, been committed, McKenzie, had been charged under the said section with the said offence, and subsequently convicted. The evidence was that two sheds and thirteen rooms had been put on the ground leased by the accused. The rooms were occupied by 71 native adults. The appellant had no written lease from McKenzie.

Sir H. Juta, K.C. (for appellant) argued that seeing that McKenzie was the owner of this land, and was convicted of having a private location on his ground in respect of certain natives, one of whom was his client, this lessee or occupier could not be charged with having established a location on the ground. It did not matter who the natives were on the ground, if the owner of the land had one native male adult on the ground that was a location, and he must get a licence.

Mr. H. Jones (for the Crown) said he proposed to leave the matter almost entirely to the opinion of the Court. The Act provided that the persons who really established the location should take out a licence. If they did not, then the owner should see that they did take out a licence. He did not know really whether McKenzie could have been properly convicted, because he thought it should be proved that he had knowledge of the location, and that did not seem to have been done in the present case.

Sir H. Juta said he did not think there was anything in the Act which made knowledge necessary to the offence.

De Villiers, C.J.: In this case it is admitted on behalf of the appellant that if McKenzie had not been convicted of a contravention of the Act, the present appellant would have been liable to conviction; but he contends that, inasmuch as McKenzie has been convicted, the present appellant cannot also be convicted. Now, there would have been much in this argument if the act committed by the present appellant were identically the same as in the case in which McKenzie has been found guilty. On reference, however, to the evidence given in the present case, I find that the appellant has actively participated in the establishment of a native location without a licence. The Inspector of Locations says: "On the 30th June I inspected the premises occupied by the accused. I found two sheds and thirteen rooms on the ground leased by the accused. These rooms were used by 71 natives." Here was active participation by the appellant in the establishment of a location without a licence. If I remember aright, that was not the charge against McKenzie—it was for allowing certain lessees, including the present appellant, to be on the premises, and in that manner to establish a native location. It is clear from the 20th section of the Act that if the owner does not take out a licence, then it becomes the duty of the occupier to take out a licence. This duty has not been performed by the occupier, the present appellant. There surely is a means of ascertaining whether a licence is taken out, and appellant ought to have ascertained whether a licence had been taken out, and he should not have allowed any sub-lessees to come upon the premises without himself taking out a licence. The sixth section provides that the owner of any land on which a private location is established, who shall neglect to take out a licence for such location, shall be liable to certain penalties. If this section had stood by itself, I should certainly have gone with Sir H. Juta, and held that the appellant who is not the owner, is not liable, and that there is no duty on him to take out a licence for the location. The twenty-sixth section, however, provides that, whenever the words "the owner of any land on which a location is established," or words in that sense, are set out in this Act, such words and the words "proprietor of the land shall be deemed to include the occupier or the representative in this colony of any *bona fide* owner or occupier of the land on which a private location is established. From that I infer that the Legislature intended that, failing a licence being taken out by the owner, it becomes the duty of the occupier to take out the licence, and if he neglects to perform that duty, he is liable to be prosecuted. In my opinion, the fact that the owner has been punished for not performing his duty does not release the occupier from prosecution for not performing his part. For these reasons, I think this appeal should be dismissed.

[Appellant's Attorneys: Silberbauer, Wahl, and Fuller.]

REX V. CARN AND ANOTHER. } 1903.
REX V. IKE DAVIS AND ANOTHER. } April 21st. „ 22nd.

Gambling House — Forfeiture — Joint offence.

These were appeals against convictions by the Resident Magistrate of Cape Town on the 12th March, 1903, for having contravened section 16 of Act

36 of 1902, styled the Betting Houses, Gaming Houses, and Brothels Suppression Act, under which appellants were sentenced to pay a fine of £150 each, or in default, to undergo six months' imprisonment, with hard labour. Carn and Another appealed on the following grounds: That the fine imposed was excessive, and out of all proportion to the gravity of the offences charged; that the conviction was not supported by the evidence given before the said Court, or that the evidence given was wholly insufficient to support the conviction, and furthermore that the conviction was contrary to law; that the Magistrate's finding in adjudging the books, cash, and other papers and effects seized under warrant on the premises of the accused at 86, St. George's-street, Cape Town, to be forfeited to the use of the Crown, was incorrect, and contrary to law, inasmuch as part thereof belonged to and was the lawful property of the accused Israel Carn, who was found not guilty on the afore said charge and acquitted, and furthermore, that the evidence adduced at the trial did not show that these books, cash, and other papers were connected with, appertained to, or had any bearing on betting transactions within the meaning of section 14 of Act 36 of 1902, between the dates as set forth in the indictment.

In the case of Rex v. Davis and Another, the appellants urged: That as the accused were jointly concerned in the commission of the offence with which they were charged, the evidence showing that they were in partnership, upon the conviction of one of them, the other of them should have been discharged, or at least one penalty only should have been imposed, and not a separate penalty on each of them; that the fine imposed was excessive, and out of all proportion to the gravity of the offence charged; that the conviction was not supported by the evidence given before the said Court, or that the evidence given was wholly insufficient to support the conviction, and furthermore, that the conviction is contrary to law; that the Magistrate's finding in adjudging the books, cash, and other papers and effects seized under warrant on the premises of the accused at 86, St. George's-street, Cape Town, to be forfeited to the use of the Crown, was incorrect, and contrary to law, inasmuch as the evidence adduced did not show that these books, cash, and other papers and effects were connected with, appertained to, or had any bearing on betting transactions within the meaning of section 14 of Act 36 of 1902, between the dates as set forth in the indictment.

Mr. McGregor for appellants; Mr. H. Jones for the Crown.

Mr. McGregor said that in the first case it appeared that one Lazarus Cohen pleaded guilty, and Israel Carn pleaded not guilty. The main point of the appeal in this case would be, firstly, that the evidence did not show that Cohen, although he pleaded guilty, had committed any offence in law; and secondly, if the Court were against him on that point, that the Magistrate, in making a confiscation order, went further than the law allowed him. Having read the Magistrate's record of the case, Mr. McGregor proceeded to say the fine was a very severe one—£150, the maximum being £200—but he was not aware that he was entitled to urge that as a ground of appeal. He mentioned the question of the record, purporting to be under the ordinary jurisdiction, resulting in a fine being imposed, which was in excess of the power of the Magistrate under the ordinary jurisdiction. In addition to that question, there was the one as to whether there was evidence on the record showing that Cohen was guilty of a crime in law that was a statutory offence. The name on the appellants' office window was "Carn," but he pleaded not guilty, and was acquitted; Cohen was punished. Mr. McGregor, having read the various sections under which owners or occupiers of premises used for the purpose of betting were rendered liable to prosecution, said there was a curious section—twenty-one—which was a kind of saving clause; it would seem to be a protection of betting at specified places and times. It showed how the Legislature did not prohibit betting, but indirectly protected it.

[De Villiers, C.J.: It does not prohibit betting in specified places. It prohibits betting houses. The question is "Was this a betting house, and did the appellants keep it?" For what purpose was this house kept?]

The men are described in the indictment as commission agents, and this

house would presumably be kept for their business as commission agents.

[De Villiers, C.J., quoted the evidence of one of the witnesses at the trial, who said: "I wrote out a ticket. I paid £1. In the ordinary course I would have received £7 if I had won." "That would be betting. Is not this house kept for betting?"]

That is not proved.

[De Villiers, C.J.: What is the board for? What are these slips for?]

These slips could have been used for betting on the racecourse at Kenilworth.]

[De Villiers, C.J.: Here the bets are made in the house?]

Oh, one bet; but they (the police) did not bring one single person to say bets were made in the ordinary course. Although the place was watched for a month, they only brought one man, sent by themselves. What is there to show that there was not legitimate ordinary business, or that these slips were intended to be used in connection with bets made at Kenilworth?

[De Villiers, C.J.: What were the betting boards for?]

That goes against the accused in this case undoubtedly, but we want something to show that these betting boards were being used in the ordinary course by people there. The betting boards may or may not have been used, but they (the police) did not prove it. "Why have we not more evidence that there is a business of carrying on betting?" There might be cause for suspicion, but those incidents do not constitute such facts in law, as would justify conviction. The Act under which these cases were brought was a new one. Therefore there ought to have been care and accuracy in the management of the prosecution. There ought to have been convincing evidence under this highly penal Act.

[De Villiers, C.J.: There is no judgment forfeiting these documents, is there?]

Yes, there apparently is. As far as I understand, Carn is the man who has been most interested in this confiscation, but owing to the curious procedure, Carn has no *locus standi*, because he is found not guilty.

[De Villiers, C.J.: What documents do you wish to be given up?]

The Magistrate (if I may be permitted to say so) was so rough and ready that it is hard to say which is Carn's and which is Cohen's.

[De Villiers, C.J.: There is £8 8s. in cash. What is there to show that it had anything to do with betting?]

Nothing at all. Carn was not found guilty, but they took Carn's property too.

Mr. Jones said that according to the Act, all accounts, cheques, etc., found on the premises were adjudged to be forfeited. The section was very wide indeed. The evidence was that all the papers and effects seized related to betting.

[De Villiers, C.J.: There is a promissory note for £135, but it says nothing about betting.]

A cheque is in the same category as accounts. I submit that if the applicant wished the money to be returned, he should make a formal application to the Court.

De Villiers, C.J., held that there should have been an appeal made to hand over the documents, on the ground that they had not been forfeited, and then the nature of the documents could be argued. He took it the property would be given up.

Mr. McGregor contended that the police were not entitled to retain anything which was not included in the search warrant, and submitted that there was no adjudication with reference to the articles which had been attached. In the case of the Davises, a cheque for £1,400, that was ear-marked for a share transaction, was taken. That was illustrative of the kind of confiscation which seemed to have been in operation in this case. There was not, he held, any proof that the books which had been seized related to betting in Cape Town. Mr. McGregor proceeded to argue that the charge against the Davises was for a single and not a double offence, that both appellants could not be fined for the same offence, and that, therefore, only one penalty could be inflicted.

[De Villiers, C.J.: Supposing there was imprisonment and not a fine, and two persons were committed for three months, each would only have to do one and a half months?]

I don't say that.

[De Villiers, C.J.: That would be legitimate.]

Mr. McGregor said that if the appellants had employed a number of clerks, according to the Magistrate's interpretation of the law, he would have power to impose fines amounting to something like £2,000 or £3,000. To give a power so excessive as that, one required strong grounds in law.

[De Villiers, C.J.: It is a punishment on each individual.]

Mr. McGregor asked, in the first case, for the conviction of Cohen to be set aside, on the ground that there was no offence in law, and that the forfeiture order was wrong. In the case of Davis Bros., he also asked for the convictions to be set aside, and if the Court was against him on that point, he asked that the penalty should be on the principle laid down by Lord Mansfield—that the offence was a single one, that only one man could be found guilty, and that one partner was but the agent of the other.

Mr. Jones admitted that the judgment did not cover the papers and effects seized, but submitted that the proper course was to apply to the Attorney-General for the restoration of the property. He did not know if the property was in the hands of the Magistrate.

[De Villiers, C.J.: Supposing there has been an adjudication?]

If there had, it ought certainly to appear on the record. As he had previously remarked, the section dealing with the forfeiture of property was very wide. It said all accounts, money, bills, cheques, or other items found in such house or place might, after conviction, be forfeited. It seemed very difficult to get away from those words. If there had been no adjudication, there was no grounds to ask for a reversal of the Magistrate's decision. If there had been no adjudication, a proper application should be made for the return of the property.

De Villiers, C.J.: In the case of Carn and Cohen, the first objection raised is that the fine imposed is excessive, and out of all proportion to the gravity of the offence charged. No doubt it is true that the fine is a very severe one, but it is a fine which is authorised by the Act. The Act authorises a penalty of £200. The Magistrate imposed a fine £150. Whatever opinion this court may hold in regard to the policy of the Act and the gravity of the offence, I don't think the Court should interfere with the decision of the Magistrate where it is clearly in his jurisdiction. The next objection raised is that the proceedings purport to be in the ordinary jurisdiction. I don't think, however, that that slip, if slip it may be called, can in any way affect the validity of the proceedings. In one sense it is ordinary jurisdiction, and there is no special reference to the Magistrate by the Attorney-General. He has the jurisdiction, in Parliament given to him directly, and without any commission by the Attorney-General; and, secondly, I am of opinion that the mere fact it is headed on the charge sheet the words "ordinary jurisdiction" would not render the proceedings invalid. It would, perhaps, be more correct if "Act 36 of 1902" appeared instead of "ordinary jurisdiction." The parties cannot be prejudiced by this heading, nor does it seem of a nature in any way to render the proceedings invalid. I am speaking of objections common to these cases. A further objection is that there has been really no offence committed, inasmuch as it has not been proved that the appellants did not occupy, or keep, or use any house or place for the purpose of a betting house. Upon this point the evidence is very brief, but it appears to me perfectly clear. Detective Eaves, who is a witness in both cases, says: I know the accused. I have frequently seen them at their office at 86, St. George's-street. On the window was painted "Israel Carn, late Cohen and Carn, member of Tattersall's." Several times during the last two months I have passed the office and seen the accused in the office. There were a number of tickets behind the counter, and one of the betting boards now produced could be seen from the street. I have frequently seen men entering the office and leaving it with slips of paper in their hands. On the 3rd inst. I went to the office, and saw Cohen behind the counter, and Carn, with another man, in front of the office. I asked Carn the price of Matthew for the Grand National, and he replied, "7 to 1." I said I would have a "quid's worth." I was given the ticket produced. In the ordinary course I would have received £7 and my £1 back if the horse won. Detective Bassett corroborates. It is important, in

my opinion, that there were these betting boards put up. Was not a statement made that there was something written on these boards?

Mr. Jones: Yes, showing the prices of the betting on the Grand National.

The Chief Justice (proceeding) read the sections bearing on the case, as follows:

14. No house or place shall be opened, kept, or used at any time for the purpose of betting, or of any money or valuable thing being received by or on behalf of the owner or keeper thereof, or any person whomsoever, as or for the consideration for (a) any assurance, undertaking, promise, or agreement express or implied, to pay or give consideration in money or valuable thing on any event or contingency, on or relating to any horse race or other race, fight, game, sport, or exercise; (b) securing the paying or giving by some other person of any money or valuable thing on any such event or contingency.

15. Every house or place opened, kept, or used for any of the purposes mentioned in the preceding section shall be deemed and taken to be a betting house.

16. (1) Whosoever opens, keeps, or uses any house or place for any of the purposes mentioned in the 15th section of this Act, or knowingly and wilfully being the owner, tenant, occupier, or lodger, permits the same to be opened, kept, or used by any other person for any of such purposes, shall be liable to a penalty not exceeding for the first offence a fine of £200 sterling, or in default of payment, of imprisonment with or without hard labour for not exceeding six months; for the second offence or any subsequent offence to a fine not exceeding £500 sterling, or imprisonment with or without hard labour for a period not exceeding twelve months, or to both such fine and imprisonment. (2) All coins, moneys, bills, cheques, notes, I.O.U.'s, good-fors, or other writings for the securing payment of money, and all lists, cards, or other documents relating to racing or betting found in such house or place, may on conviction of any offence under the provisions of this Act be adjudged to be forfeited to the use of His Majesty the King in his Colonial Government.

In my opinion (continued the Chief Justice), the evidence given before the Magistrate was sufficient to justify the verdict that appellants did keep a house or place for the purpose of betting. The contingency of a horse race is specially mentioned. The existence of the betting boards on the place, with the prices of the betting on the Grand National Handicap, clearly shows what the boards were intended for, and in addition there is the fact that this slip of paper was given to the witness in which the agent promised to pay him a certain amount in case a certain horse did win. The offence, therefore, in my opinion was committed, and the Magistrate correctly convicted the accused Cohen. He has acquitted the prisoner Carn, but that is no reason for this Court to find that Cohen was not guilty, more especially in face of the fact that Cohen pleaded guilty of the offence. It is suggested that other persons who had done betting with the appellants should also have been called. It would be difficult, I suppose, to induce any persons who had entered into transactions with the appellants to come forward to give their evidence. Under the circumstances I think the evidence which was actually given was sufficient to justify the verdict. Coming to the case of Ike and Mike Davis, there is this difference between this and the case of Cohen and Carn, that in the case of Cohen and Carn one only of the partners was affected. In the case of the Davises, both were convicted, and it is contended on behalf of the appellants, the two Davises, that the offence was of such a nature that only one of them could have been found guilty, and stress has been laid on some English decisions, more especially the decision of Lord Mansfield, in the hare netting case, that there should be only one punishment for a statutory offence. I can quite understand this judge on the matter of punishment where strict laws were made for the benefit of the landlords, and not the benefit of the public, that he might be moved by some considerations of this nature; but there can be no doubt that the Act with which this Court is now dealing is an Act passed to prevent offences which were considered offences against public morality and public decency and public justice. Whether the Legislature have not gone too far in these matters is a matter for the Legislature and not for the Court. The Court must construe the law as it finds it. No words can be clearer than those in the 16th section of the Act. The words "every one" are not used, but the words used are

quite as explicit. "Whosoever does any of these things shall be liable to a penalty." It means, in my opinion, the same as "every one." If there had been twenty persons concerned everyone of them would have fallen under this section, and have been liable to the penalty. It is a separate penalty in each case, and the Magistrate having correctly found both the accused, Ike and Mike Davis, guilty, was justified, in my opinion, in imposing on each of them a penalty of £150. A further question has been raised as to whether the Magistrate should be ordered to restore to the appellants the money, notes, and other documents which are retained by them. Unfortunately, there is no order on the part of the Magistrate indicating these articles to be forfeited, and unless the record is alleged so as to show there is such an order, it is impossible for the Court to deal with it. I only express here my opinion that if it is not perfectly clear that such an order of forfeiture was made, and that such order was duly recorded, the Court should not hold that there has been any forfeiture at all, and the Magistrate should return to these people the documents which have been handed over. As to the question whether there has been a forfeiture, that is a matter on which at the present stage I had better express no opinion, but inasmuch as Carn has been acquitted it would seem unreasonable, at all events, that any papers or documents belonging to him should be retained by the Magistrate. The Court, therefore, dismisses the cases, but it is clearly understood in dismissing the appeal there is no decision given on the question of forfeiture or restoration of the articles claimed.

Mr. McGregor: That would include money?

[De Villiers, C.J.: Oh, yes, everything that he retains.]

Mr. McGregor: I take it, no one could add now to that record, if that be the record before your lordship?

[De Villiers, C.J.: This may be incorrect. If there is no record of forfeiture, then there has been no forfeiture.]

[Appellant's Attorneys: Michau and De Villiers.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

REVIEW.

REX v. MOSTERT AND DE KLERK. 1903. May 1st.

Pounds and Trespasses Act, 1892—Taking of animals from land of owner.

The 74th section of the above Act, making it unlawful to take animals from off the land of their owner, does not apply to the case of a person claiming to be the owner of an animal and taking it from off the farm of another person who also claims to be the owner by virtue of a purchase from a third person not the owner, and who had told the accused that he might take the animal on his own responsibility.

De Villiers, C.J., said the following case had come before him as Judge of the week for review. The accused were charged before the A.R.M. for Namaqualand at the Periodical Court, held at Garies, on the 9th April last, with contravening section 74 of Act 15 of 1892, by taking away a certain horse from off the land of the owner, Jan Davis, of Welkom. The accused were found guilty, and sentenced each to pay a fine of £7 10s., or one month's imprisonment with hard labour. This Act, which they are charged with having contravened, is the Pounds Act, which makes it unlawful to take away animals from off the land of their owner. The evidence, however, shows that the two accused had been sent by a person claiming to be the owner of the horse to the owner of a farm to which the horse had strayed, asking him to deliver the horse. It appears, however, that the owner of the farm had bought this horse and refused to deliver it. Then the accused said,

"We shall have to take it." The owner said, "Very well, if you take it you do it on your own responsibility." Clearly, the Pound Act was not intended to apply to a case of this kind. The accused had been sent to fetch the horse by a person claiming to be the owner, and the owner of the farm, who relied upon a purchase from a third person who was not the owner, told the accused that he might take the horse on his own responsibility. The conviction must be quashed.

ADMISSIONS. { 1903, May 1st.

Mr. Close applied for the admission of Gustav Theodor Halse as an attorney-at-law and notary public.

Application granted, the oaths to be taken before the Resident Magistrate of Uniondale.

Mr. Benjamin applied for the admission of Francois Daniel du Toit, as an attorney-at-law and notary public.

Application granted, the oaths to be taken before the Resident Magistrate of Humansdorp.

PROVISIONAL ROLL.

BANK OF AFRICA V. SHIRLEY AND EXECUTORS.

Mr. Benjamin applied for an order of sequestration of defendant's estate. Provisional order was granted on the 23rd April, 1902.

Order made final.

MITSCHKE V. MITCHELL.

Mr. C. W. de Villiers applied for an order of compulsory sequestration.

Decree granted.

WIENER AND CO., LTD, V. EBRAHIM.

Mr. Close applied for the final adjudication of defendant's estate as insolvent. Provisional order was granted April 14

Order made final.

MAXWELL AND EARP V. VAN DER MERWE.

Mr. Russell applied for provisional sentence on eight promissory notes made by the defendant in favour of the plaintiffs, with interest from due date and costs, less £600 paid on account; and that the property specially hypothecated by the covering bond he declared executable for the amount. He also asked for judgment under Rule 329d for the amount of £8 17s. 9d., goods sold and delivered by the plaintiffs to the defendant, with interest *a temporae morae*, and costs of suit. Some of the promissory notes and the account mentioned were eight years old, the latter being also covered by the covering bond, although not specifically alluded to in the bond.

The Chief Justice: Is there a prayer in the summons that the property be declared executable?

Mr. Russell: Yes, my lord.

The Chief Justice: What is the amount?

Mr. Russell: £2,322 11s. 3d.

Provisional sentence was granted, and judgment given for the amount of goods sold and delivered.

BLANDY AND CO. V. LLOYD.

Mr. Pyemont moved for provisional sentence on a bill of exchange for £255 14s., bearing date February 21, which was duly presented and payment refused for want of funds. He also applied for interest thereon from March 23, 1903, and costs of suit.

Provisional sentence as prayed.

KLEYN AND CO. V. HEYNES.

Mr. Benjamin applied for a decree of civil imprisonment on an unsatisfied judgment of the Court. Judgment had been given for the sum of £39 10s., with other charges, for money lent. Service had been made on the defendant, and a return of *nulla bona* had been made.

The defendant was in default.

Decree granted.

MILLER V. COETZEE.

Mr. Buchanan applied for a decree of civil imprisonment. The application was made in connection with a case decided by the Court last term for seduction. £50 damages were awarded, and the costs amounted to £48. Service had been made on the defendant, but the amounts had not been paid.

Defendant in default.

Decree granted.

FREEMAN V. WEINTROB.

On the application of Mr. De Waal, this case was postponed *sine die*.

SCHOLEFIELD AND OTHERS V. McDONALD AND CO.

Mr. McGregor applied for postponement to Thursday, May 7. Counsel put in a paper signed by the attorneys for the respective parties consenting to a postponement.

Granted.

RUNCIMAN AND ANOTHER V. HOARE.

Mr. Close applied for a provisional sentence on certain conditions of sale signed by the defendant in connection with the purchase of certain three lots of land at Simon's Town, payment being due at three, six, and twelve months. Time having expired, he applied for judgment for the amount, with interest at 6 per cent. from day of sale.

Provisional sentence granted.

DE VILLIERS AND CO. V. WEINTHOL AND ANOTHER.

Mr. Van Zyl applied for provisional sentence on a mortage bond of £50, bedated December 13, 1900, for value received, payable at the Standard Bank, with 5 per cent. if not paid at maturity, less £50 paid on account. He also applied for interest from March 3, 1901, and costs of suit. He handed certificate of presentation, showing return of no funds.

Provisional sentence granted as prayed.

GEARY V. BUCHANAN.

Mr. Buchanan applied for provisional sentence on a promissory note for £70 5s.

Provisional sentence granted.

WILLIAMS V. KRULL.

Mr. Benjamin applied for provisional sentence on mortgage bond of £50, becoming due on account of non-payment of interest. He also asked that the property hypothecated be declared executable.

Provisional sentence granted.

TITIMUS V. LYNCH.

Mr. Close applied for the final adjudication of defendant's estate as insolvent. Provisional order was made of the 14th April, 1903.

Order made final.

ILLIQUID ROLL.

COTTERELL V. ROBBERTS. { 1903. May 1st.

Mr. C. W. de Villiers applied for judgment, under Rule 329d, for the purchase price of certain mules and oxen, which defendant agreed to buy from plaintiff for cash, but had failed to pay.

Granted.

FORBES AND CAULFIELD V. BILLINGS.

Mr. Pyemont applied for judgment, under Rule 329d, for the sum of £261 9s. 4d., for goods sold and delivered, with interest *a tempore morae*, with costs of suit.

Granted.

PURCELL, YALLOP AND EVERETT V. DU PLESSIS.

Mr. Buchanan applied for judgment under rule 329d for the sum of £92 2s. 9d., less £75 paid on account after the issue of summons, for goods sold and delivered; with interest *a temporae morae* and costs of suit; also for judgment for £17 2s. 9d., with interest *a temporae morae* and costs of suit.

Granted.

COLLINS V. MARTIN.

Mr. Buchanan applied for judgment under rule 329d for the sum of £45, rent on certain premises hired by the defendant; also for interest *a temporae morae* and costs of suit.

Granted.

GRUNNEBERG V. GARDINER AND EASTON.

Mr. Benjamin applied for judgment under rule 329d for the sum of £60 for rent.

Granted.

ANDERSON V. GILLANDERS.

Mr. Benjamin applied for judgment under rule 329d for rent due, with interest at the rate of 8 per cent.

Granted.

REHABILITATIONS.

FREDERICK AUGUSTUS SIMES. { 1903. May 1st.

Mr. Benjamin appeared for the insolvent, the sequestration of whose estate took place in November, 1894.

Rehabilitation granted.

ALEXANDER McGREGOR.

Mr. Close applied for the rehabilitation of insolvent, creditors having given their consent, and the Master having granted a certificate.

Granted.

EVERT JOHANNES HOEK.

Mr. Buchanan applied for the rehabilitation of insolvent. Counsel stated that application was made to the Supreme Court on October 14 last, but refused, leave being granted to apply again in six months.

Granted.

ABDOOLA, *alias* ABDULAH HAMED OR HAMEED.

Mr. Buchanan applied for the discharge of insolvent.

Application granted.

GENERAL MOTIONS.

Ex parte DE WET. { 1903. May 1st.

Mr. De Waal moved for a rule *nisi* under the Derelict Lands Act, granted by Mr. Justice Buchanan, to be made absolute.

Application granted.

Ex parte NICOLAI JACOBSON AND ARTHUR JACOBSON.

Mr. Benjamin moved that a rule *nisi* under the Derelict Lands Act, granted by the Chief Justice, be made absolute.

Application granted.

Ex parte MISSENHEIMER.

Mr. Buchanan moved that a rule *nisi* under the Derelict Lands Act, granted by the Chief Justice, be made absolute.

Application granted.

Ex parte REID AND CO.

Mr. Buchanan moved that a rule *nisi* under the Derelict Lands Act, granted by Mr. Justice Buchanan, be made absolute.

Application granted.

Ex parte HARE.

Mr. Buchanan moved that a rule *nisi* under the Derelict Lands Act, granted by Mr. Justice Buchanan, be made absolute.

Application granted.

LIQUIDATORS OF B. A. DE VRIES AND CO. V. BURNS.

Sir Henry Juta moved that a rule *nisi*, restraining the respondent from parting with certain stock pending an action, be made absolute.

Application granted.

Ex parte POSTMA.

Mr. Buchanan moved that a rule *nisi* be made absolute. Rule *nisi* was granted on 17th April, calling upon all persons to show cause why the Registrar of Deeds should not be authorised to issue certified copies of certain mortgage bonds. The order had been published, and no objections lodged.

Application granted.

KAISER V. GLASS. { 1903. May 1st.

Interdict—Removal of furniture.

Where respondent had been provisionally interdicted from removing certain furniture which she had obtained on the hire-purchase system from a house of which she had not paid the rent, but the vendor had removed his furniture before the rule was served, the Court made the rule absolute, but made no order as to costs.

This was an application to have a rule *nisi* granted by the Chief Justice on 27th April, 1903, be made absolute. The rule *nisi* called upon the defendants to show cause why they should not be restrained from removing certain household furniture and chattels from a house in Al-

tona-road, Woodstock, pending an action for the recovery of rent.

The affidavit of petitioner set forth that he entered into an agreement with defendants (Ada Glass—assisted by her husband, Ernest N. Glass) whereby he undertook to lease certain premises in Altona-road, Woodstock, consisting of a shop and six rooms for six years from 14th January, 1903. on certain conditions, it being expressly stipulated that the rent of £22 per month be paid in advance, and if not so paid petitioner should have the right to cancel the lease. Defendant paid the first two months' rent, but neglected to pay the succeeding two months' rent, which was now long overdue. He had given notice of the cancellation of the lease, and called on the defendants to quit and deliver up possession and liquidate their debt. Nevertheless, they neglected, and refused to pay the rent or deliver up possession. The lessees had brought on to the premises certain furniture, which petitioner believed would be removed. He had no security for the payment of the rent due. Unless defendants were interdicted and restrained from removing those goods and effects, he would be seriously prejudiced, and have no means of recovering the rent. A temporary interdict had been granted by the Court, which he prayed to be made absolute.

[Mr. Close for the applicant. The Respondent in person.]

The Chief Justice (to the defendant): Do you appear to oppose the application?

Defendant: Which application?

The Chief Justice: The application to restrain you from removing your furniture till the debt is paid.

Defendant: I may say we got a letter saying he wanted the premises on Tuesday at noon. The goods were had on the hire system, and on our showing the letter to Bailey, he sent for the goods.

The Chief Justice: Have you a copy of the contract with Bailey?

Defendant, Yes, sir.

The Chief Justice: And Bailey removed the furniture after the order was made?

Defendant: No, sir, on Tuesday; we didn't get the order till Thursday.

The Chief Justice: And what furniture have you now?

Defendant: We are living in another house now, and are quite prepared to give up the key.

The Chief Justice: There is no furniture in the house?

Defendant: No, sir, nothing at all.

The Chief Justice: Can you not pay the rent?

Defendant: No, sir, I am sorry to say we can't. The £44 won't be due till the 15th of this month.

The Chief Justice: What is the purchase price of the furniture?

Defendant: The value of it? About £365 altogether.

The Chief Justice: And you paid £50 in advance?

Defendant: We paid more than that. £50, and four instalments of £12 10s.

The Chief Justice: And you state positively that this furniture was removed before the order was served on you?

Defendant: Yes, sir.

The Chief Justice: Well, Mr. Close, there is nothing for the interdict to operate upon.

Mr. Close said he had no evidence to put before the Court, but he would ask that the order be made formally. The defendants were in default, and the case was set down for trial next Thursday.

The Chief Justice: And what about costs?

Mr. Close submitted that petitioner should be allowed costs. He would like to know how the person who had the furniture removed got to know about the proceedings, and so had it removed.

The Chief Justice said that all that had been stated there was not on oath. There could be no harm in making the rule absolute, as there might be some furniture still there. But as to costs, he did not see how the defendants could be made to pay costs. If they had no furniture, they were not in default in any way. There was no attempt at removal on their part. The rule would be made absolute, with no order as to costs.

Mr. Close asked, in the event of its being found that there was furniture in the house, whether the Court would allow the matter of costs to be mentioned when the case came on.

The Chief Justice: According to this man, all the property belongs to Amos Bailey.

[Applicant's Attorneys: Faure and Zietsman.]

Ex parte MURPHY.

Mr. Gardiner moved for leave to pass transfer of certain land on the Rondebosch Extension Estate. An order had been previously made by the Court for the publication of the notice once in a Cape Town newspaper, which had been done.

Application granted.

Ex parte ROTHMAN. { 1903. May 1st.

Articled Clerk — Service with Transvaal Attorney - Act 30 of 1892.

The Court recognized service of articles with a Transvaal attorney up to November, 1899, and thereafter from February 1st, 1901, with a Colonial attorney as continuous service.

This was an application for an order as to the service of certain articles of clerkship, and notice of the application had been given to the Law Society. The petitioner was of age. He had been articled to Edward Roodt, an attorney and notary of the Supreme Court of the Transvaal. He had served continuously from the commencement of his articles till November, 1899, when the period of service was interrupted owing to the Anglo-Boer war. Thereafter, on the 1st February, 1901, he entered the service of J. Coghlan, an attorney and notary of the Supreme Court, practising at Kimberley. Petitioner had served Coghlan continuously since that date, and was still in his employ. Petitioner had already passed the examination for proficiency in law and jurisprudence, being fourth on the list of candidates in 1902. He was anxious to finish his articles with Coghlan, and he asked for an order of the Court giving him the benefit of the time he had already served with Roodt, who would permit him to do so.

Sir Henry Juta, for the applicant, said the point was whether, as the rule required continuous service if such service was interrupted by war, the Court would not hold that the contract was suspended. Otherwise it might lead to great hardships. In the present case, it was nobody's fault.

[De Villiers, C. J.: There is this on the other hand: Mr. Roodt, while he was served by the applicant, was an attorney of the High Court of the Transvaal.]

That was provided for in the Act 30 of 1892, Sec. 2.

[De Villiers, C. J.: Does that Act refer to a case like the present?]

I anticipate your lordship's point is that the service was with an attorney of the Transvaal, not with one in this colony.

[De Villiers, C. J.: Yes.]

By the second section it was provided that it should be lawful for the Supreme Court to admit any person who could give proof that he had been admitted as an attorney, and that he had passed his examinations in law, and that for the three years immediately preceding the date of his application for admission.

[De Villiers, C. J.: I thought that there was a provision that this Act was not to come into operation until a reciprocal Act was passed in the Transvaal. Has such an Act been passed there?]

I cannot tell, your lordship. I was under the impression that there had been.

Sir H. Juta read further extracts from the Act, which showed that an attorney, in order to be admitted here, must prove that he had been admitted elsewhere, and that he had passed the examination in law; but according to the terms of section 4, sub-section (a), that applied only to Bachelor of Laws.

De Villiers, C. J., said it appeared there was no necessity for reciprocity, this being not the case of an attorney desiring to be admitted, but an articled clerk to have previous service counted towards the completion of his articles in this colony. Under the circumstances the order would be made.

[Applicant's Attorney: G. Trollip.]

NEALE V. NEALE.

Mr. C. W. de Villiers moved that this, an *ex parte* application, stand over till next Thursday.

Granted.

Ex parte POTGIETER.

Mr. Close appeared for the petitioner in his capacity as one of the executors testamentary of the estate of the late Johan Andries Meyer and surviving spouse, Hester Anna Maria Meyer (born Du Bruyn).

The petitioner prayed for an order removing Hendrik Jeremias Meyer from his executorship, and directing the Master to issue supplementary letters of administration to the petitioner in his correct name of Hendrik Eduard Solomon Potgieter as sole executor, authorising him to administer the estate of the late Johan Andries Meyer in lieu of the original letters of administration issued on the 29th July, 1893, and thereby enabling him to pass transfer of the landed property to the several heirs.

The Court granted an order calling on Mr. Meyer to show cause by the 21st May why an order should not be granted as prayed.

Ex parte BERRY. { 1903. May 1st.

Masonic Lodge—Change of Name—Amendment of Deed of Transfer.

This was an application for an order directing the Registrar of Deeds to amend the deed of transfer of certain landed property at Burghersdorp by substituting the name of the lodge "The Evening Star" for that of the "Rising Star," as the registered owner thereof.

The petition of Mathias Berry set forth that the petitioner was the Master of the Masonic Lodge, "The Evening Star," of Burghersdorp. On 3rd August 1870, a certain lot of ground in Lady Sarah-street was transferred to William Bisset Berry, W.M., James Mozenthal, S.W., and Henry Ridley, J.W., of the lodge "The Rising Star," of Burghersdorp, or to the Worshipful Master and Wardens of the said lodge for the time being. Owing to various unavoidable causes the lodge "The Rising Star" was closed up in 1888. In 1899 the same Master and Wardens who were in office when the lodge was closed, in conjunction with a few other Masons in Burghersdorp, started the lodge afresh, but, in order to obviate confusion with a Masonic lodge in Bloemfontein called "The Rising Star," it was decided to name the resuscitated lodge "The Evening Star," and the lodge "The Evening Star" was in reality the old lodge "The Rising Star," and its successor. It was desirable that the landed property in question, which was still registered in the name of the Master and Wardens of the lodge "The Rising Star," should be registered in the name of the lodge "The Evening Star."

Mr. Buchanan moved,

[De Villiers, C. J.: It is Berry who is applying; the trustees do not all apply.]

Mr. Buchanan: No, but in 1899 the same trustees resuscitated the lodge. They wished it to be transferred into the name of the present W.M. of "The Evening Star" and the wardens, or their successors in office. It would then come under the Trustees Act, and have perpetual succession in that way.

[De Villiers, C. J.: You ask for an amendment?]

We ask that the deed be amended by striking out "The Rising Star" and inserting "The Evening Star."

De Villiers, C. J.: I do not like defacing the deed in the Deeds Office by substituting one name for another. It seems a pity that the "rising" star should be reduced to the "evening" star, but take the order.

Ex parte THE MIDLAND AGENCY AND TRUST CO.

Mr. Alexander applied on behalf of the petitioners to raise money on mortgage. There was not sufficient cash available in the estate to complete the purchase price (£1,500) of certain property at Graaff-Reinet, bought by the late Charles Hy. Ingram. The application was for leave to mortgage all the properties in the estate of the late C. H. Ingram, in order to complete the purchase. The money was advanced by Mr. Te Water to purchase the property, but in the interval Chas. Hy. Ingram died. The estate had to be wound up within six months.

Order granted as prayed.

LAZAR V. TABLE BAY HARBOUR BOARD.

Mr. Benjamin applied for a Commission to be appointed to take the evidence of the plaintiff in Johannesburg, and suggested that Advocate Solomon, living in Johannesburg, be appointed Commissioner.

Application granted.

Ex parte FOTHERINGHAM.

Mr. Rainsford applied for an order authorising the amendment of petitioner's name in the Debt Registry of the Colony.

Order granted.

DENNIS V. DENNIS.

This was an application on behalf of the wife for an interdict (pending an action for separation between husband and wife) restraining defendant from disposing of his property, more especially funds in the Bank of Africa at King William's Town, and for an order to pay the sum of £50, in order to enable plaintiff to bring her action, £8 as alimony, and costs in the case. The parties were married in King William's Town in December, 1896. The plaintiff was at the time a widow and the defendant a widower, and the plaintiff possessed movable property, consisting of household furniture. One child, which had since died, was the issue of the marriage. Defendant became addicted to drink, and had generally rendered the plaintiff's life unbearable. Defendant had £150 standing on fixed deposit in the Bank of Africa at King William's Town. The time expired in February last, but the money had not been withdrawn. The defendant earned £3 6s. a week as a blacksmith, and it was feared he would withdraw the money from the bank. The plaintiff was utterly without means, and was in need of funds to bring her action and to support herself.

Rule granted on the motion of Mr. Buchanan, to show cause by the 14th May why an order should not be granted as prayed, that the order be for £40 instead of £50, and that the claim for alimony be not included, the order to be served on the Bank of Africa.

VAN OUSELEN V. LANDMAN.

Contempt of Court.

On the application of Mr. Burton, this motion was allowed to stand over until the 14th inst. Mr. Burton said the parties resided at Humansdorp. There was a direct conflict of evidence, which might be capable of some explanation.

Ex parte LAMPRECHT.

This was an application for an order authorising the partition of certain land at Willowmore. The petition stated that the petitioner was the only guardian of three minors, each of whom was the registered owner of certain land at Willowmore. The petitioner resided in the Orange River Colony, and the said minor children resided with him. Owing to the petitioner living at such a distance from the property, it was impossible for him to look properly after the property or the petitioner's interests. The petitioner prayed that he might be authorised to partition the said property, and sell the shares and pay the proceeds into the guardian's fund until the children attained their majority, or to use the proceeds in the purchase of property in the Orange River Colony. The property consisted of 706 morgen, which had been valued at £1,950.

Order granted, on the motion of Mr. Benjamin.

Re ESTATE OF LATE D. J. SWANEPOEL.

Mr. Close, on behalf of the executors of the estate, applied for an order authorising the amendment of letters of administration by the Master of the Supreme Court, whereby the name of Dirk Jacobus Swanepoel be substituted for Dirk Johannes Swanepoel.

Granted.

Ex parte REYNOLDS VEHICLE AND HARNESS CO.

On the application of Mr. Benjamin, the petition for an order confirming the reduction of the capital of the company was ordered to stand over until next Thursday.

Ex parte VENTER.

Mr. Joubert applied for an order authorising the petitioner to remain in possession of certain estate. The petitioner was appointed executor dative in the estate, comprising movable property to the value of £1,930, and immovable property valued at £7,600. The petitioner applied to be allowed to remain in possession of the estate until his death (he being now about sixty years of age), in order that he might be allowed to carry on his farming operations on the same scale as hitherto, and

thereby increase the value of the land and the inheritance of the children, provided he gave transfer of all immovable property to the children. There were two mortgages on the immovable estate, and in the event of realisation a considerable portion of the assets would be swallowed up. It might be in the interests of the petitioner to have this arrangement carried through, but it seemed to the applicant (Mr. Joubert) to be more in the interests of the children.

The Chief Justice: It seems decidedly in favour of the children.

Mr. Justice Maasdorp: The only difficulty might be supposing he got into debt.

Mr. Joubert said the land would be transferred. Petitioner was willing to sell the movable property and distribute the proceeds, and pay the costs of the estate out of the funds.

An order was made in terms of the petition, the movable property to be sold, and the proceeds distributed.

Ex parte GEYER.

On the application of Mr. de Waal, and in terms of the Master's Report, an order was made for the partition of certain landed property at Somerset East.

CAUSE LIST.

THOMAS v. BISHOP OF ST. JOHN'S. { 1903. May 1st.

This was an appeal from a decision of the R.M. of St. John's, Umzimkulu.

From the affidavits it appeared that a claim was made against the defendant for the rent of a certain erf at a mission station at St. John's, for school fees, and other payments. There was a further claim for the ejectment of the plaintiff from certain other erven which were specified. The defendant denied liability, and also put in a counter claim on the ground that he had been refused the right to cultivate certain arable lands, and he claimed in reconvention £60 on that head; but that was denied, and upon these pleadings the issue was joined.

Mr. Burton for the appellant; Sir H. Juta, K.C., for the respondent.

[De Villiers, C.J.: What is the question—a question of law?]

Mr. Burton said it was a little difficult to say on what ground the appeal was based. First of all, it was a question of evidence, and, secondly, of a question of the way in which the claim was framed. It seemed that at St. John's mission station there were certain persons holding erven as owners, and others held as tenants. The mission station provided a school for the people living at the station, and also provided for the water supply, for the fencing in of the arable lands, and generally undertook the management of the whole place. In August or September, 1895, a meeting was held at St. John's, at which it was agreed by the persons present representing the residents of the place that they should pay to the mission a rate of £2 a year to cover all those charges. The defendant was the owner of the erf upon which he resided. He declined to pay the £2 a year rate, but subsequently, upon the return of the Archdeacon, who have been away for some six weeks, he was called before a meeting of the committee representing the residents there, which seemed to have been in charge of the fixing of the rate, and, according to the evidence given on behalf of the plaintiff, to have admitted his liability for the rate and to have agreed to pay it, although he refused at first. The evidence of the plaintiff showed clearly that defendant refused to pay the rate, which was undertaken by the whole of the residents, because he was the owner of his erf. The Archdeacon, who was supported by the members of the committee, held that the defendant subsequently had admitted his liability, and agreed to pay the rate. Defendant denied that. It appeared afterwards he was the owner of his erf; 5s. a year represented the amount paid for his holding. The Magistrate in his judgment took off this five shillings from the rate, for which he held the defendant liable. The Magistrate held defendant liable to pay in regard to the school fees, the fencing of the arable land, etc., all of which the defendant admitted he was liable to pay. The Magistrate found defendant was liable to the extent of thirty-five shillings a year, and that was the judgment.

[De Villiers, C.J.: It seems a very fair charge.]

Mr. Burton: I don't want to prejudice my client, but I confess it seems on the whole to be a reasonable charge,

A claim is made apparently for rent; the whole case seems to be fought on that right up to the end. The Archdeacon maintains that the defendant is liable for the rent of this erf.

[De Villiers, C.J.: The Magistrate seems to have held that the defendant has had full consideration for this charge.]

Mr. Burton said the most important claim brought by the Bishop was the claim for a judgment in favour of the Bishop for some four or five erven at the Mission Station. That question was decided in favour of the defendant. The question was whether the Magistrate's decision could make the defendant pay all the costs.

Sir Henry Juta: The application was refused with costs.

Mr. Burton admitted this was so. He did not really know whether he could press for any alteration of this judgment. The whole question came down to a matter of evidence. On one side there was the evidence of the Archdeacon and three members of the committee, and on the other was simply the evidence of the defendant, and the Magistrate said the evidence given by the Archdeacon was untrue, and he found that the evidence of the defendant was correct.

De Villiers, C.J. (without calling upon Sir Henry Juta to reply): I have read the evidence in this case last term, and the impression upon my mind was that the evidence clearly shows that the defendant consented to this arrangement, and that he acknowledged his liability, although he subsequently denied this. The evidence was certainly in favour of the plaintiff. There is ample consideration given to the defendant for this agreement. He got sanitary arrangements, the school was established, and other considerations were derived by the defendant from this arrangement. The Magistrate carefully avoided giving judgment against the defendant, and upon the claim in reconvention he decided in favour of the defendant in reconvention with costs. The appeal must therefore be dismissed with costs of appeal.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller. Defendant's Attorneys: Faure and Zietsman.]

SUPREME COURT

[Before the Chief Justice, the Right Hon Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., and the Hon. Mr. Justice MAASDORP.]

REX v. DEENE. { 1904. May 11th.

The accused was convicted of a contravention of the 33rd section of the above Act by knowingly living on the earnings of prostitution. There was evidence that he was habitually in the company of certain prostitutes, but there was no evidence that he had no visible and honest means of subsistence; on the contrary, there was evidence that he had such means of subsistence.

Held, *that the conviction should be set aside.*

De Villiers, C.J., mentioned the case of *Rex* v. *Deene*, which had been submitted to him for review. His Lordship said: The accused, Abdol Deene, was charged before the A.R.M. of Cape Town with contravening section 33, subsection (a) of Act 36 of 1902 in that "he did wrongfully, unlawfully, and knowingly live wholly or in part on the earnings of prostitution." The first and the chief witness against the prisoner was Annie Smith, who had that day been convicted of keeping a brothel at 149, Caledon-street. She said she had lived on the premises for three months. She knew the accused. He came to board in her house a week after she went to live there. He occupied a room there. The accused locked the door of his room, and took the key with him. She never went into the room. Accused kept some clothing in his room. She did not know whether the accused saw her or any of the other girls taking men into the house. Accused continued to live in the room until he was arrested by the police. Witness collected the money from the men in the house. She gave half of the money earned by the girls to them. She kept the other half for food, rent, etc. She paid the rent for the house to a woman known

as Dora at the Sir Garnet Hotel. Accused paid her 10s. a week for the room. He had nothing to do with the men who entered the house. Witness was in the yard on the Saturday night when the police came there; the accused was in his room when the summons was served. Accused sometimes had continued in the house when he came home early. In the mornings he only had his coffee in the house before he went out. The Chief Justice continued: Well, other witnesses were called who had seen the accused in the house when they came there, but not a single witness stated that accused had received any part of the earnings. But then the 33rd section of the Act (sub-section 3) makes this provision, "Where a male person is proved to live with or to be habitually in the company of a prostitute, and has no visible and honest means of subsistence, he shall, unless he can satisfy the Court to the contrary, be deemed to be knowingly living on the earnings of prostitution." In the present case it has been proved that the accused was habitually in the company of prostitutes, but there is wholly insufficient proof that he had no visible or honest means of subsistence; on the contrary, there is evidence that he had honest means of subsistence. He was employed by the South African Breweries, and, amongst others, the witness Benjamin says that the accused is his foreman at the Woodstock Breweries. There are other witnesses to show that he had honest and visible means of subsistence. This sub-section, therefore, does not apply to the prisoner, and, inasmuch as there is no other evidence that the accused lived wholly or in part on the earnings of prostitution, I am of opinion that the Magistrate ought not to have convicted him. The sentence was 18 months' imprisonment and 15 lashes. The sentence will be quashed.

COLLISON v. COLLISON. { 1903. May 4th.

Divorce—Proof of adultery.

Where husband and wife live in the same house, the Court will require very strong corroborative evidence before finding that they have ceased to cohabit, and that a child born of the wife is illegitimate.

Held, *that the facts (1) of a white woman having given a Kafir meals in her house against her husband's wish, (2) of her having left her husband's home, (3) of her having subsequent given birth to a child and registered it under a false name, is sufficient evidence of adultery.*

This was an action for divorce instituted by Griffin Collison, of Hanover-street, Cape Town, against his wife on the ground of adultery. Mr. Wilkinson appeared for the petitioner. The respondent was not represented.

The evidence of the plaintiff showed that the parties were married on the 24th September, 1888, and from that time onwards they lived together until July, 1901. Differences arose between them on account of a Kafir being in the house. Cohabitation ceased in July, 1901, although the parties continued to live in the same house until November of the same year, when the respondent left the house. On the 25th June, 1902, the respondent gave birth to a child.

One of the daughters of the applicant said that the Kafir used to come to the house and be served with meals by her mother, but witness did not observe any familiarity between them.

A midwife testified to having gone to register a child of the respondent in the name of Jacobus Adams. Witness stated that the child was not black; it was similar to the other children of the parties.

De Villiers, C.J.: Where husband and wife live in the same house, and it is alleged by either party that he or she has not cohabited for a time, very strong corroborative evidence is required to justify the Court in holding that there is adultery, because the presumption is that if the husband and wife live together in the same house, they are still cohabiting. In the present case there is certainly very strong evidence that they did not sleep together, and the husband says positively that since the 1st July he never had cohabitation with her. These circumstances would not be sufficient to justify the Court in granting a decree of divorce unless there were very strong corroborative circumstances to show

that there was adultery. In the present case, it appears to the Court that there are such corroborative circumstances—the fact that she had, against the wish of her husband, given meals to a native, and that she afterwards left the place against the wish of her husband. During her absence she gave birth to a child. She gave the midwife a false name, and the name of a man called Adams as being the father of the child. That seems to be an admission on her part that the plaintiff, whose name is Collison, is not the father. These circumstances together justify the Court in granting the divorce, the petitioner to have custody of the children.

[Plaintiff's Attorney: W. Slaughter. Defendant in default.]

GREEFF v. MCLEOD. { 1903. May 4th.

This was an action brought by Mrs. Greeff, of Laingsburg, against William James McLeod, formerly of Laingsburg, but now of Aberdeen, for the sum of £122 4s. 9d., being balance due on a promissory note for £186, principal and interest.

The defendant admitted plaintiff's claim, but counterclaimed £116 17s. 9d. on an account, and £52 0s. 6d., balance of principal and interest, due on a promissory note, and he claimed in reconvention for the sum of £32 18s. 3d.

The plaintiff's case was that she wished to make the Rev. Mr. Weitz a present of £200, and she gave her signed promissory note to defendant, who was then acting as her agent, to raise that amount upon the security of the note. Defendant did so, and had the amount paid to Mr. Weitz. The plaintiff by periodical payments reduced the amount of the promissory note to £52 0s. 6d.

The plaintiff alleged she paid defendant the amount of £200 by reducing a bond which she had against him of £600 to £400. Defendant denied ever having been paid in full the amount.

Sir H. Juta, K.C. (with him Mr. Buchanan), for plaintiff; Mr. C. W. de Villiers (with him Mr. Russell) for defendant.

Evidence was given by the defendant.

Sir H. Juta: I understand that the witness says that he owes bills for £250, and that these two (produced) are one for £150 and the other for £100. I would like it to be clear that he says that. One is a renewal of the other, as a matter of fact.

Witness: It is such a long time ago that I cannot be quite clear. I am not prepared to prove whether these are discounted, or renewals, or whatever they are.

[De Villiers, C.J. (to witness): You see you have had ample time to prepare for this case.]

Cross-examined by Sir H. Juta, witness said he gave £200 to the Rev. Mr. Weitz for the promissory notes. He was suing upon the £100 promissory note, of which £50 had been paid off. He was not in a position to show how the amount was made up, except that it was shown in his books. He had not brought his books showing his transactions in 1901 and 1902; he had not thought it necessary. He claimed £52 0s. 6d. He had got back his £200. If his books were of any use he could only claim on his ledger accounts. He could not say what the promissory note of £150 was for.

By the Chief Justice: He did not know on what date his bond was reduced to the amount of £200.

Judgment was given for the plaintiff for £186, less £116 17s. 9d., due to the defendant, thus showing a balance of £69 2s. 3d. in favour of the plaintiff. Judgment was entered for £69 2s. 3d., with costs.

Mr. De Villiers submitted that the defendant had in part succeeded in establishing his claim, and that the question of costs should be reconsidered.

The Chief Justice, however, pointed out that the defendant had not tendered any money that might have been due to the plaintiff, and that the decision as to costs must stand.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bissett. Defendant's Attorney: D. Tennant.]

[Before the Hon. Mr. Justice MAASDORP.]

BOLUS BROS. v. JACOBSON.

This was an action brought by Bolus Bros., stock and share brokers, who carry on business at Cape Town, against a Mr. Jacobson, of Oudtshoorn, for the recovery of £820 14s. 9d.

Mr. Benjamin represented plaintiffs, and defendant did not appear.

The action was for £820 14s. 9d., being loss occasioned to plaintiffs in respect of two Coronation shares, which plaintiffs purchased for defendant on his instructions, and which defendant repudiated. Plaintiffs resold the shares, and brought an action for the deficiency in price occasioned thereby, together with the costs and expenses attending such re-sale.

Gillham Bolus, one of the partners, stated that he was acquainted with the defendant. He had a conversation with him regarding share transactions. He remembered receiving a wire from defendant to buy Coronation shares. The shares were bought at £2,500 each, and defendant was notified of the sale. Subsequently, defendant wired that he understood the price of the shares to be £25. Witness stated that he quoted Coronation shares to defendant before purchasing as at £2,700. After the purchase the shares rose to £2,800, and fell again to £2,000. Plaintiffs sent in an account for the transactions, but defendant repudiated liability, alleging that plaintiffs were never instructed to purchase Coronation shares. Plaintiffs re-sold the shares—one at £2,135 and one at £2,120, there being thus a deficiency, including the expenses to which the plaintiffs had been put for brokerage, Exchange fees, and insurance, of £820 14s. 9d.

After having heard Mr. Benjamin in argument on the facts,

Maasdorp, J.: In this case the plaintiffs sued defendant for loss suffered by them on the re-sale of shares, which they allege had been bought by them for defendant on his instructions. Upon the re-sale the plaintiffs allege that they had a loss of £820 14s. 9d., and this amount they now claim from defendant, this amount including, besides fall in prices of the shares, also other expenses which plaintiffs were put to through the re-sale and through the re-cancellation of sale. The defence set up by defendant is that in instructing the plaintiffs to purchase for the prices quoted by them, he had made a mistake as to the meaning of certain figures used in the telegram, and that he was under the impression that the prices quoted were really 26 and 27, and not 2,600 and 2,700, and that he was led into that mistake to some extent by a conversation which he had had with the plaintiffs previously, in which he had been told by them that the price then quoted for Coronations was £25. Now, if one looks at the correspondence that took place between the parties, partly by telegram and partly by letter, I think it must follow that the explanation of defendant that he had entered into this transaction under a mistake cannot be accepted as true, because it appears that the first telegram that was put in was one in which he instructed the plaintiffs in the following terms: "Buy three Coronations if you think good prospects." When that telegram was sent the other telegram was not in existence yet, and, consequently, he could not have been misled by a telegram which was not in existence. Here he gives positive instructions to "buy Coronations" if the plaintiffs thought prospects good, and I must take it that he acted as a reasonable man, that he was instructing the plaintiffs to buy Coronations for some price which he must have seen quoted somewhere, and that he must at the time when he sent instructions for the purchase of the shares have had in his mind the price that he was willing to pay more or less, and Mr. Bolus tells us that these prices are quoted daily in the newspapers, and at that time were quoted from £2,600 to £2,700. The defendant's explanation that he was deceived by the figures in the telegram which was a reply to this cannot therefore be accepted as correct. The reply was: "Buyers, £2,600; sellers, £2,700. Cannot advise; opinions differ." Now as to the instructions which had already been given to the plaintiffs to purchase, they, acting upon the telegram they had received, paid over £2,000 to £2,200, and the transaction could not have been questioned by the defendant if the plaintiffs had believed bona fide the prospects were good. If, in their opinion, the prospects were good, and on receipt of that telegram they had without further question bought the shares for £2,000, the transaction would have been a good one, and in that case it would have been impossible for defendant to say anything had been done by the plaintiffs which had led him into that error. The question arises: this telegram of the 2nd or 3rd January having been sent by the plaintiffs to defendant, is there any probability that the defendant was misled by it? Mr. Bolus has told us that this is the form of these telegrams, and the figures there given representing pounds, are the forms which usually pass between brokers and persons deal-

ing in shares, and any person dealing in shares could not have been deceived into believing that the figures 2,600 meant £26, as is alleged by the defendant in his plea. And there is the further consideration which would prevent one from coming to that conclusion, that in the same telegram we have the mention of several thousands Here, therefore, thousands were clearly brought to the mind of the defendant. The defendant, having already stated that 25 had been quoted before, is now met by the plaintiffs that here thousands are mentioned, and he therefore seeks to shelter himself under the plea that thousands meant to his mind thousands of shillings, and consequently he sets up the alternative defence, as it were, that if he were wrong in believing that the impression that the 2,600 meant £26, then he was under the impression that it meant 2,600 shillings. Well, these contentions are mutually destructive, and they cannot be both accepted as a defence, and I think it shows the hopeless position in which the defendant stands in this case. I think it is clearly proved that he gave instructions to the plaintiffs to buy the shares at the prices which were then quoted, that he was perfectly well aware that the prices then quoted were over £2,000, and that when he instructed the plaintiffs without reservation to buy, even without asking them what the prices were, he knew at what price he intended to buy, and he knew it was something over £2,000. His defence, therefore, entirely fails in the attempt made to show that he was under the impression that only £25 was the price which he had promised to pay them, or else 2,500 shillings. Under the circumstances, when the plaintiffs called upon him to complete the transaction, and he failed to do so, and repudiated the whole transaction, they were entitled to resell these shares at his risk, and to be recouped in all the losses they appear to have been put to through the fall in the price of the shares and with respect to any other expenses they were put to in re-sale after the cancellation of the sale to the defendant. Under the circumstances, judgment must be entered for the plaintiffs as prayed, with costs.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton. Defendant in default.]

SUPREME COURT

[Before the Chief Justice (the Right Honourable Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice MAASDORP.]

VISSER v. VAN ZYL. { 1903. May 5th. „ 15th.

Vindication—Ownership—*Jus tertii.*

The plaintiff was directed by his father, who was the owner of several horses, to fetch them on the plaintiff's farm. The plaintiff said the defendant might take them on his own responsibility, and he subsequently sued the defendant for the return of the horses or payment of their value.

Held, *that the defendant was entitled to set up his father's ownership and direction as a defence to the action.*

This was an action brought by Johannes Dirk Jacobus Visser, farmer, Klipbank, in the district of Malmesbury, against Hermanus van Zyl, farmer, Zeekoe Vlei, in the district of Van Rhyn's Dorp, to recover possession of two horses or their value, and £20 damages for alleged wrongful removal and detention. The declaration set forth that the defendant went to the plaintiff's farm and removed the two horses in dispute, and that he refused to restore them. The plea admitted the allegations in the formal paragraphs of the declaration, and said, with regard to the main allegation, that the two horses were the property of defendant's father, that they were running about on the veld, and that, acting on behalf of his father, he took possession of them. He admitted that he refused to restore the horses or pay the value. The replication was general.

Mr. Burton for plaintiff; Mr. Buchanan for defendant.

Mr. Burton said that the matter was one of considerable importance. The plaintiff in August, 1901, received from an officer of the British forces two horses, which he kept upon

his farm. The horses were not in a very good condition, they were poor and scabby, and appeared not to have been looked after. Plaintiff attended to the horses, and improved their condition considerably. From that time he kept them until the 8th August, 1902, after the declaration of peace, and while martial law was still in force, when he was ordered by the officer to bring them into the Remount Camp. At first he demurred, but eventually he took them in. The horses were sold at Malmesbury, on the 8th August, 1902, at a military auction. Plaintiff purchased one of the horses, and the other was purchased by another man from whom, however, plaintiff subsequently bought it. He then took these two horses to his farm, and defendant thereupon came to him, and claimed the two horses in dispute as his. He insisted upon his claim, and eventually took the two horses with him, at the same time giving defendant a receipt for them.

Plaintiff remonstrated with him, and stated he bought the two horses at a military auction, and paid for them. The defendant was away from his farm as a rebel. It was while he was away from the farm these two horses were taken by the military. Counsel suggested that the evidence that he had in court should first be taken, and that the case should then be adjourned until they could procure the evidence of one of the military officers.

Mr. Buchanan informed the Court that the defendant had not had the slightest indication in the declaration of the line that the plaintiff was taking up, and the consequence was that the defence had not been prepared to meet such a case as had now been laid before the Court.

Johannes Dirk Jacobus Visser, the plaintiff, said that in November, 1901, he received on his farm two horses. The war was still going on, and martial law was in force in the district of Malmesbury. He received the horses from Gideon Lensing, who was a lieutenant in the British Army, to be looked after until the war was over. The horses were about two years old, and they were in good condition. They became scurvied six months afterwards. He took the horses and looked after them until August, 1902. He then got a letter from Field-Cornet Kotze directing that he was to bring the horses to Hopefield. He did not comply. He went to Hopefield, and told Kotze that he had the horses under his protection, and he then met Lieutenant Ruperte, the remount officer, who ordered him to bring the horses to Malmesbury. He did so about the 7th or 8th August. The horses were sold by Captain Sweetland, the remount officer. Witness bought one for £15, and the other was bought by a man named Hofmann for £7. He subsequently bought the other horse from Hofmann for £14, and took both animals back to the farm. The defendant came to his farm on October 9. Witness did not know him before. Van Zyl claimed the horses, and witness told them that he had bought them from the military, and that he should not part with them. The horses were brought to the stable, and Mr. Van Zyl said they were his horses, and he was determined to take them. Witness told him that he must not take them. Witness went away to another stable, and when he returned he found that the defendant had removed the two horses and sent them away. The man said they were his horses, that he was a rebel, and that he could take them wherever he found them. Mr. Van Zyl gave him a receipt for the horses.

[De Villiers, C.J.: Why did you not prevent him from taking the horses,]

Witness replied that he was an old man and Van Zyl was stronger than he. He did not want to have any fighting.

The defendant did not declare that the horses belonged to his father, but said they were his own horses. He saw Lieut. Lensing after the latter handed the horses to him on several occasions. Lieut. Lensing called after witness had bought one of the horses.

Cross-examined by Mr. Buchanan, witness said Lensing did not sell the horses to him in 1901. He admitted that he told Van Zyl and Smith that he bought the horses from Lensing. The reason why he told the untruth was that Smith wanted to buy the animals. There was a mark on the horses when he got them, but he did not know in what part. He knew Mr. Greeff. Greeff told him in July, 1902, that he recognised the horses as belonging to Van Zyl. He admitted that he then said he could not help it, as he had bought the horses from Lensing in November, 1901. He was only making

fun at the time. Greeff did not tell him that he ought to get his money back from Lensing. He afterwards went to Malmesbury with Lensing, who wanted to take the horses. Lensing claimed the horses as his own. After witness had heard from Greeff, who was originally the owner of the horses, he took them into Malmesbury. When the horses came back from Malmesbury in August, 1902, they had a "P" on their left side. Lensing said he had received £50 from the Remount Department for the two horses. At the sale he told the remount officer that Mr. Lensing might come and claim the horses. He did not know whether Lensing was the owner of the horses. Lensing was an intelligence officer. Witness gave up the horses to Captain Sweetland, who was a protection horse officer. He did not tell Greeff, after the sale, that he had had to pay for the horses twice—to Lensing once and the military a second time. On October 9, when Mr. Van Zyl came, he was accompanied by Mr. Greeff. The defendant asked him if he had two strange horses, but he did not allege that they belonged to his father. The horses were not in the veld. His coachman had been to water the horses, and was just bringing them back to the stable. The defendant pointed to two horses, and said that they belonged to him. Witness replied that he could not help it, as he had bought the horses. Van Zyl took a halter, and witness and his son went to another stable. The defendant caught the horses in the stable, and sent them away.

Re-examined by Mr. Burton, witness said a good number of farmers in the Malmesbury district had horses placed with them by the military for safe keeping.

[De Villiers, C.J.: (to Mr. Burton): Did I understand you to say that the horses were only requisitioned by the military in the first instance? Is that the mising link in the evidence?]

Mr. Burton said that that was the portion of the evidence that was missing, and which they hoped would be supplied by the officer whom he had mentioned.

[De Villiers, C.J.: In case of postponement there should be reasonable ground for believing that evidence on this point would be forthcoming.]

Re-examination continued: There were other farmers in the Malmesbury district in 1901 who had horses for protection.

The plaintiff's son also spoke to the visit to his father's farm by the defendant. The defendant, he said, did not say a single word in his presence about the horses belonging to his father.

Cross-examined by Mr. Buchanan: Van Zyl did say that a certain mark was used by his father, and that the horses which he pointed out should bear that mark. The defendant wrote out the receipt produced.

Edward Ruperti, late Assistant Officer Commanding of Remounts and district member of the Protection Board, said that he was sent to Hopefield to sell all ownerless horses. There was an order issued by the military in July calling upon owners to claim within a certain time. He was present when the two horses were sold in the Remount Camp. They were selling horses every day. The men who protected the horses had the first offer of the horses. If they were not prepared to pay the price set upon them by the military, then the horses were put up to auction. Plaintiff bought one of the horses which had been under his protection, and Hoffmann bought the other.

Cross-examined by Mr. Buchanan: He did not know Lensing at all. When horses were requisitioned a form was usually issued. That was not done everywhere. In the Colesberg district and Clanwilliam hundreds of horses were sent away on which no requisition notes were given. These were protection horses. He did not know whether the two horses in question were commandeered. The horses were "protected" on behalf of the owners, but in many cases they did not know who the owners were. Notice was given to owners to claim their horses within a certain time, failing which, the horses would be sold by auction. He did not know what the mark "P" on the horses meant. The military put on as their mark a broad arrow upside down.

Mr. Burton intimated that that was as far as he could carry the case at present, and it would remain to be seen, if a postponement was granted, how much further the officer's evidence would take the case.

Mr. Buchanan submitted that the plaintiff had not established his right to the horses.

De Villiers, C.J., pointed out that possession was a good title as against a wrongdoer. He thought they would be in a better position to judge as to the postponement after they had heard the evidence for the defence.

Evidence was then called for the defence.

Pieter Adrian Marthinus van Zyl, father of the defendant, stated that Captain Fryer was commandant of the district up to December, 1901. Witness had certain horses on his farm. The horses had been requisitioned from his farm. He had two young horses on his farm, with others. He got authority from Captain Fryer to keep these horses. He arranged with Captain Fryer to send the horses for protection to Malmesbury, but owing to the enemy being in the district, he was told to keep them. The two horses he had on his farm were the ones he had now. They were bred by him. On a certain day Mr. Lensing came to see him. Witness said the horses were in the kraal, and that Mr. Lensing told him it would be better if he took them for protection. He had three young horses, one mare, and one mule. Some forty men came to take the horses. He could not say whether they took them all away. He got no receipt for them. He heard where these horses were, and sent his son to fetch the horses. The horses were his own, and not his son's. He was summoned as a rebel, but they could not prove anything against him. He recognised the two horses brought back from plaintiff's farm as his own horses. His son was in the rebellion in November, 1901. When the column took the horses, they did not ask if they belonged to his son.

Cross-examined by Mr. Burton: He got permission from Captain Fryer to keep the horses. His son was on the farm when he got this letter. When the horses were removed, his son had left the farm. His son left the farm on 25th November, 1901, and the animals were removed on the 28th November, 1901. Lensing said nothing to him about his son being in rebellion. Lensing took the horses to see if they were serviceable. None of them appeared to be so. The military did not take horses without a note. He filed a claim for the whole lot of horses, but he subsequently told his attorney to withdraw claims for these two horses. His son had five mares on the farm his own property. He was unmarried. He was certain the horses taken away were his and not the property of his son.

Hermanus van Zyl, the defendant, said he was not at his father's farm when the horses were taken. He was on commando. The horses in dispute belonged to his father. He denied that they had been presented to him. He did not claim the horses as his own. When he visited plaintiff's farm he told plaintiff his father had sent him for the two horses of his father's. He did not say the horses were his. He then went away. He told plaintiff again the horses were his father's, and that they had his father's mark. He denied ever saying he was a rebel, and that "he would claim horses wherever he went." He gave a receipt for them.

Cross-examined by Mr. Burton: His father had five mares of his own. Their ages were two, five, and six years. Two of the mares had two foals, and he sold them, and the other three had no foals. He had no animals, except the five mares. The five mares were not taken by the military. He said nothing about the horses belonging to him on getting them from plaintiff. He said they were his father's. They bore his father's mark. He had other stock besides the mares, a few cattle, etc., all with a mark on them. It was not true that he stated to plaintiff that the horses were his own. Greeff knew perfectly well the horses belonged to his father. He put his father's address on the back of the receipt given for the horses. He had also to give his own address. He was surprised when he got the summons instead of his father, as the horses belonged to him.

Re-examined by Mr. Buchanan: He went to plaintiff's farm on his father's business.

Peter Greeff stated that he resided at Moorreesburg. He was second cousin to the plaintiff. He knew plaintiff well. He also knew his mark on the horses. He knew the horses in dispute in 1901 as Mr. Van Zyl's, sen.'s, horses. He saw the horses again in July, 1902, at plaintiff's farm. He had a conversation with plaintiff about them. He told plaintiff he had got a letter from Mr. Van Zyl, sen., to see if there were a pair of horses there belonging to him. He had seen the horses there. He told plaintiff who owned the horses. Plain-

tiff said he bought them from Mr. Lensing. He told plaintiff he had a letter from the rightful owner of the horses, and advised him to send them back. Plaintiff said he would not. He bought the horses and paid for them, and defendant must get his money from Lensing. This was before the horses went to the Remount Camp. Witness offered to buy one of the horses from plaintiff. Plaintiff said he paid £50 for the horses. In July they had defendant's mark, and in August they had a different mark. He went with defendant's son to plaintiff's farm. The plaintiff was not there. Mr. Visser came to him in February this year, and asked him about the letter "P," which was on the back of the receipt, remarking that Hermanus could not be spelt with a "P," but witness explained that that was his father's name.

Cross-examined by Mr. Burton: He joined the enemy on the 14th October, 1901. Defendant and he were in the same commando for a time. In July of last year he told Mr. P. A. van Zyl that the horses were running at Visser's After that witness asked Visser to sell him one of the horses. The reason he did so was because Mr. Van Zyl would not come and fetch them. The defendant sometimes referred to his "father's" horses and sometimes to "their" horses. Visser understood clearly that the horses belonged to defendant's father. Witness could not understand why Visser came back in February to ask the meaning of the letter "P" when it was explained to him at the time.

Jacobus Smith, of Hopefield, said he knew both the plaintiff and the defendant. He remembered that a man named Lensing came to his place with a lot of armed coloured people and two loose horses. Lensing wanted to exchange the horses, but witness refused. He afterwards went to Visser's farm, and the plaintiff explained that he bought the horses from Lensing.

Henry Fras Fryer said that he was commandant at Clanwilliam from January to 1st December, 1901. Captain Kincaid Smith, of the R.A., succeeded him. He knew Mr. Pieter van Zyl, the father of the defendant. He recognised a letter the defendant's father wrote, requesting witness to allow him to keep his horses on his farm. Excepting what Van Zyl told him he could not say if the horses were the same. He could not say whether they belonged to the son or the father, but witness offered to buy them from the father. He certainly treated the horses as his own.

Cross-examined: He made the offer to purchase the horses about August, 1901. Beyond the father's refusal he could not say whether the horses belonged to father or son. The regulations with regard to the removal of horses were not always carried out. Sometimes he had complaints that animals were taken away without requisition notes being handed over.

Re-examined: There was nothing in his books relative to the action before the Court.

By the Chief Justice: When peace was proclaimed he was in Cape Town.

The Chief Justice (to witness): Was the district clear at that time?

Mr. Burton said that he would not dispute the point that the district was clear in August.

The case was then adjourned until Friday, 15th inst.

The Chief Justice said it would be open to either side to produce further evidence as to the manner in which the military authorities took possession of the horses in dispute.

Postea (May 15).

Gideon Jacobus Lensing, called by Mr. Burton, said he was a farmer in the district of Richmond. During the late war he acted as intelligence officer with the column of Colonel Wyndham, who was operating in the district of Van Rhyn's Dorp. He recollected the taking of horses from the farm of Mr. Van Zyl, senior. The columns were then actively operating against the Boer forces; they had had an engagement a few days before about five miles west of Zeekoe Vlei, against, he believed, Commandant Smidt's commando. He did not know at that time that Mr. Van Zyl, junior, had gone into rebellion. He went to the farm by order of Colonel Wyndham, commanding officer of the 16th Lancers, to take the horses away, because young Mr. Van Zyl (the defendant) had joined the Boers as a rebel. The horses were brought to the kraal. Witness asked Mr. Van Zyl, senior, to point out to him the two young horses belonging to his son. The rest of the horses belonged to the defendant's father. Witness reported to

Colonel Wyndham about all the horses, and the O.C. then sent him back to remove the two animals belonging to young Mr. Van Zyl. Witness handed them over to the Colonel, the column moved away; but about eight days afterwards the O.C. sent the two horses to witness's squadron along with a message that he must look after them and feed them. He had had the horses in his possession about eight days or so when Colonel Wyndham said he did not know what to do with them, and that if they were of any use to witness, he could take them as his own and keep them.

The Chief Justice: Where is Colonel Wyndham at present?

Mr. Burton: I think he is in England.

The Chief Justice: I should like to know what Colonel Wyndham has to say about it.

Witness (continuing) said he took the horses away with him in October or November, 1901, and he met Visser at his farm. The latter offered to keep the horses for him if he would let them work for him till the war was over. When he took the horses he told the elder Mr. Van Zyl that he was removing them, because his son had joined the rebels.

Cross-examined by Mr. Buchanan: He did not know whether Colonel Wyndham had gone to England. He left Colonel Wyndham in April, 1902. Witness was an intelligence officer, not a remount officer; he was scouting; it was his duty not to commandeer, but to bring in horses by order. The column were acting as a convoy from Lambert's Bay. He had nothing to do with giving receipts for requisitions; that was the staff officer's duty. He did not value the horses. Mr. Van Zyl told him about a letter he had had from the commandant of the district about keeping his horses, but witness did not read it. Most of the horses on Van Zyl, sen.'s farm were marked "O." He took all the horses away.

By the Chief Justice: The two horses which he took and which he sold to Visser were those which Mr. Van Zyl pointed out as belonging to his son. The horses were given to witness by Colonel Wyndham, but they were afterwards taken again by the military and sold to Visser.

Further cross-examined by Mr. Buchanan: Colonel Wyndham did not commandeer the horses for military purposes. The two horses in question were not fit for military work, and witness proposed an exchange with another man. He did not sell the horses to Mr. Visser. Mr. Visser asked him to sell the horses to him after the war was over. He afterwards told him (Visser) he might let him have them after the war. He had not sold Visser the horses at any time. The horses were not removed as protection horses, but as booty. There were a few people killed and wounded in the engagement. He himself was wounded. He did not know whether the defendant was in the commando at the time. They were fighting. In his letter to Visser in April, 1902, he offered to let him have the horses for £25. He supposed the reason why the military took the horses again afterwards was because he had not given a receipt to Mr. Van Zyl. He came into Malmesbury, and he sent in a claim for the horses in September or October last after the military sale.

Mr. Burton, in argument, contended that the property in question should be considered as "booty."

De Villiers, G.J.: It is not necessary to hear Mr. Buchanan on behalf of the defendant. Mr. Burton has candidly admitted that if the horses belonged to the defendant's father then, with a certain reservation to which I shall presently refer, the plaintiff is not entitled to succeed. There is no question in the present case of the horses having been requisitioned, because it is admitted that none of the requisites of a requisition had been complied with. The defendant's father stated that the horses were taken to the plaintiff's farm for protection. They were subsequently sold to the plaintiff, but afterwards the defendant, by his father's direction, fetched the horses from the plaintiff's farm. There is no circumstance in the case which would justify the Court in deciding that the defendant's father, being the owner, had ever been deprived of his ownership, and defendant would, therefore, clearly be entitled to rely up his father's ownership, as a defence to the present action. The reservation which Mr. Burton had made is to this effect, that inasmuch as defendant's father had led Mr. Lensing to believe that the horses belonged to his son, the son is not entitled to take advantage of the ownership of the father. The plaintiff was not prejudiced in any way by the statement made by the defendant's

father, but I am bound to add that, in my opinion, the defendant's father never stated to Lensing that the horses belonged to the defendant. This being the view of the Court, it is unnecessary to enter into the wider question raised by Mr. Burton in his argument. The plaintiff has not established his ownership to the horses, and the defendant has shown he was sent by his father to fetch the horses. In my opinion there must be absolution from the instance with costs.

Maasdorp, J.: In my view of the case, I come to the conclusion that it has been satisfactorily proved that the property in these horses was in the father, and not in the son. The evidence on that point is very strong, and I cannot come to any other conclusion. I am satisfied that when Lensing went to that farm he went with the object of ascertaining whether there was any property of the son, the defendant in this case, who had gone into rebellion, which might be taken possession of by the military authorities as booty, and on arriving at the farm, the question was raised between the defendant's father and Lensing. I am satisfied it was discussed, and that Lensing did inquire whether there was any property belonging to the son on the farm, and that the father told him that these two horses belonged to the son. That question was discussed, I feel sure: and if it was discussed, then it is admitted that the father misled Lensing by the statement he made when he said all the horses on the farm belonged to him, and as a matter of fact, there were five mares belonging to the son among the property. The father gave out that these two horses belonged to the son, in order to save the other property belonging to the son. Thus the defendant set up the defence that the property was not his. I cannot find that anything that has been done by the father in making this statement has induced the plaintiff in this case to alter his position in such a way as to debar the father from setting up the claim that the property belongs to his son.

Kotze, J., expressed his opinion that the two horses belonged to the father of the defendant, and that the defendant on the occasion in question acted for and on behalf of his father, and therefore, under these circumstances, he concurred.

Mr. Burton applied for defendant to be allowed his and his witnesses' expenses.

De Villiers, C.J., said that these would be allowed.

[Plaintiff's Attorneys: Michau and De Villiers. Defendant's Attorneys: Van der Byl and Van der Horst.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

Ex parte JORDAAN. { 1903. May 6th.

Mr. De Waal stated that the petitioner's attorney had given notice to the trustee, the petitioner being an insolvent, that he would apply for his rehabilitation on the 6th day of May instead of the 7th. The notice was inadvertently set down for a day on which the Court did not sit to hear provisional cases, and petitioned applied that their lordships should direct the Registrar to accept the papers for the following day, May 7.

De Villiers, C.J., asked whether the trustee had received notice of the postponement.

Mr. De Waal replied that the trustee was the largest creditor.

Application granted.

LEVY V. ROSE. { 1903. May 6th.

Agreement to give lease and occupation - Time—Essence of contract.

The defendant agreed to give a five years' lease of certain premises to the plaintiff, who paid a quarter's rent in advance. At the time of the agreement the premises were not completed, and the defendant agreed to give occupation at a certain date. On the arrival of the date the premises were not com-

pleted, and the time was further extended to a fixed date which the Court found to be an essential part of the agreement. At the expiration of such extended time the defendant gave the plaintiff the keys, but after the plaintiff had taken possession an objection was raised by the municipal inspector to occupation without an occupation licence, and the defendant told the plaintiff to leave until such certificate could be obtained. The plaintiff vacated the premises, and refused to take occupation ten days afterwards when an occupation licence was forthcoming.

Held, *that the defendant's failure to give possession at the time agreed upon released the plaintiff from the obligation of taking a five years' lease, and that the plaintiff was entitled to recover back the rent which he had paid in advance.*

This was an action brought by Solomon Levi, of Salt River, against Manuel Rose, of Long-street, Cape Town, for the cancellation of a lease, and the return of £36 paid in advance in consideration of rent for three months, and also for damages. The declaration set out that on or about January 3, 1903, the defendant agreed to let and the plaintiff agreed to hire a certain shop and rooms situate at the corner of Milton-road and Main-road, Sea Point, for a period of five years at a rental of £12 a month payable in advance, the said premises to be used by the plaintiff in his business as a boot and shoe dealer from the 31st January then ensuing, the defendant undertaking to complete and finish the said premises then in course of erection before the 31st January. The defendant failed to have the said premises completed and finished on the aforesaid date. Thereafter, the plaintiff accepted possession of the premises, saving all such claims as he might justly have for damages by reason of the breach of contract on the part of the defendant. On or about the 3rd March the plaintiff was ordered by the Sea Point Municipality to vacate the said premises immediately, as the premises had not been approved or a certificate of occupation granted as required by the bye-laws of the Municipality. Plaintiff paid on or about the 31st January £36, being three months' rent, he expended upon fixtures £5, and in addition to that he had suffered damages estimated at £100 in respect of loss of business profits, owing to his not being in possession of the premises, as well as time and trouble that he had been put to. He prayed for an order cancelling the agreement of lease, and judgment for £36, £5 and £100 respectively, and costs of suit. The defendant, in his plea, said that the lease was entered into on the understanding that Levy should have possession of the premises on the same being completed ready for occupation. The defendant denied that the 31st January or any other date was agreed upon for giving possession of the premises. Thereafter, the defendant used all reasonable expedition in the erection of the premises, and on the 1st February he, by his agent, one Lancaster, gave notice to the plaintiff's attorneys that the premises would be ready for occupation on or about the 31st March, and that he might put in his fixtures. On the 19th February the defendant forwarded to the plaintiff's attorney for signature a draft lease embodying the terms of the lease, and on the 28th February the plaintiff, unconditionally and without reservation, accepted possession of the premises, but he thereafter left the premises, as defendant had not obtained a certificate of occupation from the Municipality's engineer. Afterwards the defendant, having obtained a certificate, tendered re-possession of the premises to the plaintiff with the sum of £12 as and for any damages which he might have sustained in respect of the certificate not having been obtained, together with taxed costs. The defendant had since the said date always been ready and willing to carry out the said tender. Defendant denied the allegation that plaintiff had sustained any damage through any act of his for which was liable in law, and prayed that the claim might

be dismissed, with costs. In reconvention, he said that the plaintiff unlawfully neglected and refused to sign the lease, and he claimed in default of performance £500 damages and costs.

Mr. Benjamin for the plaintiff; Mr. Close for the defendant.

[De Villiers, C.J., said that before the case was proceeded with, he wished to understand what the defence was. The plaintiff alleged that the Sea Point Municipality ordered him to vacate the premises; that he (the plaintiff) left the premises, as defendant had not obtained a certificate for occupation from the Municipal Engineer, but the defence did not admit or deny whether the plaintiff was ordered by the Municipality to leave.]

Mr. Close said their position was that the plaintiff left the premises in consequence of some remark made to him by the inspector of the Municipality, but he was not ordered to go, and he could not be ordered to go.

[De Villiers, C.J.: Because if he was ordered to go, and he left, I suppose that he was not bound afterwards to come back?]

We contend that there is no authority on the part of the Municipal Inspector to cause him to go.

[De Villiers, C.J.: Then that is the main issue—whether he was properly ordered by the Municipal Engineer from the premises.]

The plaintiff, Solomon Levy, stated he was a boot and shoe maker, and in January this year he saw some premises in course of construction at Sea Point, and interviewed the defendant at 73, Long-street. The defendant agreed to let him have the shop for a consideration of three months' rent in advance. Plaintiff paid £36, and the defendant said the shop would be ready within four weeks. A five years' lease was agreed upon. Plaintiff requested defendant to put the time of completion in writing. Plaintiff could not read, and he put the receipt on a file. When three weeks elapsed, plaintiff saw the premises, and very little had been done. The defendant said he could not help that, and denied giving the plaintiff anything in writing. At the end of the fourth week little progress had been made, and plaintiff again interviewed the defendant. The defendant said he could not help the delay, and that plaintiff would have to wait. Plaintiff's attorney wrote a letter to defendant asking him to complete the premises within a week, to which he replied through his attorney that no time was specified, and that the plaintiff would get possession when the premises were ready. Plaintiff's attorney further wrote, when defndant denied having made any arrangement, pointing out that if there was no arrangement, it would be absurd to suppose that the defendant could have plaintiff's money and finish the premises just when he wished. On the 20th February plaintiff's attorney wrote to defendant's agent acknowledging receipt of copy of lease. On the 24th February defendant's agent wrote requesting return of copy of lease, and asking when the plaintiff would be ready to sign it. He got possession of the premises on the 28th February, and the defendant offered the shop or the money back. Plaintiff told defendant he would hold him responsible for the loss of time. Defendant said the shop was quite ready, and on the following Monday, March 2, he went to the premises, and commenced putting up fixtures. The following day he started his business, when the building inspector came in and said he had got no right to be there, and ordered him out at once. Plaintiff saw defendant, who asked him to wait a few minutes, in order that he might get a certificate. Subsequently he went to the shop, and the defendant asked him what he meant by going there, and told him to clear out. Defendant offered to return the cost of carting between Salt River and Sea Point, and plaintiff accepted a note from him. In reply to plaintiff's attorney, defendant's attorney wrote stating that the defendant emphatically denied that the plaintiff was turned out by him, and offering to obtain a certificate on the 16th March. On the 9th March defendant's attorney wrote stating that the certificate had been obtained, and offering £12 for any damages sustained, together with costs. The second day after plaintiff had been moved out, defendant saw him in his shop at Salt River, and they both went to plaintiff's attorney's office. Defendant sent him upstairs, telling him he would be with him in a minute, but he did not turn up that afternoon. Plain-

tiff claimed cancellation of lease, £36 rent paid, £5 gas fittings, and he based his claim for damages on a calculation that his profits would be £25 per month.

[De Villiers, C.J.: How do you know you would have made those profits?]

Sea Point is a very good place.

[De Villiers, C.J.: Why didn't you take the premises when he offered you possession?]

He would not give it to me.

[By Maasdorp, J.: He took the other shop three days after he was moved.]

Cross-examined by Mr. Close: Witness had a bookkeeper, but he (plaintiff) looked after the receipts on the file. The bookkeeper read the receipt to plaintiff, and he was then aware that there was nothing on the paper about possession in three weeks. The defendant did not tell him that the buildings would be completed by contract in four months. If the inspector said that he merely told him about the certificate, and did not order him out, he would be telling a lie. The defendant refused to accept the key of the premises.

Fanny Levy, wife of the plaintiff, corroborated her husband's testimony with regard to the defendant's offer of either the shop or the money. The day after the plaintiff was ordered out, the defendant offered to settle the matter.

Wm. Christopher Dracott, building inspector to the Sea Point Municipality, said he remembered interviewing the plaintiff at the shop. He merely told him that Mr. Rose had not got a completion certificate yet. The plaintiff then locked the shop up, and said he would see the defendant about it. Witness had no power to turn the plaintiff out. When he saw plaintiff, he told him he was the building inspector. The occupation certificate was granted on the 10th of March. The letter was not forwarded to the defendant until the 20th April.

[De Villiers, C.J.: Then he could not have had possession until the 20th April?]

No, my lord, he could have had possession on the 10th March.

[De Villiers, C.J.: Then why didn't you send it to him?]

We hold it in case there are any works to be completed.

Cross-examined by Mr. Close: There would have been no objection to give possession early in March. The plaintiff's story about being ordered out was false.

[De Villiers, C.J.: It was possible witness might have been annoyed at the time he spoke to plaintiff.]

[By Maasdorp, J.: He might have conveyed the meaning which plaintiff took from his remarks when he spoke to him.]

The defendant, Manuel Rose, stated that when the plaintiff called to get a lease of the shop, he (plaintiff) was very anxious to have the matter arranged. At that interview it was clearly explained to the plaintiff that he could take possession as soon as the premises were ready. The plaintiff was satisfied to take the shop when ready, and the only mention of time was the term of four months with the contractor. It was agreed that the contract with regard to the lease should be written down, but defendant mentioned nothing about writing down the time when the premises would be ready. When the plaintiff called again, he offered defendant a month's rent if he would give him two months' rent back and cancel the contract. This witness declined to do.

[De Villiers, C.J.: Did you specify the 1st of March?]

I told him he could take possession when the contract was finished.

Witness, in further evidence, said that by the state of the buildings at the time he could not have thought that they would be ready by the 31st January. He saw the engineer of the Municipality with regard to what had been said as to the certificate. He saw Levy again, when the latter told him that he was going away, and that the building inspector was driving him out. Witness told him that the inspector had no right to drive him out. Levy went out. All that Levy had in the place were a shelf and gas fittings. Witness got the certificate on the 10th March. A letter was written for plaintiff on March 12 offering Levy possession, and £12 in satisfaction of any damages he might have sustained. The shops were fit for occupation, as one of them had been occupied since March. He claimed that Levy should sign the lease.

Cross-examined by Mr. Benjamin: He told Levy that he could not make a pro-

mise to him as to the date when he could go in. A letter was received by him on the 30th January demanding possession on the 31st January, on behalf of the plaintiff, and giving him notice to complete the premises within one week. Witness was surprised at the receipt of the letter, because he had not made any promise as to the date of possession. The contract term was not up until March. Levy afterwards offered to let him have the key back, but witness would not accept it.

[By Maasdorp, J.: He did not tell the plaintiff that he (defendant) would be fined if plaintiff continued in occupation of the premises.]

There was just a little remaining to be done in the yard; that was the only reason as far as he knew why the certificate had not been granted. There was a screen half-way up in the shop. He had this pulled down after March 1. The plans did not show a screen.

Re-examined by Mr. Close: The screen was in the first shop; Mr. Levy occupied the second shop. He could not give possession when the summons was issued, but as soon as the premises were completed he offered the plaintiff immediate possession, and £12 damages on account of not getting the certificate granted until March 10. The plaintiff at that time had no fixtures in the shop.

Frederick Robert Sloane, a waiter in the employ of Mr. Rose at a cafe in Longstreet, said he knew the plaintiff. As to the contract of lease made in January, he was about eight yards away from the parties at the time it was entered into. The arrangement entered into between them made no mention of possession on the 31st January. Rose said he had had a contract from November for four months, and he would be prepared to let plaintiff have possession when that was up. If the building were finished before the contract term he would let him have possession then. The arrangement was that the rental should be £12 a month, three months' rental to be paid in advance, the duration of lease to be five years.

Cross-examined by Mr. Benjamin: He did not distinctly hear the latter part of the conversation between Mr. Rose and Mr. Levy. He heard on a subsequent occasion the plaintiff propose to cancel the lease and forego £12 of the rent which he had paid. He understood the plaintiff to say that he did not want the shop, and that it had not been given to him in time.

This concluded the evidence.

[De Villiers, C.J., intimated that the Court would adjourn, and that in the interval the plaintiff might consider how far he should amend his declaration. The Court would be prepared to consider any reasonable amendment which would not prejudice the defendant.]

After the adjournment, Mr. Benjamin asked leave to amend the declaration, and to substitute certain words in the fourth paragraph, viz., after "ordered by the Sea Point Municipality," to read, "or defendant or both of them to vacate the said premises immediately."

[De Villiers, C.J.: You have left out the most important point. The plaintiff says that the defendant ordered him off the premises.]

Mr. Benjamin said the words he proposed to insert after "on or about the 3rd March plaintiff was ordered by the Sea Point Municipality," were "or their officer, or defendant, or all of them."

[De Villiers, C.J.: The declaration says nothing about the defendant ordering the plaintiff off the premises. I should say "ordered by defendant or the Sea Point Municipality, or by one or other of them." The only question is whether it would prejudice the case.]

Mr. Close said he could not see there was any definite prejudice to the defendant by the alteration.

[De Villiers, C.J.: I don't think it could possibly prejudice the defendant.]

Mr. Benjamin said that the other amendment was to add "or that in the alternative that on the 2nd March, 1903, no certificate of occupation of the said premises had been granted to the defendant by the said municipality, and that his (the plaintiff's) occupation was unlawful, and rendered him liable to penalties for breach of the said regulations, and that he was accordingly justified in vacating the premises."

Mr. Close pointed out that it was a very drastic alteration of the whole declaration that was proposed.

[De Villiers, C.J., said he admitted it was somewhat drastic, but it raised no new question that the defendant should not be prepared to meet.]

After counsel had been heard in argument on the facts of the case,

De Villiers, C.J.: It is common cause in this case that on the 3rd January last the plaintiff paid to the defendant the sum of £36 for three months' rent in advance, and that he received from the defendant a receipt in the following terms: "Received from Mr. Levy the sum of £36 sterling, payable three months in advance, being rent for a shop on Main-road and Milton-road, Sea Point, the second to the chemist's shop. Promised five years' lease." (Signed by defendant.)

This document is clearly not intended as a contract of lease, but merely as a receipt, and it was the intention of both parties that a formal lease should be executed. Now the question is, when was this formal lease to be executed, and when was the lease to commence? Well, if there were no other evidence in this case, the Court would hold that the lease must be forthwith executed, and possession given as soon as the lease is completed.

The evidence, however, of the plaintiff shows that it was intended that some time should elapse before the possession, at all events, could be given. It is admitted that he knew at the time that the buildings were not yet completed, and that some time must elapse. As to what that time is, there is a difference. The plaintiff's version is that it was represented to him that within four weeks' time the premises would be ready, and the defendant's version is that he made him understand that under the contract which he had with the contractor, that the building would not be completed until the 1st of March. I am not at all satisfied, however, that this was told by the defendant, and I am more inclined to accept the plaintiff's statement that he understood that by the end of that month of January he would get possession, and this view is supported by the correspondence, which shows that the plaintiff, at all events clearly must have understood that within the four weeks at the utmost he would get possession. However, the plaintiff is not entitled to take advantage of this circumstance because he subsequently waived his right by expressing his readiness and willingness to accept possession on the 1st March. It is clear that on the 1st March, if the defendant had said to the plaintiff, "Well, now, I am unable to give you possession in ten days," the plaintiff would have been quite right in saying, "I am not going to execute the lease; it was an essential part of our agreement that you should give me possession not later than the 1st of March; you have broken your contract, and I claim back the rent which I have paid in advance." That is not exactly what took place, but the effect of it is exactly the same. On the 1st March he obtained possession, and, at all events, he got the key, went into the buildings, went to certain expense in putting up shelving, and after he had been there working for some time, first comes the inspector, who tells him he had no business to be there, or words to that effect. The inspector admitted that he was somewhat annoyed, and probably he used language that was not quite so gentle as he wished the Court to believe he used; and I believe he left the impression on the plaintiff that he wished him to go out. Then the defendant comes on the scene, and the plaintiff informs him of what had passed with the inspector, and the defendant then said he had seen the inspector, and when he returns again the defendant was annoyed too, and I believe the plaintiff's statement that the defendant told him to clear out temporarily, probably for ten days, until the certificate could be given; but I am satisfied the defendant wanted the plaintiff to clear out until then. He was willing to pay expenses of carrying the goods there and back, clearly showing that his desire, at all events, was that the plaintiff should go. The position was exactly the same as if there had been a refusal on the 1st March to give him possession, and in my opinion the plaintiff was not bound to return to the premises. He was quite justified, then, in saying: "I have been waiting now for four weeks. You have not given me possession yet; you should have given me possession on the 1st March. I am not going to wait till the 10th now; the whole agreement is put an end to, therefore I claim the cancellation of the whole agreement, and claim also damages for your breach." This view of the case entirely disposes of the claim in re-convention, in which the defendant claims that the plaintiff should execute the lease. In my opinion the plaintiff is not bound to execute the lease under

these circumstances. If there was a breach of contract on the part of the defendant in not being ready with his building on the day, and not being ready to give possession to the plaintiff, then the plaintiff was entitled to claim damages. The question is, what shall be the measure of the damages? The only damages proved in this case are, first of all, the £36 which he has paid in the way of rent in advance. He has paid that money, and he is entitled to recover it back. Then there is the shelving which he put up, and the £1 10s. expenses in going there and back, and also another £1 expenses, making £7 10s. That is all that is clearly proved. The other damages are somewhat remote and very vague. The plaintiff has a firm belief that he would have done well in these premises; but if he really believed that he would have done so well, then the wonder is that he did not go on with the lease, because it was open to him to obtain the lease on the 10th March. By the 10th March it is quite clear that he would have got possession. But he had his own reasons. He says that he had secured other premises, but it did not seem that he had any objection to having more than one business place. But, whatever the state of facts may be, one thing is clear, that there is not sufficient proof of damages to justify the Court in awarding damages in respect of the delay that took place. The judgment of the Court will, therefore, be for the plaintiff for £43 10s., with costs. Judgment for the defendant on the claim in reconvention.

Maasdorp, J., concurred.

[Plaintiff's Attorney: C. Brady; Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1903. May 7th.

Mr. Benjamin moved for the admission of Frederick Benjamin Andrews as an attorney-at-law.

The application was granted, and the oath administered.

Mr. J. E. R. de Villiers moved for the admission of William Parke Cressy as a conveyancer.

Application granted, oath to be taken before the Resident Magistrate of Richmond.

CHOLEFIELD, GOODMAN AND SON V. MCDONALD AND CO. { 1903. May 7th.

Provisional sentence — Bill of exchange—Novation—Agreement to give time.

The defendant, being sued for provisional sentence on certain overdue bills of exchange accepted by him, raised the defence that the plaintiff had agreed to accept payment in instalments, but the evidence showed that, although there had been negotiations for such a settlement, no definite agreement had been arrived at.

Held, *that the plaintiff was entitled to provisional sentence.*

This was an application for provisional sentence on certain bills of exchange.

The bills were dated as follows, and were for the following amounts: 21st March, 1902, £676 14s. 6d.; 27th March, £194 1s. 1d.; 4th April, £264 11s. 3d.; 11th April, £1,413 19s.; 18th April, £1,336 14s. 11d.; 25th April, £137 5s.; 9th May, £457 11s. 3d. and £481 0s. 6d. He said he understood that £1,000 had already been paid.

Defendant's affidavit stated that he carried on business in East London. Plaintiffs acted as his buyers in Europe and America, and shipped merchandise to him. Up to July, 1902, they drew drafts on him at 120 days sight. Up to the end of June, 1901, he paid the drafts regularly, but through the war great difficulties arose at East London. In June, 1902, the plaintiffs' representative came to East London, and expressed himself perfectly satisfied with the defendant's position. Negotiations were entered into in August, when the defendant owed the plaintiff £7,792. On the 9th November, 1902,

a great fire occurred in East London, in which the defendants' premises were destroyed. Subsequently it was agreed that the Colonial creditors should be paid out of the fire insurance money, and that the plaintiffs and other creditors should be paid *pro rata*. He was to pay the balance of the debt by instalments, and a verbal agreement to that effect was entered into with Mr. Mouat. On the 18th ult. the plaintiffs accepted the sum of £1,000, and the summons was issued on the 24th ult. Counsel submitted the instalments were reasonable, and so long as he reduced the plaintiffs' debt by such instalments they were not entitled to take the action.

The affidavit of Charles Thomas Mouat, who represented the plaintiffs in East London, stated that in November last he went to Durban, and received a letter from the defendant, which stated that it would take time to realise such a business. The defendant pointed out that he proposed to Mr. Pennington that Mr. Drake and his solicitor should constitute a committee of inspection, and he would give all information. The defendant calculated that three or four months would be required to wind up the business, and suggested that if the arrangement was considered satisfactory, Mr. Mouat should wire from Durban, "Proposal considered favourable," which the deponent did. It was understood that the assets should be drafted up for settlement, and Mouat pointed out to the defendant that if he were forced into a second insolvency his business career in the Colony would be at an end, as very bad times were anticipated for business men for three or four years. On the 9th November a great fire occurred at East London, and the defendant's premises were destroyed. He said that he would lodge the fire insurance money with Wakefield after paying certain Colonial debts. Mouat entered into no arrangement with the defendant to postpone legal proceedings. He had ascertained from defendant's letters that a binding agreement had been entered into, which he entirely repudiated. It was pointed out that the payment of £1,200 out of £3,000 to Messrs. Thompson was not *pro rata* with the plaintiff's claim.

Sir H. Juta, K.C., for defendant; Mr. McGregor for plaintiff.

Sir H. Juta, K.C.: It is perfectly clear that after the fire at East London on November 9, 1902, an arrangement was entered into between the parties. Mouat denies this, but in the correspondence with Lance and Wakefield plaintiffs admit an agreement. Hence it is evident that Mouat's memory is not reliable. According to Mouat it was not till the end of January that anything was said about an agreement.

[De Villiers, C.J.: Do you say that there was a novation?]

No, not a novation, but a certain arrangement for valuable consideration. Defendant virtually said to Mouat: "If you press me now I must become insolvent, but if you give me time I will gradually reduce the debt, and everybody will be paid.

[De Villiers, C.J.: The question is, was there a definite agreement?]

Yes; I want in the first place to dispose of Mouat's affidavit. That affidavit implies that we did not set up any arrangement till the 3rd of February, but the negotiations alluded to by Mouat were entered into before the fire took place. That altered the whole situation. Then, again, Mouat says nothing about the arrangement made by the letter of December, the 18th. The agreement as to the insurance money was acted upon by both parties.

[De Villiers, C.J.: There was nothing definite and final.]

Our letter is definite enough, and plaintiffs received their *pro rata* share of the insurance money. See Lance and Wakefield's letter of March 30.

[De Villiers, C.J.: The agreement has been repudiated by them all along.]

Not the whole agreement, but only as to the payment of the balance in instalments. The point arises: "Is their story or ours the more probable?" If there was an arrangement as to the payment of the balance, the agreement has no meaning. If the defendant was liable to be called upon at any moment to pay everybody in full, why say that goods, etc., must be at once paid in full? Several instalments were accepted by the plaintiffs without protest. Lance and Wakefield's letter of December 23 shows that payment by instalments was agreed to.

[Maasdorp, J.: Subject to confirmation. Where is your confirmation?]

Confirmation may be given by acts as well as in writing.

Mr. McGregor was not called upon.

De Villiers, C. J.: The defendants are sued as acceptors of a number of bills of exchange long overdue, and the plaintiffs are consequently entitled to provisional sentence unless there is a reasonable probability that the defendant will succeed in the principal case. In my opinion, upon the documents before us, the probabilities are the other way. It is a case in which the defence depends almost entirely upon the meaning of certain correspondence, which has been read, and the Court, having read that correspondence, is in a position upon that correspondence to decide whether there was such a definite agreement as would justify the Court in refusing to give provisional sentence. The correspondence shows that all along the plaintiffs have denied that there is any definite agreement. All they admit was that when the fire had taken place the plaintiffs consented that, instead of the whole amount of the insurance money being paid to them, the amount should be divided *pro rata* amongst the principal creditors. But there is nothing in the correspondence, so far as has been read, which shows that there was a definite agreement that time should be given, or that there was anything in the nature of a *pactum de non petendo*. Provisional sentence must be granted.

Plaintiff's Attorneys: Fairbridge, Arderne and Lawton. Defendant's: Walker and Jacobsohn.

STEYN V. PRICE. { 1903. May 7th.

This was a motion for a decree of civil imprisonment upon an unsatisfied judgment of this Court. The present defendant, instituted an action for malicious prosecution against the present plaintiff, and in that matter judgment was given for the defendant in the suit, with costs. It was for the costs of the action, £119 3s. 11d., that the present application was brought.

Mr. Benjamin moved,

Respondent appeared in person.

The defendant said that he was willing to pay the costs, but he was absolutely without means at present. He was earning £2 10s. a week as a temporary boatman. He had no property and his wife had none.

Cross-examined by Mr. Benjamin: His wife's mother had no property. His father-in-law had only a part share in a launch and a boat. He could not pay above £1 a month. The costs that he incurred in the suit, he believed, had been paid by Mr. Stephan on behalf of his father-in-law. He did not think that if a decree of civil imprisonment were made against him, money would be found to satisfy this judgment; in fact, he was sure it would not.

[De Villiers, C. J.: Decrees of civil imprisonment are not given with a view of putting pressure on others.]

Further cross-examined: He had formerly been in the employ of the Texas Jack Circus at £10 a week, and he calculated that if he had not been arrested at Steyn's instigation, he would have been able to earn £1,000 a year. He had recently been trying to obtain further employment with Texas Jack.

De Villiers, C. J.: According to the evidence which is not contradicted, the defendant has no means. He has an income of £10 a month, which is barely sufficient to keep him and his wife alive and keep them in clothing. It would appear that he cannot possibly afford to pay £1 a month. His salary is £10 a month, and he has to pay £8 for board and lodging, leaving £2 to provide clothing for his wife and himself, so that practically the man has no means. It is possible that at some future time he will have means, and in that case an order may be applied for again, but at present there will be no order, with leave to apply again on proof that the man has means.

MICHAU V. VAN NIEROP.

Mr. De Waal moved for provisional sentence on a promissory note, with interest.

Granted.

MOORREES V. BASSON.

Mr. J. E. R. de Villiers moved for provisional sentence on a promissory note for £120, less £40 paid on account, with interest from the 15th January at 8 per cent. and costs of application.

Granted.

HEDDLE BROS. V. LLOYD AND FITTLE.

Mr. Buchanan moved for a decree of civil imprisonment on an unsatisfied

judgment, obtained on the 14th April, for £71 14s., on a certain bill of exchange, and also for costs, £8 12s. 11d.

The defendant Lloyd said that he wished to have this case reheard. The debt referred to certain machinery; he did not get the machinery, and it went to the Imperial Brick and Tile Co.

[De Villiers, C. J.: How is it you did not appear when the case came on before?]

Defendant replied that he could not get the chairman and secretary of the company to make affidavits. The chairman of the company told him that he need not trouble himself, as he (the chairman) would see the matter settled.

[De Villiers, C. J. (to defendant): You can reopen the case by entering an appearance. To Mr. Buchanan: It is rather hard measure, Mr. Buchanan, to sue for civil imprisonment if this man has done his best to meet you?]

Mr. Buchanan: If all he says is true, it might be so, my lord, but I am instructed that it is not true. I am instructed that, so far from his having an action against this Brick and Tile Co., they have an action against him. Be that as it may, we sue him on a bill of exchange which he gave to us.

Defendant, in answer to the Chief Justice, said his average earnings, after payment of expenses, were about £30 a month, and he paid £14 a month for the board and lodgings of his wife and himself. He offered £5 a month in satisfaction of the judgment.

The Court granted a decree of civil imprisonment, with costs, to be suspended upon the defendant paying £2 a month until the judgment was liquidated, the first payment to be made on the 1st June.

S A. SUPPLY AND COLD STORAGE CO. V. CAISSE.

Mr. Russell moved for a provisional order on a bill of exchange for £300.

Judgment as prayed.

ILLIQUID ROLL.

GORDON MITCHELL AND CO. V. BLUEMENTHAL. 1903. May 7th

Mr. Russell moved for judgment for £57 9s. for goods sold and delivered, with costs and interest.

Order accordingly.

NEDERLANSCHE BANK V. CAISSE.

Mr. Van Zyl moved for judgment for the sum of £1,325 4s., being an overdraft on the bank, together with interest and charges until the 24th April, and further for interest on afore-mentioned amount at the rate of 8 per cent. and costs of suit.

Order accordingly.

KAISER V. GLASS.

Mr. Close moved for judgment on an order for the ejectment of the defendant from certain premises at Woodstock, and for the recovery of £44, being the arrears of two months' rent.

Judgment as prayed.

EILENBERG V. CAISSE.

Mr. Benjamin moved for judgment for the sum of £119 5s. 11d., being the underpaid balance of purchase price of certain goods.

Judgment as prayed.

SMUTS V. STRYDOM.

Mr. Benjamin applied for judgment for the sum of £965, being underpaid purchase price of certain landed property.

Judgment as prayed.

THESEN AND CO. V. DURBAN, JACKSON AND CO.

Mr. Benjamin applied for judgment for the sum of £346 7s. 6d., being the purchase price of certain goods sold and delivered.

Judgment as prayed.

REHABILITATIONS.

Ex parte GEO. CLYNE, TRADING AS G. CLYNE AND CO. 1903. May 7th.

Mr. Buchanan applied for the rehabilitation of insolvent. The estate was surrendered on the 21st December, 1898, when the debts were £707 15s. 5d., and the assets £421 13s. 6d. The debts proved amounted to £671 4s. 3d., and the assets realised £125 1s. 6d., and the expenses of administration £25 5s. 5d. The trustee's report was favourable.

Order granted as prayed.

Ex parte IBERTSON.

Mr. Buchanan applied for the rehabilitation of insolvent. The estate was sequestrated on April 14, 1897. The debtor's statement showed total habilitues of £617 16s. 2d., and assets of £319, leaving a deficiency of £298. The assets realised £234, the cost of administration was £58, and the amount available for distribution was £176 18s. 2d., leaving a dividend of 13s. 2d. in the £ for concurrent creditors.

Order granted as prayed.

Ex parte WEAKLEY.

Mr. Alexander applied for the rehabilitation of the insolvent. The creditors had all been paid in full, and after such payment a balance remained in the Master's hands of £113 18s. 2d.

Order granted as prayed, the Chief Justice remarking that there was no doubt in regard to this application.

Ex parte GRASSOW.

Mr. Alexander said that this application was before the Court on February 7 last. It was then refused, but leave was given to applicant to apply again in three months. That period had now elapsed.

Order granted as prayed.

Ex parte BRODIE, TRADING AS B. BRODIE.

Mr. Close applied for the rehabilitation of insolvent.

Order granted as prayed.

Ex parte JORDAAN.

Mr. De Waal applied for the rehabilitation of insolvent.

Order granted as prayed.

Ex parte THERON.

Mr. J. E. R. de Villiers applied for the rehabilitation of insolvent, whose estate was voluntarily surrendered in 1884, and in respect of which no final order had been made.

Order granted as prayed, subject to the production of balance-sheet as required by Act 15 of 1859.

GENERAL MOTIONS.

JACKS V. JACKS. { 1903. May 7th.

Mr. Upington said that this was the return day of an order of Court calling upon the defendant to restore to plaintiff her conjugal rights on or before April 15, failing which to show cause why the bonds of marriage should not be dissolved with costs, and why the plaintiff should not have an order entitling her to have the custody of the minor child of the marriage. Their lordships would remember the case. They had some doubts as to the jurisdiction of the Court, as to whether domicile was sufficient. Counsel read the affidavit of G. P. Kotze, a clerk in the office of Messrs. Van Zyl and Buissinne, plaintiff's attorneys, deposing that he served notice of the rule upon Walter Barrett Jacks. A letter had been addressed by Mrs. Jacks to her husband, in which she pointed out that he took up his domicile at the Cape, and got a good situation here, and yet he had contributed nothing to her support. She had no means whatever to proceed to the Cape, and she asked her husband to provide her with passage money and a home on her arrival here, and to maintain her and her child as a good husband and father should do. An affidavit sworn by Mr. W. T. Buissinne set forth that he had received a letter from W. B. Jacks, stating that it was not his intention to restore conjugal rights to his wife, and he should have no means of paying his wife's passage to this country.

Ordered that the rule be made absolute.

NEALE V. NEALE. { 1903. May 7th.

Judicial separation—Division of goods held in community—Suspension of community—Marital power—Husband and wife.

On a decree of judicial separation and division of goods owned in community it is competent for the Court to interdict the husband from dealing with his wife's share or with property acquired by her, but not to dissolve the community altogether.

This was an application by the plaintiff on motion for an order of the Supreme Court made on the 11th September, 1902, to be explained and amended by the insertion therein of a decree dissolving community of property.

The affidavit of Welhelmina Sarah Neale, stated that the Court granted her a decree of separation from her husband, and authorised her to retain the balance of the estate in her hands after payment to her husband of £750, the custody of the children being given to her. She begged to refer the Court to the order granted last September, with a view to more definite particulars being stated. It was not definitely stated in the order that the community of property had been dissolved. Defendant desired the Court to add to the order granted on September 11 last a clause enabling her to deal entirely with her property. Counsel said that he had been unable to find any precedents for this application.

[De Villiers, C.J.: You had better consider the matter between this and two o'clock, becauses it raises a very important question. I am inclined to think that the same object could be attained in another way.].

Mr. C. W. de Villiers, for applicant; Respondent in default.

Mr. De Villiers: What we really want is simply an order of Court to enable the applicant to deal with her property independently of the respondent's control. The Court has already granted a separation *a mensa et thoro*, and this would seem to have the effect of suspending the community of goods as long as the parties remain apart.

[De Villiers, C.J.: If that is the law you have everything you want. Why should you want an order for the dissolution of the community?]

In view of what *Van der Linden* says (1—3—9) and *Van der Keessel* (Thesis 231), it would see that a judicial decree is necessary in order to dissolve the community. see also *Wessels* v. *Wessels* (12 S.C.R., 465). All we want is to have it made perfectly clear that the Court allows the applicant to deal with her property during her separation from her husband.

[De Villiers, C. J.: *Voet* (24—2—17) does not go quite as far as your authorities.]

De Villiers, C.J.: The notice of motion calls upon the defendant to show cause why a decree of separation *a mensa et thoro* already granted shall not be explained and amended by adding an order dissolving the community of goods between the parties. The application is founded upon a misconception as to the true effect of a decree of judicial separation. Such a decree leaves it open to the parties to be again reconciled and live together as husband and wife, and, even where a division of goods owned in community is decreed, the community of goods is not dissolved or intended to be entirely dissolved. *Voet* indeed (24—2—17) goes so far as to hold that, unless the husband is interdicted from dealing with his wife's share, the marital power remains in force, and the community is not even suspended. *Van der Linden*, who of course, wrote many years after *Voet*, says (1—3—9) that where the decree of separation includes a division of goods, and is duly published, the community of goods, as well as the marital power, is suspended so long as the parties remain apart. The object of the present application is to prevent the defendant from dealing with any property acquired by the plaintiff, but this object might be attained without the drastic remedy of an entire dissolution of the community. Such an order would remain in force even should there be a future reconciliation, with the result that, without an antenuptial contract to that effect, community of goods would be excluded between two spouses living together. The defendant does not object to an order interdicting him from dealing with his wife's separate estate, and this order will be granted accordingly.

[Applicant's Attorneys: Van Zyl and Buissinné; Respondent in default.]

SEKELINI v. SEKELINI. { 1903. May 7th.

Executor — Native custom — Interdict.

A native, who had been married in Griqualand East in 1874 according to Christian rites, died in 1902, and the applicant was appointed as executor. The respondent, who was the eldest son of the de-

ceased, retained possession of the property, claiming to be entitled to such possession under native law and custom

Held, *that as long as the appointment of the applicant was not revoked he was entitled to administer the property, and the respondent was accordingly interdicted from parting with the property unless and until the appointment should be set aside, and leave was given to the respondent to proceed by motion for that purpose.*

This was a motion for a rule to be made absolute restraining the respondent from disposing of any part of the assets of his late father's estate.

The petitioner's affidavit set forth that she was the widow of the late William Sekelini, of Griqualand East. The respondent was her eldest son. On the death of the said William Sekelini, the estate was not administered, probably through the ignorance of the parties. The eldest son took possession of the estate. A death notice and inventory notice were recently published, and an executor dative was appointed. The respondent petitioned against the appointment. The petitioner had unsuccessfully tried to get possession of the estate, and the respondent had disposed of the majority of the assets since the appointment. In his protest Johannes Sekelini pointed out that his father and mother were married at Hopewell, East Griqualand, in 1874, by a minister of the Christian religion, and at that time the native tribes were under their own law. Competent men were appointed to inquire into disputes, and, according to the customs of the Griquas, the eldest son succeeded to his father's property, and the respondent contended he was entitled under that law to do so. During 1879 the Governor by Proclamation declared that East Griqualand would be subject to the laws of the Cape Colony under the terms of the annexation.

The respondent, in his affidavit, denied that since his father's death he had used the property solely for his own benefit. He had kept no strict account of his father's estate, but he had contributed to the maintenance of his mother. A few days before his death, his father declared before his mother that he (the respondent) was to take over the property. The point of dispute was whether the estate should be administered under Ordinance 104, existing in East Griqualand at the time of the death of the father.

Mr. Upington for applicant; Mr. Schreiner, K.C., for respondent.

[De Villiers, C.J.: Are there any disputed facts?]

Mr. Schreiner: It is really a point of law, my lord. It would be a great pity to have any further litigation, and I will waive the point of the father having specified the son previous to his death.

Mr. Upington proceeded to read a further affidavit from the petitioner, in which she denied that any disposition of the estate was made by her husband previous to his death. She denied that the respondent had any property as a result of his own labour, and also that he had always contributed towards the maintenance of herself and children. On the 9th April, 1903, the respondent had handed over nine oxen to the Messenger of the Court, who served a writ on him for £129 6s. 9d.

Mr. Schreiner: Although the question raised by this application is one of considerable importance, it can, I submit, be decided on affidavit. The whole question really turns on the interpretation of Sec. 2 of Act 38 of 1877. Ordinance 104 did not by virtue of that Act come into operation in the Native territories, though it has been brought into operation to some extent by subsequent proclamations. The term "Act" used in Sec. 2 of Act 38 of 1877, includes "Ordinance," and, therefore, proclamations 110 and 112, Sec. 7 of 1879, define the extent to which Ordinance 104 is brought into force in Native Territories.

[De Villiers, C. J.: Were these people married before 1879?]

Yes, in 1874. Then see proclamations 207 of 1899 and 112 Sec. 31 to 33. This is a prospective and not a retrospective law. The question which now comes before the Court was discussed in *Fortuin's Executor* v. *Abrahams* (14—S.C.R. 21). Sec. 34 of proclamation 112 shows that a marriage by Christian rites must be registered, hence this proclamation cannot refer to a time when

the Marriage Register Act did not exist as far as Native Territories were concerned. The Master has no right to appoint an executor unless either there is a will, or unless the marriage has been registered. Kafir or Fingo marriages should be registered in a book, and Christian marriages in the manner prescribed by the Marriage Ordinance.

[Maasdorp, J.: What would be the effect of an unregistered European marriage; it would be binding on the parties?]

Yes; but such a marriage would not fall under Ordinance 104. Then, my client has now been in possession of the estate for five years; and says that he is entitled to remain in possession of the whole property subject to the obligation of making provision for his mother, his brothers, and sisters.

[De Villiers, C.J.: Could the deceased have made a will?]

Certainly he could.

[De Villiers, C.J.: Then does not the fact that he did not make one amount to an indication that he wished the estate to be distributed in accordance with Colonial law?]

I submit not. We should have no objection to the appointment of an executor dative if he were instructed to administer in accordance with native laws.

[Maasdorp, J.: I can see that the relations of husband and wife may have been governed by native law, but it does not follow that the devolution of the property should follow native law.]

I submit it would. See section 101 of the Report on Native Law.

[De Villiers, C.J.: Suppose two Kafirs are married in the Colony, under what law would they come?]

That depends upon whether they fall under the Locations' Act or not. *Mohile* v. *Mosesh* (5 Juta, 30).

[De Villiers, C.J.: Should the decision of the Court be favourable to your client, I take it that the interests of the widow and of the other nine children would be protected by a Magistrate administering native law?]

Most certainly they would.

Mr. Upington: I fear that I have not come into Court fully prepared to meet the argument of respondent's counsel. I thought the only question before the Court was: "Should the rule *nisi* be made absolute or not?" The executor has already been appointed, and unless he is removed the assets in the estate must be handed over to him. I contend that the words of Section 32 of Proclamation 112, of 1879, show that in the case of all natives married by Christian rites an executor must be appointed, no matter what law governs the devolution of their property.

[De Villiers, C.J.: Then do you say that the Section is retrospective?]

Yes, decidedly.

[De Villiers, C.J.: Suppose that under Kafir law the widow were entitled to two-thirds of the estate; would the Proclamation deprive her of a portion of her share?]

That I am hardly prepared to say; but if "Act" includes "Ordinance" the whole argument falls to the ground. See *Re Dugmore's Estate* (5 E. D. C. 96). The whole question is:—Whether at the time of the father's death in 1898, Ord. 104 was in force or not?

[De Villiers, C.J.: Then you say that the widow is entitled to one half?]

In all probability, but I am not prepared to argue the full effect of the Proclamation, I only say that the executor has been rightly appointed, and that the assets must be handed over to him for administration. The widow's proper course would have been to at once get the appointment set aside. See *Poppies* v. *R.M. of Kokstad* (6 E.D.C., 183).

[De Villiers, C.J.: That was a different case from this.]

I must admit that the two cases are not perfectly analogous.

Mr. Schreiner: My client made a full protest at the time the executor was appointed.

[De Villiers, C.J., said there were some points on which they would require evidence. One point was as to the date when the son was born, and another was what his rights were before the date of annexation under native custom, and again. what rights the widow had.]

Mr. Schreiner said that the widow, he supposed, would have some vague rights.

[De Villiers, C.J.: What right has the son before the death of his parent?]

Mr. Schreiner: I would not contend that he has any right. Under native custom he could only have the right of primogeniture after his father's death.

[De Villiers, C.J.: What you say is that his father died under the belief that the will would be administered under native law?]

Mr. Schreiner: That is so, otherwise he would have made a will, my lord.

[Maasdorp, J.: Is it admitted that the marriage was celebrated by a minister of the Christian religion?]

Mr. Schreiner: Under Christian custom, my lord.

Mr. Upington: That is admitted by the respondent, my lord.

[De Villiers, C.J.: At present an executor has been appointed, and until that appointment has been set aside has he not control of the estate?]

Mr. Schreiner said if he had succeeded in showing the merits of the case their lordships would be quite in order in getting a report from the Master of the Supreme Court.

[De Villiers, C.J.: What could be the rights of Europeans who were married there before the annexation?]

Mr. Schreiner said that that was a nice point of international private law, but if the Europeans were domiciled there the Court would probably hold as in the case of *Fortuin's Executor* v. *Abrahams*.

De Villiers, C.J.: It is to be regretted that the case is not ripe for decision now, and that further costs will have to be incurred before the real question at issue can be decided. As the case now stands an executor has been appointed to the estate, and, in his capacity as executor, he claims a rule calling upon the respondent to show cause why he shall not be interdicted from parting with the assets of the estate. It is impossible upon the case as it stands for the Court to set aside the appointment of the executor. There is no motion to that effect, and without some proper motion or action the Court could not take that course. I am bound to say from the argument, as far as it has gone, that it appears to me that under Proclamation 112 only the marriages celebrated after the passing of that Proclamation were intended to be affected. It could hardly have been decided that this Proclamation should have a retrospective effect, so as to affect the rights of parties married before that proclamation, entirely altering succession and entirely altering the relations between husband and wife. But, as the case now stands, this point does not really arise. All the Court knows is that an executor has been appointed, and until that appointment is set aside the Court cannot give an authoritative pronouncement upon the issue which has been raised by Mr. Schreiner. At present, therefore, the Court can only grant an order interdicting the respondent from parting with the property in his possession, and belonging to the estate, so long as the appointment of the applicant as executor shall not be set aside, and the question of costs will stand over. The possession will remain with the respondent, but he is not to deal with that property until the appointment of the executor shall have been set aside. He should at once proceed with his motion or his action to have the appointment set aside, and the question of costs will stand over.

[Applicant's Attorneys: Scanlen and Syfret; Respondent's Attorneys: Faure and Zietsman.]

Ex parte THE ZWARTKOPS VALLEY LAND COMPANY.

Mr. Schreiner moved for a rule *nisi* granted by their lordships in chambers, confirming certain alterations in the memorandum of association to be made absolute.

Order granted as prayed.

Ex parte JOHNSTONE.

Mr. Buchanan moved for leave to raise a mortgage for £200 on the estate of the late B. Johnstone, so as to enable certain alterations and extensions to be carried out to more properly fit the house as a boarding house.

Order granted as prayed.

Ex parte DYER.

Mr. Buchanan moved for the appointment of a *curator ad litem*. Mr. Dyer was in the Valkenberg Asylum, and it was proposed to institute proceedings to have him declared of unsound mind.

Order granted, appointing Mr. C. W. de Villiers as *curator ad litem*, summons to be returnable for Thursday, May 14.

ESTATE THOMAS V. KERR.

Mr. Schreiner moved for the Fairview Coal Ore Co. to be joined as co-defendants in this case.

Mr. Benjamin, on behalf of defendant, said he had no objection to raise.

Order granted as prayed, costs of application to be costs in the cause.

KINNEAR V. HUXHAM.

Mr. J. E. R. de Villiers moved for a commission to be appointed to take the evidence of a certain witness at Krugersdorp, Transvaal.

Mr. Benjamin, for defendant, consented.

Order granted as prayed, the R.M. of Krugersdorp being appointed as commissioner.

SOUTH AFRICAN SUPPLY COMPANY V. CAPE TOWN COUNCIL.

Mr. Buchanan moved for an award of arbitrators to be made a rule of Court.

Order granted as prayed.

BARLOW V. BARLOW.

Mr. Alexander said that this matter was before the Court on the first day of the present term, and was ordered to stand over until the present sitting. They had received return of service, but it was not in proper form, and therefore had to be sent back to the Transvaal. Counsel asked that the matter should stand over until the 21st inst.

Application granted.

Ex parte VON POST.

Mr. Buchanan moved on behalf of petitioner, who was leaving the Colony and proceeding to Stockholm, Sweden, for authority to sell certain property belonging to his minor daughters. The matter had been before the Master, and he recommended that leave to sell be given on condition that the proceeds of the sale be paid into the Guardians' Fund, so that the money might be remitted from them to the gentleman who occupied a similar position in Sweden.

Order granted in terms of Master's report.

Ex parte TITUS.

Mr. De Waal moved for an order authorising the Registrar of Deeds to amend the petitioner's name on a certain mortgage bond to Carolus Mattheus Titus instead of Carolus Titus. The mortgage was upon a fortieth share in a certain property.

De Villiers, C.J., pointed out that the name on the bond should be consistent with the name on the deeds. They could not grant an order to alter the name on the bond, because the bond must be identical with the name on the deeds of the property. There would be no order.

Ex parte VERMOOTEN.

Attorney—Reinstatement.

Mr. Van Zyl applied on behalf of Octavius Septimus Vermooten, the petitioner, for his reinstatement as an attorney and notary public, and for the return from the Registrar of the Court of his certificate of admission. The petition was to the effect that Vermooten, who resided at Dordrecht, was formerly admitted as an attorney and notary public, and that in May, 1900, he was tried at Graham's Town before the Judge-President and a jury for high treason, and found guilty, and sentenced to four years' imprisonment. He was subsequently suspended from practice as an attorney and notary public of the Court until a further order of the Court, and ordered to deliver up to the Registrar his certificate of admission. Petitioner was imprisoned at Graham's Town and Tokai from the date of his conviction until the 4th November, 1902, when he was released. Since his release the petitioner had been serving as a clerk in an attorney's office at Dordrecht.

[De Villiers, C.J.: Has the Law Society had notice of this application?]

Mr. Van Zyl: I am not instructed.

De Villiers, C.J., in giving judgment, said: Under all the circumstances, the Court will grant an order. The Law Society does not appear to oppose. The applicant has undergone sentence and served his imprisonment for 2½ years, and been suspended from practice for nearly three, and under all these circumstances, an order will be made.

[Applicant's Attorneys: Michau and De Villiers.]

Ex parte THE EXECUTORS OF THE ESTATE GARDNER.

Mr. Buchanan, on behalf of the petitioners, applied for leave to raise £1,100 on mortgage, in order to carry out necessary repairs and alterations to the buildings situate at Mowbray.

[De Villiers, C.J.: Why is the property not sold?]

Mr. Buchanan: The survivor is a usufructary.

Order granted as prayed.

Ex parte WOLFF.

Mr. Close moved for the release of petitioner's estate from sequestration. Counsel stated that the petitioner made a voluntary surrender of his estate to his creditors. At the first meeting of the creditors, held at Oudtshoorn, debts were proved to the amount of £1,151, and at the second meeting, debts were proved to the amount of over £3,000. At the second meeting, an offer was made by some friends of the debtor, and this was accepted by the creditors, who decided not to proceed further with the sequestration, inasmuch as their claims had been settled. The petitioner had not been able to deal with the assets of the estate, as they were still vested in the hands of the Master of the Supreme Court. The difficulty, said counsel, was that all the sections in the Insolvency Ordnances dealing with the release of property said that it was to be done after the third meeting had been held. That meeting must be called by the trustee, but in this case no trustee had been elected.

De Villiers, C.J.: Under the special circumstances, an order will be granted as prayed.

Ex parte VAN DER WALT.

Mr. C. W. de Villiers moved, on behalf of petitioner, who was the father and natural guardian of certain minors, for leave to transfer certain property at Steynsburg. The property in which the minors were interested was situate near the Dutch Church; a certain lady wanted this, and she was prepared to give in exchange property adjoining the greater portion of the petitioner's land. The exchange would be to the advantage of the minors. The Master reported favourably.

Order granted as prayed.

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice), and the Hon Mr. Justice MAASDORP.]

Re ESTATE EATON, GOODSON AND ANOTHER v. BATHGATE. } 1903. May 8th.

The Registrar informed the Court that, in accordance with the 116th and 337th Rules of Court, the High Sheriff reported that on the 6th May, 1903, the sale of immovable property attached in this matter was held at Claremont, in the division of the Cape, before Johan Carel Hinsbeeck, as Commissioner, but the said property was not sold, as the highest offer, made by one Simon Westermann, namely, £1,560, did not reach the reserve price fixed under the 113th Rule of Court, namely, £1,900. The High Sheriff recommended that this offer of £1,560 be accepted, and that the sale to Simon Westermann be confirmed by the Court. On the first occasion the highest bid was £1,010. The bonds on the property amounted to £1,850.

The Chief Justice: What do the bondholders say?

The Registrar: They desire that the sale may be confirmed, my lord.

Order granted as prayed confirming sale.

TREVOR v. CHETTY.

This was an action for the transfer of certain property or for damages. Sir H. Juta, K.C., appeared for the plaintiff and Mr. Alexander for the defendant.

Mr. Alexander applied for a postponement on the ground of the defendant's illness. He stated that he was prepared to prove this by the evidence of the defendant's brother and the doctor attending him.

Sir H. Juta: I see no reason why the plaintiff's case, at any rate, should not go on. All his witnesses are here.

[De Villiers, C.J.: Are they not all Cape Town witnesses?]

Sir H. Juta: Yes, my lord. It might simplify matters if the plaintiff's case were opened, because there is an important legal question raised as to whether

any evidence can be given at all by the defendant. The action is brought for transfer of certain property or for damages, and the declaration alleges that a sale took place on a broker's note that the defendant signed, and that broker's note contained a statement that the property consisted of buildings and lands numbered 1 to 19, Alfred-street. Upon the transfer being passed, it was discovered that numbers 17 and 19 in Alfred-street were not contained in the transfer, and the plaintiff now sought transfer of those portions or damages.

The defence set up was that the terms of the contract were incorrectly stated in the broker's note, and that the properties in dispute were not included in the contract, purchase, and sale.

Mr. Alexander said he did not see that anything could be gained by going into the case that day. The defendant was unavoidably absent.

The Chief Justice: What about the costs of to-day?

Mr. Alexander replied that he thought the costs should be costs in the cause. Owing to the defendant's illness, he had been unable to have a consultation with him.

Sir H. Juta said he was quite prepared to admit that the defendant was ill. If he could not come to the court, then he (counsel) did not see why the plaintiff should have to pay the costs of that day.

The hearing of the action was set down for Saturday, May 23, any additional witnesses' expenses occasioned by the postponement to be paid by the defendant, and the question of other costs to stand over.

BUDGE AND ANOTHER v. BUDGE. ESTATE BUDGE. 1903. May 8th.

Mutual will—Adiation—Acquiescence—Kinderbewys.

By the mutual will of the testator and his wife, who were married in community, they appointed the survivor and their eight children as heirs of the first dying, and directed that the survivor should have the usufruct of the joint-estate, and that on the death of the survivor the joint-estate should be divided between the children. The wife died in 1875 and the testator remained in possession of the joint-estate, and about a year after her death, when he was about to re-marry, he framed an account and passed a deed of kinderbewys for the amount of his children's maternal inheritance after deducting his own child's portion under the will. Some of the childrens' maternal portions, including that of the plaintiff, who was one of the children, remained unpaid until the death of the testator, which took place in 1902.

Held, *that there was sufficient proof of adiation on the part of the testator, and that the plaintiff, who had never seen the account or the deed of kinderbewys, was entitled to claim his one-eighth share of the joint-estate on the death of the testator, and that his delay in making his claim could not be construed into acquiescence, seeing that he was justified under the will in not making his claim to any part of the joint-estate until after the testator's death.*

This was an action brought by George Thomas Erith Budge (eldest son of the late George Ryall Budge and Ann Budge) and George William Steytler (executor dative in the estate of the late Ann Budge) for a declaration of the first plaintiff's rights.

The declaration showed that the late George Ryall Budge and Ann Budge were married in community of property. That marriage was ended in December, 1874, by the death of Ann Budge. There was a joint will of the testator and Ann Budge, his first wife, dated April 23, 1868, which, at the time of the death of Ann Budge, was in full legal force and effect. The joint will of April 23, 1868, provided that at the death of the first dying, the survivor should have the life usufruct of the estate, with equal shares

for the children already born, but the will contained a penal clause to the effect that, in case any of the heirs required that his share should be realised and paid to him, he should be cut off, not with the full share that he would be entitled to at the death of the survivor, but with the smallest legitimate share that the law permitted. There was nothing in the will as to what was to take place on the re-marriage of the testator. The testatrix, Ann Budge, died in December, 1874, and the survivor was appointed sole executor under the will. He took out letters of administration in January, 1875. He filed no account, and he did nothing to indicate any repudiation of the joint will until the surviving spouse entered into a second marriage, which took place in January, 1876, he filed an account dated December 24, 1875, purporting to be a liquidation and distribution account, in which he valued the estate. There was no realisation of the assets. The executor awarded half to himself, and also awarded a child's portion to himself, and then shortly afterwards passed a Kinderbewys for securing the inheritance of five minor children, and secured to them thereby a sum of £98 odd upon that account. At no time during the lifetime of the executor did the first plaintiff, George T. E. Budge, receive any sum out of his mother's estate. The testator, George Ryall Budge, died in 1902. He had in 1898, having been married without community of goods to his second wife, made with her a second will, the validity of which was now questioned, in so far as it proposed to touch the assets in the joint estate of the testator and his first wife. Testator died in September last, four years after making that will with his second wife, and the present defendants were appointed his executors testamentary under the will of 1898. The second plaintiff, G. W. Steytler, was thereon, at the instance of the first plaintiff principally, as a heir in the estate, appointed as an executor dative in the estate of Ann Budge, the first wife, and he was joined to the action with the first plaintiff, who asked for a declaration of rights. There were valuable assets in the estate of the late George Ryall Budge and Ann Budge, in the hands of defendants, who unlawfully and wrongfully refused to recognise the rights of the plaintiffs. Plaintiffs asked that the joint estate of George Ryall Budge and Ann Budge should be realised under the joint will of April 23, 1868, and also for a declaration that the first plaintiff was entitled to receive a one-eighth share of the assets of the said joint estate. A further order was sought, declaring that the second plaintiff was entitled to join with the defendants in realising and administering the assets of the joint estate. In the alternative, in case their lordships held that there was no ordination, they asked for an order, declaring that the second plaintiff was entitled to receive and administer the half of the assets of the said joint estate, as executor dative of the estate of the late Ann Budge, and compelling the defendants to account for the same, and also an order declaring the plaintiff entitled to receive an eighth of the realised value of the half of the said joint estate of his parents. As a further alternative, judgment was sought for the plaintiff for the sum of £38 17s. 11d., and for one-eighth of the sum of £98 17s. 11d., awarded for the executor testamentary of the late Ann Budge to her surviving spouse, the late George Ryall Budge. The defendant's plea denied adiation and acceptance of benefits.

Mr. Schreiner, K.C. (with him Mr. Close), for the Plaintiffs; Sir H. Juta, K.C. (with him Mr. Russell), for the Defendants.

The matter, said Mr. Schreiner, was largely one of construction. He put in various documents, and especially called their lordships' attention to the second will, executed in 1898 by both Mr. Budge and his widow. There were two wills. The testator, in his will, desired that his children, with Edith Burn, should take an immediate distribution of one half, and the other half remained subject to a life interest in favour of his widow. The plaintiff's contention was that so far as the assets of the joint estate were concerned those assets were massed, and that the survivors adiated and accepted benefit.

[Maasdorp, J.: What did the first estate consist of?]

Mr. Schreiner: Landed property largely There is considerable property, valued at over £5,000, which were assets at a time long before the death of Mrs. Ann Budge. My client lived away at East London, and hardly ever saw his father, but there was property that was realised and sold. There was a farm,

Rocklands, beyond Simon's Town, and there was a farm on the hill, and also some property in the town. The testator had also acquired some property in the town There are two sets of property involved—the property acquired after the death of the first wife, now remaining, and the property acquired before.

George Thomas Erith Budge, first plaintiff, and eldest son of the late George Ryall Budge, said that until the age of 21 he lived with his father, and he then went to live with his uncle, Mr. Lindsay, through whom he received 400 sheep from his father. Occasionally, he paid visits to Simon's Town, and was there before his mother's death, and was also present at his father's death. He never received anything from his father, on account of his portion under his mother's will.

[De Villiers, C.J.: What was the value of the sheep?]

Between 4s. 6d. and 5s. each.

He never had any communication about the sheep from his father, although he understood they were a gift from him, and he wrote in return thanking his parents. When he heard about the will, he came and saw it at the Master's Office. During his lifetime he never made any demands on his father. When the second will was read at Simon's Town he immediately protested.

Cross-examined by Sir Henry Juta: He never heard from his sisters that they had had some money on account. He could not say why he never had the farm Bossisveld left to him by his grandfather. He denied asking his father for money in 1890, in the presence of his brother. When his father sold the farm, witness expressed his satisfaction, but he denied ever having been told by his father that he could have the farm if he paid the mortgage. He had legal advice in 1890 about the farm, but on nothing else.

[De Villiers, C.J.: You said you took advice on the lot?]

Witness: I took advice principally on the farm.

[De Villiers, C.J.: Did you take advice on the will?]

Witness: No, my lord; I took no advice on the will.

[De Villiers, C.J.: Well, that is a mistake, then.]

In further cross-examination, plaintiff said that he did not go to see his mother's will with a view to getting money. He had been to see his father since 1890, but never heard that his brothers and sisters had been paid. Mrs. Runciman was the only one of the family he was aware of who had been paid out of his mother's estate.

Re-examined by Mr. Schreiner: It was his grandfather's will, under which he was entitled to Bossisveld, that he took advice upon, and not his mother's will.

Jane Elizabeth de Villiers, eldest daughter of the late Geo. Ryall Budge, said she received £100 eleven months after her mother's death. She never gave a receipt for the amount, and she did not know at the time that it was her portion from her mother's will. When the first plaintiff came to see her she advised him not to claim anything under his mother's will, otherwise he would not get anything at his father's death. The day after the will was read none of the family would give her eldest brother (plaintiff) a hearing.

Cross-examined by Sir Henry Juta: She thought that the plaintiff was going to make a fuss about her grandfather's will. She did not know why she advised her brother not to claim anything under his mother's will.

Re-examined by Mr. Schreiner: She could not exactly say when she told her brother that she had been paid.

This closed the evidence for the plaintiffs.

For the defence, Sir Henry Juta called,

John Wm. Budge, son of the late Geo. Ryall Budge, who said that he had received his share under his mother's will. About 1890 he said he was aware that some of his brothers and sisters had been paid their share under his mother's will George came up from King William's Town after his mother's death, and asked his father about his share under his mother's will. His father said that he had had that. He next asked his father about the farm, and his father said that if he paid off the mortgage he could have it. He wanted to set up in the wheelwright business, and wanted money from his father.

Cross-examined by Mr. Schreiner: He could not say what the farm was sold for.

Re-examined by Sir Henry Juta: He did know of his own knowledge that

George had had any money from his father. The sheep were mentioned at the table in general conversation.

George Runciman, one of the executors in the estate of the late George Lyall Budge, said that all the children, with the exception of George, had been paid their inheritance under their mother's will. The property that was in existence at the death of the first Mrs. Budge had since been realised. At the death of the first Mrs. Budge there were a number of mortgages which had been paid off by the time of Mr. Budge's death.

Cross-examined by Mr. Schreiner: As executor he paid the last witness his mother's portion in 1902. He did not get any receipts from the three majors at the time of the death. He never had any receipt from the last witness. He could not say that Rocklands, Simon's Town, was owned by the plaintiff's father before the death of the first Mrs. Budge. The late Mr. Budge was very reticent about his transactions, and witness knew nothing of Bossisveld having been sold and transferred in 1874. According to the list he had filed if the Court were to hold that the joint estate was to be administered there would be considerable assets.

[De Villiers, C.J.: Isn't it possible that part of these properties were acquired by means of the proceeds of the property in the first estate?]

Witness: I cannot trace any books to that effect, my lord.

[De Villiers, C.J.: You cannot say it is not so?]

Witness: I cannot say it is not, my lord.

Mr. Schreiner: The joint will speaks for itself as to the merits of this case. It does contain a penal clause, but it does not penalise the second marriage. The will certainly shows that the joint estate was massed, and that there was a gift over to the survivor. No doubt any one of the children might have been entitled to get a child's portion from the estate of the first dying, but only his or her bare *legitime* out of the rest of the estate. If, then, the defendant adiated, what can be said against our claim? Then in 1898 Budge made a second will. In 1874 and 1875 he had enjoyed the usufruct of the whole estate for his Kinderbeways referred only to the estate of his deceased spouse, and undoubtedly complied with the provisions of Sec. 1 of Act 12, of 1856. But the point which settles the fact of adiation is that he awarded himself a child's portion under the will. An account should have been framed, but a detailed account could not possibly be framed after the lapse of some years. If the defendant wished to repudiate his benefits under the will he should have refused his child's portion, and apportioned the estate among the children. *Watson* v. *Burchell* (9 Juta, 2). If the survivor does not adiate he cannot take even his interest as an heir. Again, had he not adiated, he would have paid out the mother's portion as soon as any one of the children attained majority or married; but some of these portions were not paid out till long after his death. Clearly George Budge was not a *persona grata* in the eyes of his father, and I, therefore, submit that the father would never have paid him £98 without taking a receipt for this money. Let Messrs. Steytler and Runciman frame an account and administer the estate.

[De Villiers, C.J.: Would it not be better for the parties to agree upon a certain sum?]

Certainly, but here are considerable assets brought into question, and they should be followed up. A mere rough valuation made in passing a Kinderbewys cannot be held to bind the heirs for all time. The value of the estate of the deceased spouse should be brought up as it was at the survivor's death.

Sir H. Juta (for defendants): The principal point in this case is—was there such an adiation under the joint will as would prevent the survivor from making another will? The meaning of adiation is that the survivor means to support the joint will. The fact that the survivor accepts a child's portion is no proof of adiation.

[De Villiers, C.J.: Can a man adopt a will in part, and dispute it in part?]

Not, if he understands what he is doing; but this transaction took place in 1875 when the rules of law were not as well known as they are at the present day. The whole conduct of the defendant is inconsistent with adiation, save that he took a child's portion. But then he pays off a very heavy mortgage, and would he have done that if he thought he was to get only a life usufruct out of the property. Then, again, why should he pay out the children's portions of the mother's share if he was entitled

to the usufruct of the whole estate? As to the passing of the Kinderbewys, that is rather a proof that the defendant did not adiate than that he did.

[De Villiers, C.J.: Well that cuts both ways.]

If the defendant had adiated there would have been been no need of a Kinderbewys (See Section 1 of Act 12 of 1856), for nothing would have been due to the children till the death of the survivor.

[De Villiers, C.J.: When did Budge die?]

On the 11th of December, 1874.

[De Villiers, C.J.: Then does it not raise a presumption of adiation if he remained in possession of the whole estate?]

He did not remain in possession of the whole. He paid out the children's portions, and paid off a mortgage (in all about £1,500). It is not necessary to go by what he did within the first few months after his wife's death; we must be guided by the whole of his conduct during his lifetime.

[Maasdorp, J.: No, he may have changed his mind.]

The burden of proving adiation is on the plaintiff. See *S.A. Association* v. *Mostert* (Buch. 1868, 286; 1869, 231; and 1873, 31; L.J.P.C., 41). There Mrs. Mostert gave up part of the will. But, if the court is not with me as to adiation, we say that Budge did not consider himself bound by this will, but still considered that he was entitled to the share left him under the will. See *Van Rooyen* v. *Gorman* (6 Juta, 55) and *Silver* v. *Silver's Executors* (5 Juta, 29), where see particularly the judgment of De Villiers, C.J. It is not to be presumed that a man has surrendered his rights unless some definite act by which he has done so can be proved. *Williams* v. *Williams and Others* (12 S.C.R., 392), where see the judgment of De Villiers, C.J., at p. 398. Some of Budge's evidence (e.g., as to his looking up the will) is quite incredible, and now, after 29 years, he, having been then a major, cannot come in and upset all that has been done.

[De Villiers, C.J.: But if the never received his share, is he not entitled to it now?]

He is entitled to his £98 if he has not received that, but it is very difficult to make up satisfactory accounts since 1875.

In any question as to adiation each case must be judged on its own merits. The conditions for adiation laid down in Silver's case are all present here. It is quite a new doctrine that a man need not file a Kinderbewys if he has adiated.

[After Counsel had argued at length on the facts of the case:—]

De Villiers, C.J.: The real question to be determined in this case is whether the late Mr. Budge adiated in terms of the mutual will, which had been previously made by himself and his wife. She died on December 11, 1874, and no account was framed by Mr. Budge until December, 1875. In that account he awarded to himself one half of the property held in community, and in addition to that awarded to himself a child's portion. If there had been no will he would not have been entitled to any child's portion at all. Now, it would appear to me in the present case that the Court should hold that there has been adiation. It has been held, and I think correctly held, especially in the case of Silver and Silver, that adiation must be unequivocal, and in the present case I am of opinion that it was unequivocal. The facts to prove such adiation are threefold. In the first instance there was no account framed within six months as required by law, and after the expiry of six months the testator remained in possession of the joint estate, as he is authorised to do by the will. This is one circumstance. The next circumstance is that when he came to frame the account he awarded to himself a child's portion due to him as heir. That could not have been done except under the will. The will gave him a child's portion, the first portion of the will, and it could only be because he adopted the will and intended to act on the will that he awarded himself that amount. The third circumstance to be borne in mind is that even after the deed of kinderbewys had been executed the testator did not at once proceed to pay out the shares to the major children. He had paid a certain amount by way of advance to Mrs. De Villiers before his re-marriage, and it was only after such re-marriage that he informed her that that payment was made as a portion of the maternal estate. In regard to the other children, he did not pay them all as they became of age, and in point of fact several of those children

remained unpaid until the testator's death. As to the plaintiff, at all events, he never got paid, and the conduct of the testator towards him was quite consistent with his adoption of the will, and quite inconsistent with the alleged repudiation. The only circumstance in the present case which is inconsistent with such adiation is that by this account and the deed of kinderbewys, the testator awarded to himself a half share as coming to him by virtue of community of property. No doubt, that is a circumstance to be borne in mind, but in my opinion this was simply done for the purpose of complying with the law as to a deed of kinderbewys. I find that this is simply a printed form of the deed of kinderbewys which was employed in the present case, and I do not consider that this circumstance, taken, by itself, would justify the Court in throwing aside all the other circumstances of adiation, and coming to the conclusion that there was an intention on the part of the testator not to abide by the will. This being the view of the Court the plaintiff would be entitled to succeed, unless he has done anything by way of renunciation of his rights, or has acquiesced in the acts of the testator. There is no proof whatever of any such reunciation or acquiescence. The plaintiff has never received his inheritance, he has never seen the account, he has never given any receipt for the proceeds which ought to have been given to him, and in that way acknowledged that he has received anything from his father. And in the absence of any renunciation on the part of the plaintiff, he is still entitled to succeed, notwithstanding the lapse of time. Under ordinary circumstances, no doubt, lapse of time may debar the plaintiff, and might be proof of acquiescence, but in the circumstances of the present case I do not think that the lapse of time can in any way affect the plaintiff's case, because the plaintiff knew the terms of the will, and he knew under that will his father was entitled to remain in possession of the joint estate, and therefore he was quite justified in remaining quiet and in not pressing for the settlement of his claim until his father's death. At the same time, considering that the plaintiff is the only person who, so far as the Court can judge at present, is interested in having all the proceedings set aside, and having a further administration of the estate of the deceased testator I consider that it is unnecessary to make an order in terms of the first prayer of the declaration, an order declaring that the assets of the said estate shall be realised and distributed in accordance with the provisions of the joint will, dated April 23, 1868. That can stand over for the present. I think the plaintiff is entitled to an order in terms of prayer (b), "Declaring the first plaintiff to be entitled to receive one-eighth of the assets of the said joint estate, or of the realised value thereof." If it is impossible to realise it without calling in the aid of the second plaintiff, then possibly it may become necessary to grant a further order, declaring that the second plaintiff is entitled to join with the defendant in realising and administering the assets of the said joint estate, but I should think, after an expression of the opinion of the Court, there ought to be no difficulty on the part of the plaintiff and defendant in coming to some terms. The only question that may arise on the part of the defendant is as to what would be the amount to which the plaintiff would fairly be entitled under the order of the Court, and if they do not come to terms, then it may become necessary for the Court to make an order in terms of prayers (a) and (c). For the present I think there will be no order upon them, reserving to the Court the right to make an order in case the parties should not come to terms of prayer (b) of the declaration. As to the costs, I think they may fairly come out of the joint estate.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller; Defendant's Attorneys: W. E. Moore and Son.]

COLONIAL GOVERNMENT V. COATON AND LOUW.

Mr. Upington, on behalf of the defendants, mentioned the case of the Colonial Government against Coaton and Louw, concerning alleged underpaid carriage. (See 12 C.T.R., 752). Counsel said that he had witnesses in court from Wellington, who would be prepared to give further evidence. The case had been part heard, and then the questions of account, figures, and so forth was referred to Mr. Nash, who had now presented his report. He might state that the defendants had tendered to the Government the balance of £5,481 9s. 4d.,

which the accountant found to be due to the Government, with costs to date of tender. That had not been accepted.

Mr. Schreiner (with him Mr. McGregor) said that this was a case in which the Government were extremely desirous that the finding of the accountant should form a judgment of Court.

[De Villiers, C.J.: Upon the question of mixing Colonial and imported produce?]

Mr. Schreiner: Yes; it is not so much a matter of the lump sum to be paid as the moral effect which a pronouncement in open Court would have. The Government are wishful that there should be nothing bearing a semblance of settlement out of Court.

[De Villiers, C.J. (to Mr. Schreiner): Could not the case be settled at once by giving judgment for the amount of £5.481 9s. 4d., with costs to date of tender.]

Mr. Schreiner: We are prepared to go on with it on the understanding that it should be a judgment of Court. Counsel added that the accountant had given the defendants full credit for all their Colonial produce having been sent by rail. That, he thought, was hardly probable, but he admitted that Mr. Nash could have hardly done better with the material before him.

Mr. Upington said that Mr. Nash expressly pointed out that it was to the advantage of Messrs. Coaton and Louw to have sold all their imported produce locally, and not have sent it away by rail.

De Villiers, C.J.: In this case, which was heard by my brother Buchanan and myself, there was the evidence of Floyd, the first witness, which was certainly very clearly given and very damaging to the defendant. He was positive that it had been the regular practice at the defendants' establishment to mix the Colonial and imported grains, to grind them together, and then to send them upcountry as Colonial meal and Colonial flour, and if his evidence had been corroborated by other trustworthy witnesses it would have been difficult for the defendants to escape liability for the full amount of the claim. But Floyd was not corroborated, and witness after witness was called who denied any practice of this kind. The impression upon the minds of both the judges, who heard the evidence thus far, was that it would be extremely dangerous, upon the uncorroborated testimony of that witness, to find the defendants guilty of the gross fraud imputed to them. The case was not proven, and there would be absolution from the instance. The proof is not satisfactory, and therefore, while I do not wish to say that in the opinion of the judges Floyd was saying what was intentionally untrue, I consider that without some corroboration it would not be safe to act upon his testimony, as opposed to that of the defendant's witnesses. It is admitted, however, that wheat had been sent by train as Colonial wheat which really was imported wheat, and there was a tender for £4,800 or some similar amount. The matter, however, was referred to Mr. Nash, the accountant, and he has found that there is no proof of the mixing, but that there would still be due to the Government the sum of £5,481 9s. 4d. in respect to imported wheat, which was sent as Colonial wheat. For that amount, at all events, the Government is entitled to judgment, with costs up to the date of tender, which was on the 4th May, 1903. Any costs subsequently incurred, which must be comparatively trifling, must, of course, be paid by the Government, but the main costs in the case will be paid by the defendants.

[Applicant's Attorneys: Reid and Nephew; Respondents' Attorneys: Van Zyl and Buissinné.]

FAISHT v. COLONIAL GOVERNMENT. 1903. May 8th.

Pleading — Replication — New cause of action.

The plaintiff by his declaration claimed damages from the Cape Railway department for non-delivery of certain luggage at Johannesburg. The plea alleged that the luggage had been duly conveyed to Johannesburg and there according to custom left in the custody of the Transvaal Railway department, and that by plaintiff's direction the Transvaal department was requested to return the luggage to Cape Town. The plaintiff

then by his replication alleged that the defendant had contracted for hire to deliver the luggage at Cape Town.

Held, *that such new matter raised a fresh cause of action, and that, as the declaration relied upon a contract to deliver at Johannesburg, the plaintiff could not by his replication raise a claim based upon a contract to return the goods to Cape Town.*

This was an argument on exceptions. The plaintiff's declaration alleged, *inter alia*, that he had entrusted to the charge of the Cape Government Railways certain passenger's luggage, to be by them conveyed from Cape Town to Johannesburg, and that the defendants had only re-delivered a portion thereof to the plaintiff at Cape Town. The defendants' plea admitted that they had received the said luggage, but said that they had carried it safely to Johannesburg, and that as plaintiff was not there to claim it, the defendants placed it, in accordance with custom, in the custody of the Central South African Railways, to whom the Park Station at Johannesburg belongs, and who duly received the same for and on behalf of plaintiff. That thereafter plaintiff asked that the said luggage should be returned to Cape Town, and defendants accordingly requested the Central South African Railways to so return it, and such portion as was so returned was duly delivered to the plaintiff. Plaintiff's replication said that defendants contracted with him to carry the said luggage back to Cape Town, and there safely to deliver the same to the plaintiff, but that defendants in breach of the said contract did not so safely deliver the same, but only a portion thereof. Plaintiff said his sole contract was with defendants, and with no other, and that if the luggage was received and accepted by the Central South African Railways, the said Railways acted as the agents of the defendants and not of the plaintiff. To this replication the defendants now excepted, as being embarrassing and bad in law.

Mr. Schreiner, K.C. (for the exceptors): The replication sets up quite a different case from that disclosed by the declaration. The latter claims damages on the ground that the goods were not safely delivered at Johannesburg. The replication claims damages on the ground that they were not brought back and re-delivered at Cape Town.

Mr. Wilkinson (for the respondent): See *Scothorn* v. *South Staffordshire Railway* (8 Exch., 341).

[De Villiers, C.J.: But does the point in that case turn upon a question of pleading?]

It affects the question at issue to this extent, that it was there decided that if a Railway Company contracts to convey goods from A to B over its own line, and then hands them over to another company to be conveyed from B to C, and the consignor thereupon requests the first of these companies to return the goods to him and this said company directs the second company to return them from C to B that they may be forwarded to A, this second company acts throughout as the agent, not of the consignor but of the first company, and the contract which this first company tacitly makes with the consignor to return his goods is really an extension of its original contract to deliver the goods at C. That case is on all fours with the present case, and if the decision there is law, it is clear that our replication, while it may introduce fresh matter, does not disclose any new cause of action. We had no knowledge of the Central South African Railways in this matter, there was no privity of contract between us, and whatever they did they did merely as the agents of the defendants.

Mr. Schreiner was not called upon in reply.

De Villiers, C.J.: It often becomes necessary for a plaintiff, in order to meet the plea of the defendant, to allege new matter, and a mere allegation of new matter is not necessarily "embarassing." But the plaintiff cannot by his replication set up an entirely new cause of action, and that is what the plaintiff has done in the present case. His original cause of action was in respect of the non-delivery to the plaintiff of certain luggage at Johannesburg. He alleges that the defendant undertook to carry the luggage to Johannesburg, and there deliver it to the plaintiff, that the defendant has not delivered the same

to the plaintiff, but only a portion thereof, and that he has either lost or retained the remainder. Then, the defendant, by his plea, says that the luggage was taken to Johannesburg, and there, in accordance with custom, placed in the charge and the custody of the Central South African Railways, and that the plaintiff thereafter asked that the luggage should be returned to Cape Town, and the defendant accordingly requested the C.S.A.R. to return the luggage to Cape Town, and that a portion of such luggage was thereafter returned, and duly delivered to the plaintiff. Then, in his replication, the plaintiff says that the defendant contracted for hire with the plaintiff safely to carry the said luggage back to Cape Town. That is new cause altogether. In my opinion, it would be exceedingly embarrassing to the defendant if this new cause of action were allowed, so long as the declaration stands. The better course for the plaintiff would have been, when he discovered the mistake, or saw what the true circumstances were, to have applied to the defendant to allow him to amend the declaration. If he refused, application might have been made to the Court to amend the declaration, so that there might not be two opposing causes of action by the same plaintiff in the same action. The replication clearly is bad, so long as the declaration is unamended, and the exception must be allowed, with costs.

[Attorneys for the Exceptor: Reid and Nephew; Attorney for Respondent: C. W. Slaughter.]

SUPREME COURT

[Before the Chief Justice (the Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

REGISTRATION APPEALS. { 1903. May 11th.

The Chief Justice stated that it would be necessary to fix a day for the hearing of the registration appeals, for which purpose there would be a full Court, and the only day available would be the 22nd May. In consequence, the trial cases set down for that day would be postponed, viz., Robertson v. Moss, Lazar v. Harbour Board, and Spiegel v. Eilenberg. They were Cape Town cases, so that they might be postponed until the following week. Robertson v. Moss would be set down for the 2nd June, Lazar v. Harbour Board for the 3rd June, and Spiegel v. Eilenberg for the 4th June. The rest of the cases for that day were appeals from R.M. courts. Then some of the other cases standing in the list might be postponed. To-morrow (Tuesday) there were a large number of cases in the list. Steyn v. Zeeman would probably take some time. The case of Masterton v. Bray and Tarry would be taken first. Domingo v. Tonkin would be taken on June 8, Black v. Kaiser on June 9, and Harbour Board v. Sacks and Christ and Cumes on June 10. On Wednesday the Court might sit in two divisions.

STEVEN V. STEVEN.

This was a suit for divorce instituted by John Steven, an engine driver, of Cape Town, against his wife, Mary Maggie Steven (born Thomson), of Maxwell Town, Kirkcudbrightshire, Scotland, on the ground of her adultery.

The petitioner had obtained leave in this Court to sue by edictal citation, and the return day was fixed for the 1st May. In the edictal citation, which was personally served on the defendant, the return day was correctly stated as the 1st May, but on the notice of trial the return day was stated as the 23rd April, and the day of trial May 1. That was served on the defendant on the 26th February, so that she had time enough to enter an appearance. The defendant was at present in Scotland. The trial day had subsequently been altered.

The notice having been read, the Chief Justice said counsel might proceed with the case.

Mr. Russell for plaintiff; defendant in default.

The plaintiff stated that he was an engine driver in the Municipal quarry. He was married to his wife Mary Maggie Thomson, on the 26th June, 1885, at Holywood, Dumfriesshire. They lived together until November, 1896, and there was issue of marriage of three children, a boy and two girls. He left Scotland in that month for South Africa to better

his position. He had never been back to Scotland since then. His intention was to settle in South Africa, and he had regularly sent money to his wife. In July, 1900, he made inquiries about certain reports he had heard, and found that the defendant had committed adultery with some person unknown, and as a result she had an illegitimate male child on the 26th September, 1900, at Maxwell Town, Kirkcudbrightshire.

[De Villiers, C.J.: Why didn't you send for your wife when you got work?]

I was not in a position, my lord.

[De Villiers, C.J.: You sent her money regularly. How much did you send her?]

Witness: £3 10s. and £4 a month, my lord, according to my wages.

Mr. Russell then adduced further evidence taken on commission, notice of which had been sent by registered letter to the defendant. The sworn testimony of Andrew Steven, brother of the plaintiff, was read, which stated that in consequence of talk he had heard in Glasgow of a scandal at Maxwell Town about the end of 1900, he proceeded there, and found his sister-in-law enceinte.

[De Villiers, C J.: I see in the register of births the child is given as illegitimate?]

Mr. Russell: The father's name is not given, my lord.

Decree granted as prayed.

RAPLEY V. RAPLEY.

This was an action brought by Lena Rapley, of London, England, against her husband, Wm. Rapley, late of Stellenbosch, for the restitution of conjugal rights, or, failing compliance, for a decree of divorce with custody of the three children of the marriage, and maintenance at the rate of £15 a month.

Mr. Upington appeared for plaintiff; defendant in default.

The petitioner, Mrs. Lena Rapley, stated that on the 9th August, 1886, she was married to the defendant at Tunbridge Wells, England. Shortly after, she came out to Pretoria with her husband in 1888, where her husband entered into partnership in a broker's business. Her health was not good, and she returned in 1889 to England. Her husband returned home in 1900. Later on, they came out to Johannesburg. Shortly after, her husband lost all his money, and in 1891 they went to Natal, where her husband had a position as secretary to a club in Pietermaritzburg. He lost that position, and they again went to Johannesburg. In 1894 her health was again unsatisfactory, and she went to England, but her husband did not supply her with money, and she had to come to Johannesburg again. She again, however, had to go back to England on account of her health. About five months afterwards she received a remittance of £20, and later on one of £10. Since then she had not received a penny from defendant. She had not had letters from her husband since 1897, except only occasionally. She had written to him repeatedly, asking him to take her back, but he declined, and said that he preferred to remain a bachelor. Her correspondence was now in the hands of her attorneys in England. Since the issue of the summons and the filing of the declaration, the defendant had not made any offer to her. Since 1895 she had maintained herself and family with the aid of friends. Her family—three girls, aged 16, 13, and 10 years—were under the care of a convent until she returned. She had written to her husband at Fraserburg, where he was Commandant, asking him to take her back. She came out to the Cape about three weeks ago in the Walmer Castle.

[By De Villiers, C.J.: She had earned her livelihood on the stage acting and reciting, and at times giving lessons in elocution. She was not strong now. She did not know whether her husband had any means.]

Mr. Upington: As a matter of fact he has taken the farm Amoy, at Stellenbosch, in partnership with another gentleman.

George Holker, of the farm Amoy, Stellenbosch, said he entered into a lease of the farm in partnership with the defendant, Wm. Rapley. They had taken the farm for 19 months, with the option of purchase.

[By De Villiers, C.J.: They supplied capital in equal amounts. Defendant had supplied between £300 and £400. They had been in business since last October.]

[Maasdorp, J.: Where is the defendant?]

I don't know.

The Court granted a decree of restitution of conjugal rights, defendant to return to or receive the plaintiff on or before the 31st May, failing which plaintiff should take a rule calling on the defendant to show cause on the 12th June why a decree of divorce should not be granted with costs, the plaintiff to be entitled to custody of the children of the marriage, and, further, why the defendant should not pay £8 per month for the maintenance of the children until the youngest child shall have attained the age of 16 years.

VAN DER POST v. TWYFELHOEK DIAMOND PROSPECTING SYNDICATE. 1903. May 11th.

Evidence — Surrounding circumstances — Interpretation of written agreements.

The defendant purchased a certain farm from the plaintiff, and by two written agreements it was agreed that a portion of the price should be paid in cash, and that, as to the balance, it should be paid within six months in case tranquillity should be restored, but that in any case a bond for the amount should be passed. After tranquillity had been admittedly restored a third agreement in writing was entered into, providing that the provisions of the two previous agreements should be considered as therein inserted word for word, and that a bond for three years certain should be passed.

Held, *that the three agreements should be construed as a whole, and that those provisions of the two earlier documents which were in conflict with the latest document were intended to be superseded.*

Held further, *that even if the matter were in doubt, the fact that tranquillity had been restored at the date of the latest document was one of those surrounding circumstances which may be taken into consideration for the purpose of ascertaining the intention of the parties.*

This was an action brought by Christian Wilhelm van der Post, of Stellenbosch, and late of Fauresmith, O.R.C., to have an agreement cancelled into which he had entered with the defendant company for the sale of certain lands.

The declaration set forth that on or about 3rd December, 1901, a written agreement was entered into between the plaintiff, who resided at Stellenbosch, on the one hand, and one Isak Bosman, acting for himself and for other persons, afterwards to be constituted a syndicate, on the other hand, in which the said Bosman obtained the option of purchase for the sum of £10,000 of a certain farm in the Orange River Colony, the property of the plaintiff, upon certain terms set forth in the said agreement. In terms of the said agreement certain sums of money were from time to time paid to the plaintiff by Bosman for the said refusal or option. About 20th February, 1902, the terms and conditions of the said agreement (a) were altered by mutual consent, in a letter written by the plaintiff to Bosman on that date. Those agreements (a) and (b) constituted the contract between the parties. The syndicate was formed for the purpose of carrying out the agreements (a) and (b), and on April 9, 1902, the syndicate notified to plaintiff that it exercised the option of purchase under the said agreements; the time for the payment of the first instalment of the purchase price having been extended by plaintiff. An interdict was placed upon the transfer in March, 1902, by the military authorities, and the fact was duly notified to the defendant company. It was provided in the agreement (b) that on payment of the sum of £2,500, including all sums already paid for the refusal or option, the sale of the said property should be finally concluded. About March, 1902, plaintiff agreed to extend the time to May, 1902, when the defendants paid the sum of £2,500 It was further provided in (b) that the balance of the purchase money, viz., £7,500, should become payable within six months of tranquillity, or in any case, within three years. Another

document was submitted to plaintiff in July, 1902, and a clause inserted to the effect that the balance should be left on mortgage for three years, but subject to the stipulations in (a) and (b). Tranquillity was restored in July, 1902, and the balance became payable six months thereafter. The defendant company failed to pay the sum, and contended, by virtue of the clause in the agreement (c), that they were not called upon to do so for three years. The plaintiff claimed the sum of £7,500 with interest (tendering the transfer of the property), and further, if it appeared to the Court to be necessary, a rectification of the document (c), which, he contended, neither varied nor altered the agreements (a) and (b). Failing the above, he claimed a cancellation of all agreements between the plaintiff and defendants, plaintiff tendering to return all moneys paid by him or on behalf of the defendant syndicate in respect of the purchase price of the said property or interest.

The defendants' plea admitted the allegations up to paragraph 9, but denied that the agreement (c) was not part of the contract between the parties. The plaintiff entered into the latter agreement with a full knowledge of its contents. They denied the restoration of tranquillity on the date given, but admitted having received notice of it. They contended that they were not bound to pay the sum until the lapse of three years, and claimed in reconvention for the transfer of the property.

The replication was general.

Mr. Burton (with him Mr. Van Zyl) for the plaintiff; Sir H. Juta, K.C. (with him Mr. Benjamin), for the defendants.

Mr. Burton said that the pleadings and documents gave the gist of the question. It seemed that Mr. Izak Bosman wanted to get hold of an option on the farm Twyfelhoek, which belonged to the plaintiff, and subsequently he got the amendment made by the plaintiff contained in document (b). They would contend that the document (c) contained all that was in (a) and (b). The defendants stated that according to the terms of (c) they were entitled to give a mortgage bond, and to have payment of the balance of the purchase money deferred for three years. Counsel contended that six months after July 1 the money became payable.

[Maasdorp, J.: What is the meaning of "in any case" in (b)?]

He says once tranquillity was restored the money became payable within six months, and, in any case, if the war went on he was not to be kept out of his money any longer than three years.

[Maasdorp, J.: What does three consecutive years mean. Does it mean instalments?]

No, my lord.

[De Villiers, C.J.: What is your case, then? That he did not read this before he signed it?]

No, my lord. After the document (b) was signed the plaintiff was approached in the first place to give the defendant time for the payment of the first instalment of £2,500. Then the defendants, through their attorney, wrote to him in May, after they had paid the first instalment, saying that they wanted to register the syndicate as a company, and it was desirable to have a new contract. They sent him a draft of such a new contract. That draft contained practically the document (c) as it stood, with the insertion in the preamble of the words "subject to the stipulations in (a) and (b)." That alteration was introduced by the plaintiff himself.

The plaintiff, Christian Wilhelm van der Post, said he was a burgher of the late Orange Free State, and that he was for 15 years a member of the late Volksraad, and was chairman for some time. He lived at Fauresmith. He was allowed to come down to Stellenbosch on parole in September, 1901. He knew Mr. Izak Bosman. They entered into an agreement on the 4th December. He subsequently received a letter from Mr. Bosman on the 20th February, embodying the offer of £10,000, and witness sent in reply a letter containing the terms. On the 19th March his agents received a telegram from Mr. Bosman, stating that the syndicate would complete contract on the 31st March. Further correspondence took place. Witness spoke to an interview with Mr. Saber, one of the directors, and Mr. Bosman.

Sir Henry Juta (interposing) said he thought one might at this stage raise a question of some importance to the case. There was no allegation of fraud in the statement of declaration, and it was a little bit difficult to understand on what his friend proposed to erect his case.

His case was that there was a contract, so that no verbal evidence could be led as to what took place before it. If there were to be a rectification, there must be an allegation of fraud or mistake. Neither had been made in the present case. First, the contract must be construed simply as it stood, and then if there were to be a rectification there must be an allegation of fraud or mistake.

[De Villiers, C.J.: But is not that practically alleged?]

No, there is no allegation of fraud or mistake. The declaration contains no allegation that there was anything fraudulent about it.

[De Villiers, C.J.: No exception has been taken.]

I admit that; but the whole question is whether evidence is admissible as to anything which took place before this contract was signed. I submit it is not alleged that it is fraudulent, because, on the face of it, it is ridiculous to allege that it was fraudulent, inasmuch as he had the contract, and he made the additions to the contract himself.

[Maasdorp, J.: But is there not a mistake? Does it not amount to saying, "I signed one thing when I intended to sign another?"]

When a contract says A sells B a horse, then B cannot come and say that he *bona fide* believed that he was buying a cow. I am prepared to maintain that unless a person is illiterate, and he has no opportunity of reading a document, and as long as the words are plain and definite, unless you allege fraud or a mutual mistake, you cannot ask that that document should be altered.

[De Villiers, C.J.: But would not a mistake by default of another be sufficient? If one party brings a representation to bear on another man, and puts before him a document, and says it contains so and so, the latter says, "I signed it in the honest belief that it was correct." The person who induced him to have that honest belief could not take advantage of the mistake caused by his false statement.]

Mr. Van der Post had the document, and he made pencil alterations on it; the contract was drawn up in accordance with his own alterations, and he came into a solicitor's office and signed it.

[Maasdorp, J.: If he actually read it, he cannot now fall back on his being deceived.]

Yes, that is exactly what he did.

Witness (continuing) said that the interview took place on April 4 at Stellenbosch. Mr. Saber told him that, on account of the reasons already stated in the previous letter, namely, Mr. Rhodes's death and the Easter Holidays, he would have to wait a little while for payment of the first instalment. A sum of £800 was offered to witness, and he was told that he would have to wait for the balance of the first instalment. He agreed to wait for a reasonable time. Witness afterwards got a letter on the 7th April informing him that there would be a meeting of the syndicate, and on the 9th he received notification that the directors were authorised to proceed with the purchase of the farm on the terms arranged. Further correspondence ensued with regard to the payment of the first instalment of £2,500. On the 7th May, 1902, he received a letter from the defendants' attorneys enclosing a cheque for £1,250 and a receipt for £250 in respect of ten shares in the company. He had previously received £1,000. On the 12th May he returned the receipt for the ten shares until a proper certificate was issued to him, and he declined to execute a new memorandum of agreement which had been sent to him, on the ground that the syndicate were drawing a red herring across the track. They were proposing to make Bosman and himself cancel the previous contract, and enter into a new one. He informed them that they could not reasonably expect him to sign that document, seeing that it was contrary to existing documents. He received further letters on the 3rd and 12th June, and on the 17th June he agreed to sign an agreement drawn up in accordance with the alterations which he had made in pencil in the draft. On the 1st July he was in Cape Town, and he signed the agreement. He met Messrs. Saber and Irwin at the secretary's office on other business. When that business was completed, they asked him to accompany them to the office of Messrs. Van Zyl and Buissinne to sign a new agreement. He went with them, and met Mr. Van Zyl, the junior partner in the firm, who

handed a document to him. He looked through it, and found that the alterations which he had made in pencil on the draft had been inserted, and he thereupon signed the contract. The parties who were to sign the document on behalf of the syndicate were not present. He thought at the time that he was fully protected under the contract.

[De Villiers, C.J. (to Mr. Burton): How can you go behind the contract?]

There is still left the question of mistake.

[De Villiers, C.J.: He receives the draft and makes his alterations, the alterations are accepted, and then there is the final contract which he inspects and then signs.]

Mr. Burton admitted that that side of the case was not strong, and said he took it that, in view of his lordship's holding, the evidence in the case ceased at that stage.

[De Villiers, C.J.: I should think so.]

Counsel were heard at length in argument.

It was contended, for the defence, that the agreement (c) was absolute and binding, and that the clause, referring to the repayment of the balance of the purchase money at the rate of 6 per cent. per annum, on a mortgage bond, was thoroughly understood by the plaintiff when he signed the document.

De Villiers, C.J.: The plaintiff in this case has given his evidence with perfect fairness and candour. On the 6th December, 1901, he entered into an agreement with one Izak Bosman, acting on behalf of the defendant syndicate, by which he gave them an option of purchase in respect of his farm Twyfelhoek, in the Orange River Colony. Some discussion subsequently arose between the parties in regard to the terms of this contract, which could not be fully carried out by the defendant, and the syndicate wrote a letter early in 1902, which formed part of the agreement between them. Subsequently, on the 1st July, 1902, a further document was executed, and it is in regard to the execution of this document that the real dispute between the parties arises. The plaintiff alleges in regard to this document of the 1st July, 1902, that at Cape Town, the defendant tendered to the plaintiff for his signature a document marked "c," representing to the plaintiff that this merely embodied the terms of (a) and (b). The evidence in the case wholly fails to support this allegation. It appears that some time before the execution of this document a document had been sent by the defendant to the plaintiff with a request that he would execute it. He thoroughly examines it, and he subsequently returned it with certain amendments written in pencil on the face of this document. The defendant then executed the formal agreement, in which the amendments proposed by the plaintiff were inserted. The plaintiff came to Cape Town, and went to the office of the defendants' attorneys, and according to his own account, he signed this document without any further representations having been made to him. "I was asked to go to the office of Van Zyl and Buissinne. I went. I met Van Zyl. He gave me the document. I looked through it. I found the alterations I had made had been inserted, and thereupon I signed the contract." There is no proof here whatever of such a representation being made to the plaintiff as is alleged in the declaration. Therefore, this case must be decided as if there were these three documents executed between the parties, and the Court has now to construe these three documents together. I agree that the documents (a) and (b) should be read as if they had been inserted in the preamble of (c), and that the third paragraph of the document (c) should be read as if subject to the stipulations contained in the two first agreements. It is a principle in the construction of every document to give effect, if possible, to every part of it, and to endeavour to give a consistent interpretation to the whole of the document, and that is what the Court has to do in the present case. It appears to me a perfectly consistent view to hold that those provisions of the earlier documents which are in conflict with any of the provisions of the latest document were intended to be superseded. Those provisions, on the other hand, of the earlier documents which are consistent with the latest must remain in force. For instance, in the second clause of (b): "This balance shall bear interest at the rate of 6 per cent. per annum, payable quarterly, and failing payments, I shall have the

right to demand and enforce immediate payment of the capital owing, if the property shall have been transferred, and if not yet transferred, then to declare the sale cancelled, retaining all moneys that have already been paid. All payments to be made at the office of Messrs. P. J. Bosman and Son, Stellenbosch." The stipulation which I have just read is wholly consistent with the rest of this agreement, and therefore it must be considered as still binding on the plaintiff. Would it be consistent with the last document (c) to hold that a provision that the moneys shall become payable in full six months after tranquillity has been restored is still binding? In my opinion, it is wholly inconsistent, but more, it seems to me that whatever the plaintiff may have thought of the matter, the defendants, at all events, might fairly believe that this part of the agreement was wholly set side, inasmuch as tranquillity had been restored. Even if there had been a doubt as to the true intention of the parties, the fact that tranquillity had been restored at the date of the latest agreement would have been one of those surrounding circumstances which the Court would have been justified in considering for the purpose of ascertaining the meaning of the agreement. The earlier documents refer to the restoration of tranquillity as being an event on the occurrence of which the balance of the purchase money should become payable in six months. It is clear, however, that the parties intended that this stipulation should fall to the ground, for, notwithstanding the restoration of tranquillity, they agree to a provision for the passing of a bond for three years certain. There must be absolution from the instance with costs, and the plaintiff in reconvention will have judgment with costs.

[Plaintiff's Attorneys: Van der Byl and Van der Horst; Defendant's Attorneys: Van Zyl and Buissinné.]

SIBBET AND STEPHAN v. WILLIAMS.

Mr. Russell mentioned this case as a matter of urgency. He said the petitioners were brokers in the sale of a certain piece of land by Thomas Williams to John Koppel for £1,850. Koppel passed a mortgage bond on the property to Williams for £300 in payment of the balance of the purchase price. Wilson refused to pay the brokerage—£46 5s. Williams was now in Johannesburg, and the bond was in the hands of Messrs. J. and H. Reid and Nephew, of Cape Town, Wilson's attorneys. Petitioners asked that the bond might be attached to found jurisdiction in an action against Williams for the said sum, and also for leave to sue by edictal citation.

Both applications were granted, the edictal citation to be served personally and returnable on June 12.

STEYN v. ZEEMAN. { 1903. May 12th. „ 13th.

Water—Servitude—Prescription—Accustomed flow—Rights of owner of dominant tenement.

A servitude had been imposed on the tenement of defendant's predecessor in title in the following terms:—"That the proprietor shall not be entitled to use more of the water coming down from the kloof than what is required for domestic purposes and not to lead off more than a stream of one inch, and that he shall be obliged to allow the remainder of the water to pass free and undisturbed, and not to be allowed to alter or displace any water-course by which the free run of the water might be impeded." *In or about 1862 the river water had been diverted from the previous course of the river, and the then owners of plaintiff's farm cut a new furrow. Plaintiff now complained that the defendant had interfered with and damaged this said furrow, and had unlawfully diverted water therefrom. Plaintiff now claimed 1) a declaration that he was entitled to the sole free and undisturbed*

use of the water of the said river, and to that of the furrow traversing defendant's land, to maintain the said furrow, to have access thereto, and to take materials necessary for that purpose from defendant's land; (2) a perpetual interdict restraining defendant from interfering with the said river, the said furrow or the water therein, and (3) judgment for £1,000 by way of damages.

Held, *that (1) the plaintiff was entitled to the free and undisturbed use of the water in the said furrow, and to reasonable access for the purposes of cleaning and repairing the same; that he was not justified in taking materials from defendant's land (save in the immediate vicinity of the furrow) for the purpose of executing such repairs; (2) that no interdict could be granted; (3) that inasmuch as the furrow had been damaged by the defendant the plaintiff was entitled to some damages, which the Court assessed at £50.*

In this matter the plaintiff was Casparus Steyn, of the farm Orangerie, in the district of Malmesbury, and the defendant was Andries Zeeman, of the farm Uitkyk, also in the district of Malmesbury. The plaintiff sought an order of Court restoring his rights to the waters of Siebrits River, in the use and enjoyment of which he alleged he had been disturbed by the defendant, and he claimed £1,000 damages for the alleged wrongful acts of the defendant in so doing.

The declaration set out:

(1) That the plaintiff was the owner of certain land, part freehold and part quitrent, forming portion of the farm known as Orangerie.

(2) That on or about the 13th January, 1837, one Bartholomeus Siebrits, the owner of the said first undivided farm, transferred a portion to Bartholomeus Siebrits, jun., and subjected the remaining extent of quitrent, not so transferred, to a certain condition in favour of the said transferee, regarding the use of the water theretofore, belonging to the said farm.

(3) That the defendant was the successor in title to the owner of the said remaining extent.

(4) That in and under the terms of the said condition the defendant was precluded and barred from using, and had no right or title to use any part of the water of the Siebrits Kloof River (save as to one inch thereof, the rights to which or part thereof were no longer vested in the defendant, but which right or rights it was not necessary to set forth in this form), and the plaintiff was entitled as against the defendant to the sole enjoyment and use of the said water.

(5) That continually from a period prior to 1862 the plaintiff and his predecessors in title had had and enjoyed as of right the sole and exclusive use of the water of the stream known as Siebrits River (save and except as to the one inch aforesaid), and had continually and as of right diverted and led the said water from the said stream by an artificial furrow or watercourse, in 1862, or theretofore made and since then repaired and maintained by the predecessors in title of the plaintiff, and by him for the purposes of such sole and exclusive use as aforesaid.

(6) That the furrow traversed certain land formerly forming part of the farm Orangerie; the said furrow had been cleaned, maintained, and repaired, and materials taken for that purpose from the said land.

(7) That in August, 1900, the defendant wrongfully and unlawfully interfered with, damaged, and re-laid the said furrow and diverted water therefrom, but on the 7th December, 1900, he admitted that such acts were wrongful, and paid certain costs incurred by the plaintiff in preparing to take legal proceedings.

(8) That thereafter in December, 1900, the defendant (a) wrongfully interfered with, re-laid, and damaged the said furrow, causing the banks to be damaged, and otherwise damnifying the plaintiff, and (b) wrongfully and unlawfully interfered with the water in and the channel of the said Siebrits River, and damaged and weakened the banks thereof, causing the same to fall

in, and diverted the water in the said river, and made use of the said water for several days, and deprived plaintiff of the use thereof, and also further damnified him.

(9) That on the 10th January, 1901, defendant admitted that he had no claim to the water, and that on the 7th December he had wrongfully diverted and used the water.

(10) That plaintiff claimed £100 damages from defendant, but he was willing to settle the matter on payment of £50 if the defendant would enter into a written agreement, acknowledging plaintiff's rights, both as to the water and the furrow, and as to taking materials for the repair of the furrow, but the defendant refused to pay damages, and no agreement was executed.

(11) Thereafter the defendant (a) in March, 1901, again interfered with the furrow, and diverted the water into his plantations, and in May and June, 1901, and damaged 50 yards of the said furrow or thereabouts, and caused the same to be washed away and filled up with sand and dirt; (b) in August, 1902, defendant injuriously interfered with and damaged the said furrow where it ran on to the farm Kweeperfontein, in consequence whereof the said embankments were washed away, and the furrow was entirely covered up and silted with sand for some distance, and otherwise injured; (c) in November, 1902, defendant interfered with and damaged the said furrow, where it was led out of the aforesaid river, by making embankments in the river and impairing the banks of the said furrow.

(12) In consequence of defendant's action plaintiff has been deprived of the use of the water, to which he is entitled, his orchards, vegetable gardens, and plantations have suffered in consequence, and he had otherwise been put to labour, expense, and trouble, and had so been damnified in the sum of £1,000.

Plaintiff therefore claimed:

(a) A declaration that he was entitled, as against the defendant, to the sole, exclusive, and undisturbed use and enjoyment of the water of the said river, and to the free and undisturbed use of the furrow traversing the defendant's said land, and to clean, maintain, and repair the same from time to time, and had exclusive access to and reasonably take materials for those purposes, and to the sole and exclusive use of the water diverted and led in by the said furrow from the Siebrits River, across the defendant's said land.

(b) A perpetual interdict restraining the defndant or his servants or agents from in any way interfering with the said river or the water therein, or with the said furrow or the water therein, or in any way preventing the plaintiff from the free and undisturbed use of the said furrow or the sole and exclusive use and enjoyment of the said water as aforesaid, whether in furrow or river.

(c) Judgment for £1,000 sterling by way of damages.

(d) Other relief.

(e) Costs of suit.

Defendant, in his plea, admitted paragraphs 1 to 6 inclusive. He admitted the allegations in paragraph 7. As to paragraph 8, he admitted the use of water in sub-section (b), but denied the allegation of damage. He denied the allegations in paragraph 9, admitted the allegation in paragraph 10, except that he said plaintiff originally claimed, not £100, but £50; denied the allegations in paragraph 11, save that he admitted that he made the embankments in the river, but said that the water thereby diverted flowed into the furrow and then on to the plaintiff's land, and was not used by defendant. He denied the allegations in paragraph 12, but tendered £5 in full and sufficient satisfaction of any claim that the plaintiff had. He further said that the plaintiff had from time to time neglected to keep the furrow clean, and give a clear passage to the said water, and that, in consequence, he (defendant) had become entitled to and did so clean the same. He was prepared to submit to judgment in terms of prayer (a) of the declaration, subject to the omission of the words "and reasonably take materials for those purposes," and subject to a declaration that he was entitled to use the furrow for the passage of the water herein referred to, and to clean the same if the plaintiff should neglect so to do. He was further prepared, and expressed his willingness to submit to an interdict, and tendered the sum of £5, together with taxed costs. Save as to the tender he had made, he prayed that the claim should be dismissed, with costs.

Mr. Sohreiner, K.C. (with him Mr. McGregor) for plaintiff; Sir H. Juta, K.C. (with him Mr. Benjamin) for defendant.

Mr. Schreiner, in going over the various clauses of the declaration, said that the furrow was practically a lost furrow now to the plaintiff. He could not get his supply of water now as formerly, and it would be a very heavy cost to him to reinstate that furrow as it was prior to the interference of the defendant. The other furrow made by Mr. Zeeman in the river bed had robbed the plaintiff of water which was of great value to him; he had prevented the water coming down as it used to do by sand silting up and by large fallings down of the bank. The defendant had not the title even to an inch of the water. The inch named in the declaration belonged to Meltz Steyn, and the defendant had no right to touch a drop of water apart from domestic user. The defendant had interfered with the plaintiff's furrow most detrimentally, in fact, ruined it lower down, by collecting the drainage water from his upper property, which used to come down in many small streams and driblets into or over the furrow to plaintiff's property, and so into the river. He had taken the drainage water, and brought it down in one great stream. The defendant, in his plea, submitted to a declaration of rights, and to an interdict, but he asked that the declaration of the plaintiff's rights should be made, subject to his right to send his drain water down the plaintiff's furrow. The plaintiff, of course, could not consent to that. The question was one not only of defendant using water belonging to the plaintiff, but he had deprived the plaintiff of his *acqueductus* and of the servitude which he had across the defendant's property. If the drain water were allowed to go down the plaintiff's furrow, the defendant would by that means be able to make it perfectly useless. The plaintiff could not consent to that; that was perhaps the most important issue outstanding between the parties. As to the question of materials, *Voet* laid it down that where they had servitude, they must have all the conditions necessary for the servitude. The plaintiff was informed that the defendant had, since this action was brought, sold his property to one Mr. Smidt, but he understood from the other side that transfer had not actually been passed. Counsel laid some stress on the damage sustained by the plaintiff by reason of the defendant's acts.

Pieter Adrian Bergh, Government Land Surveyor, spoke to a survey which he made in 1898 of Uitkyk, and the alteration of the plaintiff s furrow between that time and 1901. The old furrow was a very substantial one, overgrown with shrubs. He also spoke to finding a new furrow in the river bed in 1901. There were furrows which led the water to the defendant's plantation.

Cross-examined by Sir H. Juta: It was an inference of his own that the furrow must have been cut for defendant's purposes—for irrigation purposes. He saw the defendant leading water out of Steyn's furrow on to his plantation. The defendant said it was an overwash, and that he had come to block it up. The defendant blocked it up. He was confident that there had been a cutting. He saw the spade marks at the outlet. He had been down at Orangerie, where the water came down into a dam, but he did not know where the water went from the dam. The furrow was very much overgrown when he saw it in 1898; he would not deny that it was a very much neglected furrow.

Bartholomeus Siebrits (73) said he was born on the farm Orangerie. It was his father's property. When he was ten years old he left the farm a little time —about two years—and he then returned and lived in the neighbourhood. He left when he was about 30 years of age, and came to Cape Town for about two years, and he then returned and farmed a portion of Orangerie for some years. He had occupied the present farm about thirty years. When he was quite young, the Steyn furrow was there. As far as he knew, the furrow was always there until Mr. Zeeman became the owner of the adjacent farm. Zeeman was the fifth owner of the farm Uitkyk since the furrow was placed there. It was purely the Orangerie sluit; there was one inch of water allowed, but that was acquired by Meltz Steyn. The furrow was large enough to take the rain-water. There was a watermill driven by the water formerly, and the farm had no water, except what was got from the furrow. Orangerie was

dependent on that furrow mainly. The defendant did not lead water to his vineyard, but it oozed through. He saw Mr. Steyn's furrow a fortnight ago. In some places the old furrow was still the same, but in several places it was changed. Defendant had diverted the stream of the river and taken the poplars out of the bank. The water could not be taken now into the furrow from the place where it was formerly taken from. The water was too low, and a wall had had to be built to get it to the same place. The defendant now cultivated right up to where the water ran, and the broad bank which used to be there had disappeared.

[De Villiers, C.J. (to Sir H. Juta): What are the acts in respect of which you tender £5?]

The defendant admitted diverting the water. The allegation was that the defendant took the water in December, 1900. It appeared from the declaration that there was a complaint made, and the matter was settled by his client paying costs, and what he said now was that he did take water, but it was before the settlement was made. The plaintiff alleged that the defendant twice relaid the furrow, but the defendant said that he only once relaid it.

[De Villiers, C.J.: That is a curious kind of settlement. I should have thought the settlement would include everything.]

That is what my client thought, too.

[De Villiers, C.J.: Then why do you tender £5?]

I don't know exactly. He rather thought, I suppose, that in order to settle a matter like this he would tender a few pounds, in the hope that nothing more would be heard of the case. He admits that he put the embankment in the river. His statement is that he did so because Mr. Steyn was complaining that he could get no water down the furrow. Defendant said that that was because the plaintiff did not repair the dam.

Witness (continuing) said that during the first two years the water supply was all right, but during the last year there was none. This was not on account of the last season being a dry one, because elsewhere the water ran all right. The stoppage of the supply was on account of the defendant's delving operations higher up, and his cutting away the poplars, thus causing another outlet. Lately he had cut a channel on the other side of the river from his estate, and this washing away the banks, caused drift sand in the bed of the river, thereby impeding the flow. There was a dam down below belonging to the plaintiff, which before defendant's operations supplied water to his stock, but it had not done since.

Cross-examined, witness said the plaintiff used the water in the dam for his distillery, poultry, and lands. He was aware plaintiff had a spring down below, from which he pumped water on to his werf, and used for his household. He was aware that Jordaan and all the proprietors below cultivated up to the edge of the river, but he asserted that they did not go as near to the edge of the embankment as the defendant, and did no damage to the water supply. He knew the Widow Jordaan's place on the river, and admitted she worked nearer to the river than the defendant, but trees there protected the bank. There was a dam which turned the water into the furrow, but it was damaged, and could not kept in a proper state of repair to be efficient. He had not tried it.

Sir H. Juta: Oh, but we have.

Witness, re-examined: If a masonry or cement wall were made, the water could be raised to the proper level; but a loose embankment to the dam would not stand, as now that the river was made to run off in a different place, the bank would all wash away.

[Maasdorp, J. (to Mr. Schreiner): Does your client object to an embankment being put there?]

I am instructed that the alteration would entail an outlay of £6,000 to £7,000 to reinstate the position.

[De Villiers, C.J.: In order to shorten the proceedings, I may say there is much evidence about which there can be no conflict.

Sir H. Juta: So far from objecting to an embankment to the dam being made, my client has made one to send the water into the dam, and that is the case of the plaintiff.

Casparus Johannes Reinhard Steyn, plaintiff in the case, said that before defendant came to the place he (plaintiff) had had no difficulty in getting water into his furrow, and during

the sixteen years he had been on the farm he had had no trouble about the water with any other proprietor above. Now and then other proprietors had let a little water on to their land. Plaintiff mentioned several dates on which defendant took or interfered with his water. The water ran all right opposite the defendant's place, but it washed the loose ground down, and silted up his (plaintiff's) dams. To take the water from defendant's ground through an 8-inch pipe on to his (plaintiff's) ground would cost him £600, and he would also have to pay the cost of transport. Defendant's claim to send his drainage water down his (plaintiff's) furrow was correct, but the water had to spread, and not come down in a single stream, and thus damage his embankments. Plaintiff objected to this, in 1901, and defendant made certain alterations by laying corrugated iron, and so forth, to obviate it, but without avail. On defendant's own ground, he could take the water over plaintiff's furrow by means of a chute. Plaintiff described how, by being deprived of water through defendant's action, he had sustained damage to his lands, his distillery, and his poultry, estimating it at over £1,000.

Cross-examined, plaintiff admitted there was a dam made by the defendant which, if repaired, would turn the water into the furrow; but he held that the cost would be too great.

Re-examined, he had tried three times to make the dam good without avail, and unless he employed cement and masonry, the cost of which would be too great, the dam could not be utilised.

Casper Johannes Reinhard Bresler and Bartholomeus le Roux, who claimed to be for a long number of years acquainted with the property in question, and a coloured man who constructed the new furrow on defendant's property, were called in support.

Johannes Petrus Minnaar, of Malmesbury, testified as an expert in water matters as to the great expense that would be incurred in rectifying the damage that had resulted from the construction of the new furrow. He also corroborated the evidence that had been given as to the heavy cost that would be necessary to build a proper dam wall on the plaintiff's farm.

Mr. Werdmuller, attorney, practising at Malmesbury, and acting for the plaintiff, said that on the 10th January, 1901, plaintiff offered to withdraw proceedings on payment by defendant of £50, and making certain alterations and improvements in the sluits, and giving a notarial undertaking not to interfere with the water supply in future. This defendant refused to do.

Mr. Schreiner intimated that he had other witnesses, but closed his case.

Sir Henry Juta said he had any number of witnesses, but he would confine the number to five.

Sir H. Juta, before opening the case for the defence, said he should like to put a question or two to the plaintiff.

The plaintiff (re-called), replying to Sir Henry, said he knew Nicola Smidt, of Malmesbury. He did not remember asking Smidt before the war to give an estimate for laying a pipe from the intake to bring water to his farm.

Nicola Smidt, contractor, Malmesbury, for the defence, said his brother-in-law was owner of part of the farm before Steyn. He knew Steyn's furrow, and he also knew Meltz Steyn's farm. In summer the water sometimes failed to reach Steyn's farm. The furrow was leaky. In some places it was cultivated close to the furrow. Before the war conversation took place between plaintiff and himself with regard to laying a pipe, the plaintiff saying that water spread too much and did not always reach his farm. He had seen the intake. The water could be turned into the furrow with an ordinary dam. The dam might be washed away in heavy rain. It was possible to put something here that would not be washed away. He could make a simple dam there for £5, and an "extra" dam for £30.

Cross-examined by Mr. Schreiner: For £5 he would make a dam, but it would wash away when the rain came. The £30 dam would not wash away when the rain came. He had made concrete walls in the river at Porterville. The £30 would incude the repair of the furrow. The "extra" dam would be made of concrete and cement. He would go down to proper foundations, and would carry out the work for £30. He had recently seen the river. At the out-turn place it was formerly deeper than now. It was more difficult formerly than now to turn the water in the furrow.

Nicholas Siebrits said he formerly farmed part of Uitkyk for four years. He knew the sluit known as Steyn's furrow.

In his pressing season he used to carry his grapes across the furrow. It was leaky. He made a furrow below Steyn's furrow to take the water oozing from the other furrow, so as not to get it into his vineyards. He lost vines through damage in that way. The water used to overflow Steyn's furrow. He used to cultivate close up to the furrow. Jordaines and others of the lower proprietors used to cultivate close to the furrow. He had not seen the place lately. The water did not always run in the furrow in summer; it ran about three or four months in the summer.

Cross-examined by Mr. Schreiner: He had heard Mr. Bartholomeus Siebrits's evidence as to the furrow, though not all that he had said. The furrow was only a foot wide at some places; it might have been a yard wide in other places. He worked within half a foot of the furrow. He had not seen whether the defendant proceeded on similar lines. He had not seen how Mr. Zeeman drained his property now. There was a made furrow in witness's time to take the water from the kloof. In the old time the water used to reach Steyn's furrow in a body, and not in a series of small sluits.

Re-examined by Sir H. Juta: There was no embankment of three or four feet deep in Steyn's furrow.

By De Villiers, C.J.: The slope towards the river varied a good deal. It was great in some places. It was in some places 1½ ft. deep, while in others it was 3 ft. deep.

Bartholomeus Siebrits, jun., said he was born on the farm Uitkyk. He left there about 1893, a little before Mr. Nicholas Siebrits bought the farm. As to Steyn's furrow, below the orange trees was a little embankment. In places the furrow was both narrow and shallow, and he had passed a thousand times with his cart over it. The furrow would have done a lot of damage through leakages to their vineyards if they had not attended to it themselves. The poplar trees which had been spoken of were more or less in the middle of the river. It was necessary to put down a small dam to turn the water into the furrow. If a heavy rainfall occurred the dam was washed away. The water had failed on several occasions before it reached the farm.

Cross-examined by Mr. Schreiner: The water ran into Steyn's sluit at the turn down at the old boundary sluit into the river.

[De Villiers, C.J.: The whole question is now what became of the water after running into the furrow, or whether there is such an increased flow into this furrow as to make Zeeman liable to an action.]

Mr. Schreiner: We ask that if the Court is of opinion that we should receive the water in the furrow, that defendant should not send it down in such quantities as to make a servitude of our property.

[De Villiers, C.J.: The defendant has nothing to do with the water after it reaches plaintiff's furrow.]

My point is that after reaching the furrow it was previously the custom to turn it into the river. If the Court holds that my client must receive the water, and that it is not necessary for defendant to send it over the furrow in a chute, my contention is that the water should be sent down in such quantities as could be dealt with on reaching the furrow.

Willem Riepersberg, formerly in the service of Melt Steyn, of the farm Waterval, situate above Uitkyk, was called to prove that there had previously been a difficulty in obtaining water from the river. Questioned as to the broken dam on the plaintiff's property, which it was held by the defence would be adequate to supply water to plaintiff's property were the dam repaired, witness concurred. He was not of opinion that the removal of the trees would by loosening the soil and thereby causing a bank to be formed lower down affect the water supply.

Charles John Pritchard, Government Land Surveyor, said he visited plaintiff's farm on the 7th of the present month. In the orchards the pear trees were shrunken, but otherwise all the trees were in splendid order. The vineyards also looked well, with the exception of those that had phylloxera. He did not see any trace of damage from want of water. The bush on the bank of the river had been cleared, but cultivation on the edge of the river at defendant's property was as near as on the others. He had had some experience of dams. From what he could see there should be no difficulty in turning the water from the furrow into the river. The bed of the furrow and

the level of the water in the river were only two feet in difference.

Mr. Schreiner produced an envelope containing some shrivelled specimens of what was supposed to be fruit, and inquired if witness would expect that sort of fruit from the trees he said looked so well.

[De Villiers, C.J.: The best orchards might have a few specimens like that. If your witness had said these were the best specimens of the fruit this would be valuable.]

Stephanus Sebastian Walters having given evidence,

Andries Petrus Zeeman, the defendant, was called. He said that when he became the owner of the farm Uitkyk in 1899, the furrow was in a most "miserable" condition, being overgrown with bushes and weeds, and the banks being broken down. Some parts of the ground were so wet that they could not be cultivated. He cleared out the furrow and improved it, but keeping it the same level. While he was making the furrow, plaintiff often saw him at work, and did not interfere. Since the furrow was made his vineyards were much better. The "intake" of the new furrow was in the same place as the old one. Plaintiff never attempted to turn the water into the furrow, but with the assistance of a couple of "boys," he did so. On account of plaintiff complaining that he could get no water, witness constructed a dam to turn the water into the furrow. The water ran for nine days, and then the dam was broken. He did not know how the dam was broken, but he could see hoof marks around the place. He could make another dam that would answer the purpose, and he denied that it was necessary to make a cement wall. On the specific occasions on which he was charged with breaking the furrow he denied having done so with one exception by arrangement with Jordaan, but a dispute arising, the furrow was closed again. The only embankment he had made was the dam in the river. There were no trees or gardens that were damaged for the want of water. "All I saw in his vineyards was phylloxera; I could not see a place where he could suffer one penny," added witness.

Cross examined by Mr. Schreiner: It was all nonsense for Lategan to talk about making a furrow 105 yards long for witness. It was untrue that his furrow was altered at the intake. There was no change of furrow where the old intake was. He took out the poplars; he did not alter the embankment. He had not taken out a wall, because there had not been one there. He had had a good deal of litigation from time to time. Haman sued him, and he had had to pay plaintiff's costs. Mrs. Jordaan had a claim against him in 1901, and recovered £15. Smidt had a case against him. There were also two cases pending against him. Leroux had a case against him. He thought the other man and himself were friendly now. His overseer sued him for assault, and he was fined £4. He was also fined 10s. for another assault. He contended that the plaintiff had only a "common" case against him; he was "unguilty." He had been very friendly with Mr. Steyn.

He did not ask Mr. Steyn's permission for what he did. He never went to Mr. Steyn and complained that the furrow was neglected. He did not do so as long as they were friendly. He did not take water out of Steyn's furrow in March, 1901; he might have allowed overflow water to go on to his sweet potatoes from the furrow. He denied that he was leading out water about where the old furrow was. The one inch of reserved water was Melt Steyn's; the other was water belonging "to Orangerie." In March, 1901, the water was overflowing from the furrow. The furrow was bad. He did not know whether there had been heavy rains at the time. He had told Mr. Bergh that Mr. Kotze had told him that he had the right to lead water from the river, but not from the furrow. He had never taken out of the furrow; he had taken water out of the river. He took the water out of the river 60 yards below the intake. It was untrue that he had led water out of the furrow to his potatoes. As to water from the mountain, he knew the road that ran parallel with Steyn's furrow. He had not made a furrow to carry the water in the drain from the mountain; he had simply opened an old furrow. The drain water had always come down that old furrow. His knowledge of the locality extended beyond 1899. He was acquainted with the farm long before then.

Mr. Schreiner: But then you won't put your evidence against the evidence of old Mr. Bartholomeus Siebrits?

Witness: I was there many and many a time. I was there as a young man. I used to go there to see Bartholomeus Siebrits. In further examination, witness said that the old people on the other side were not giving correct evidence. Mr. Bartholomeus Siebrits was one of the old people. He was very sorry for them. He should have won his other cases if the other side had spoken the truth.

This concluded the evidence.

Mr. Schreiner (for the plaintiff) commented very strongly on the evidence for the defence, observing that none of the old residents had been called, and that several of the witnesses had not seen the furrow at all lately. The central fact of the case, he contended, was how was the water taken out by the furrow from the river before Andries Zeeman interfered with it? They had had no credible witness called for the defendant on this point. The plaintiff's witnesses had given most reliable evidence on this point. The defendant had absolutely interfered with the furrow at the out-take itself. It was most extraordinary that the defendant in his plea should submit to a perpetual injunction in view of the testimony that he had given that day. Counsel laid stress on the interruption and damage caused to plaintiff's furrow by the defendant sending down his drain water in a big stream instead of in small driblets. He contended that if the Court made an order in terms of the defendant's plea the plaintiff would lose his acqueductus servitude. He also asked for substantial damages, such as would indicate the Court's view of the acts committed by the defendant.

Sir H. Juta, for the defendant, said that in face of the defendant's admissions and the pleadings there was no question arising in the present case as to the defendant's rights. The only two questions that could arise were—firstly, the amount of damage; and, secondly, whether the plaintiff was entitled to the wide interdict that he sought without the qualifications which the defendant's plea contained. In the declaration they would notice that no complaint was made but the defendant had been sending down more water into the plaintiff's furrow than he should do, that was not a grievance alleged at all, and, consequently, the defendant, in order that the scope of the interdict may not be made so large as to prevent him from sending the water into this furrow had put in these two qualifications, the second one being that the defendant should have the right to clean out the furrow if the plaintiff did not. As to the question of damages, counsel contended that the plaintiff's idea was to get a cement dam and pipes for his own benefit at the expense of the defendant. No reliance was to be placed on the plaintiff's evidence as to the furrow being put into good order again. He said, "I don't think it can be done," or, "I can't see a chance of its being done." Where was the evidence then, that it could not be done? The plaintiff had made no attempt to prove that the water would not run down the furrow again if he made an attempt to make it. Evidence had been given to the Court that for a small sum they could make a substantial dam. The evidence showed that there was no damage. Mr. Zeeman had done wrong technically, but that was all settled, and there was no damage accruing during the year 1902. The truth of the matter rather seemed to be that Mr. Steyn would like to have pipes, and that he did speak to Mr. Smidt about pipes.

Mr. Schreiner was heard in reply.

De Villiers, C.J.: The servitude which is now in question was imposed in the following terms: "That the proprietor shall not be entitled to use more of the water coming down from the kloof than what is required for domestic purposes, and not to lead off more than a stream of one inch, and that he shall be obliged to allow the remainder of the water to pass free and undisturbed, and not to be allowed to alter or displace any watercourse by which the free run of the water might be impeded." If this condition had stood by itself there would have been no proof whatever that the right of water-leading had been given by the former owner of the defendant's farm to the former owner of the plaintiff's farm. It is only by inference and by referring to the actual facts as they stood at the time when this servitude was imposed, and as they stood afterwards that such a right of water-leading can be ascertained. It would appear that at that time there was a kind of water-course, and that nearly as far back as the year 1862 the river water had been diverted from the river by a course different from the original course

of the river, and, substantially, the water-course which is now in question is the water-course which has existed there since the year 1862. For upwards of 40 years, therefore, the owners of the plaintiff's farm have enjoyed the right under this condition to lead water out of the river by means of the furrow, and a servitude, in my opinion, was established, and the plaintiff, therefore, is entitled to the full benefits of such a servitude. He is, of course, liable to all the inconveniences which result from the existence of this watercourse, and therefore, to come first of all to this question of the drainage, if any drainage water from the defendant's farm has been accustomed to flow down into this water-course, the plaintiff cannot now object to this water-course being used as a receptacle for such drainage water, as well as a means of bringing this irrigation water to his own farm. The defendant has satisfied me by his evidence and by the evidence of other witnesses who have been called that this water which is led into this furrow was water which had been accustomed to flow there; all that he has done has been to improve his farm for cultivation, and the Court cannot allow the existence of a servitude to have the effect in operation of preventing the owner of the servient tenement from improving his farm in the ordinary way, and from cultivating it as a good farmer would do. Defendant appears to me to have done no more than that for the purpose of preventing the water from injuring his cultivated land. He had to make certain cross furrows, and the effect has been perhaps to bring the water in a body, but I do not believe that any larger quantity of water has been forced into the furrow than came down there before, nor am I satisfied that the silt, or mud and sand has been greater in consequence. Therefore, upon that part of the case which raises the question as to whether if a declaration is made by the Court, the defendant would be entitled to have that declaration modified upon that point, the opinion of the Court is entirely in favour of the defendant. In the same way, the opinion of the Court is in favour of the defendant upon the further question raised as to whether the plaintiff is entitled to a general declaration that he is entitled to take materials from the land of the defendant for the purpose of repairing and maintaining this furrow. I am not aware of any authority which gives the owner of a dominant tenement any such rights in respect of such acqueductus. All the authorities lay down clearly that where servitude has been created the owner of the dominant tenement has all those rights without which it is impossible for him to enjoy his servitude, and the illustrations given by the authorities show what is meant. The first illustration given is where a person has the right to take water from a well. It is understood that he has a right of way to the well. It follows, it is an absolute necessity that he cannot draw the water from the well without going to the well, and, therefore, he must have a road to the well. That is a kind of necessity which goes with the servitude. But it would be going quite beyond any authority or any decision of this Court to hold that the owner of the dominant tenement may take materials from the servient tenement for the purpose of enabling him to better enjoy his servitude. Take the case, a person having a right of road. It has never been held that he has the right to take the gravel from the land of the servient tenement for the purpose of repairing that road. He must get the gravel and soil as best he can; all he has the right to is that road, but he has no right to go to the land itself. There is no doubt in a case like this, where a watercourse is made, he may use the stuff taken out of the soil. Naturally he can do that, because the stuff which had been taken out of the ground must be put somewhere, and he may use it for the purpose of an embankment. No authority has been cited, and I certainly know of none by which the right is given to take materials from elsewhere, even in the immediate vicinity, for the purpose of improving, or maintaining, or repairing the watercourse to which the owner of the dominant tenement has the right. Before I leave this point, I may say I don't see there is any necessity for really making any declaration at all in the case. If a declaration has to be made, it will have to be made with certain modifications. If the defendant had made a claim in reconvention, and asked for a declaration, then the Court would have been in a position to frame such a declaration as will give the defendant his full rights. The Court cannot by merely modifying the

form of declaration of rights asked for by the plaintiff give the defendant any declaration in respect of his rights, nor do I think there is any necessity for an interdict in this case, because it is not alleged that the defendant will again infringe the plaintiff's rights. On the contrary, as far as one can gather from the evidence in the present case, there is no such intention, and, therefore, the necessity for giving such intedict has not been proved. I come, therefore, now to the only question left for the consideration of the Court, and that is the question of damages. Upon this question of damages I am bound to say also that the plaintiff has greatly exaggerated his own rights. Just in the same way he has been wholly wrong in claiming too much from the defendant in regard to the declaration of rights, in the same way he has claimed excessive damages in the present case. There is no proof whatever that he has sustained anything approaching £1,000 damages, though he would lead the Court to believe that that is a very moderate estimate indeed. The defendant, in my opinion, has not been guilty of any very gross infringement of rights, but I think he has gone wrong, and has gone wrong chiefly in this respect: It was his duty before he altered the water-course and before he did anything by which the nature and substance of that water-course could be altered—it was his bounden duty to have given notice to the plaintiff of his intention to do so; and having made an alteration in the furrow and in the intake, it was his duty to restore the watercourse to the condition in which it was before he started his alterations. The watercourse was an old one; it had existed there for many years—something like 70 years—and certainly for 40 years it had been in existence, as it was just before the alterations. The trees had been allowed to grow, and the ground was hardened, and naturally the flow was in a certain way, and there was not much escape of water from an old-established furrow like this. The mistake defendant made was in removing the trees from the immediate neighbourhood, changing the watercourse, and then not taking sufficient pains so to harden the soil, either by the use of cement or stones or other matter, so as to make the watercourse as substantial as it had been before, and put it in a condition to allow as little water as possible to escape as had been accustomed to escape before. The effect of the loosening of the soil in that neighbourhood was undoubtedly to make it easier for the water to escape from this furrow than it had been before. The hard, old-established, trodden-down soil was altered altogether; it was loosened, trees taken out, roots removed, and there was left a loose soil there, through which any action of crabs or moles would have a much readier effect in allowing the water to escape than ever before. Then the defendant, I am satisfied, took advantage of the escaped water. I don't believe it is clearly proved that on any occasion that he deliberately led water out of this furrow, but he took advantage of it. There was then loose soil in consequence of this new aqueduct, this new watercourse, and here and there water escaped, and the defendant was not slow to take advantage of this escaping water for the purpose of watering his sweet potatoes, and other plants that required water. In that the defendant did wrong, and he must suffer for the consequence of his acts. I believe, however, that the damages are nothing approaching the amount which the plaintiff claims. I believe that with a moderate expenditure —with an expenditure of about £30, it would be quite possible for the plaintiff to make this dam, this intake and furrow as substantial, and as resistent to the escape of water as it ever had been before, and I think the sum of £20 will be ample compensation for any other damage he has sustained. The judgment of the Court will, therefore, be for the plaintiff for £50 damages, and as there has been no sufficient tender, but only a tender of £5, the judgment will carry costs.

Mr. Schreiner: Will you allow the plaintiff his witness's expenses?

De Villiers, C.J.: I suppose so.

Mr. Schreiner also applied for the cost of making the surveyor's plan.

The Chief Justice allowed £5 for the preparation of the plan.

[Plaintiff's Attorney: D. Tennant, Junr.; Defendant's Attorneys: Faure and Zietsman.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZE.]

FIRST DIVISION.

ADMISSIONS. { 1903. May 14th.

Mr. Alexander moved for the admission of Joseph Buirski as an attorney-at-law, notary public, and conveyancer.

Application granted, and oath administered.

Mr. Buchanan moved for the admission of Fredric Benjamin Andrews as a notary public.

Mr. M. Bisset, on behalf of the Law Society, asked that the application should stand over for another week, pending further inquiries in view of certain facts which had come to the notice of the society, and which they wanted to pursue.

Application to stand over as desired.

Postea (May 22nd.)

The application was granted.

PROVISIONAL ROLL.

PRITCHARD v. BAYER AND ANOTHER.

Mr. Buchanan moved for provisional sentence for £1,500 upon a mortgage bond, and also interest from the 1st February, 1903, the bond having become due, and payable by reason of the non-payment of interest; and also for the property specially hypothecated to be declared executable.

Order granted as prayed.

NEDERLANSCHE BANK v. CAISSE.

Mr. Van Zyl moved for provisional sentence, on a certain promissary note.

The Registrar mentioned that according to Rule 328, service should have been effected 48 hours ago upon persons resident within 36 miles of Cape Town. The defendant had not had service in due time, when the case was previously befort the Court.

Order granted as prayed.

GABIER v. JOHANSEN.

Mr. M. Bisset moved for provisional sentence.

The Registrar said that the summons had not been returned.

Case ordered to stand over.

Later on the case was again mentioned, and it was stated that the summons had been returned.

Mr. Bisset then moved for provisional sentence for £150 on a mortgage bond, with interest from the 30th June, 1902, with costs of suit, and for the property to be declared executable.

Order granted as prayed.

ROSS v. CHETTY.

Mr. Close moved for provisional sentence on two promissory notes given by the defendant, viz., one for £64 4s. 10d., and the other for £58 4s. 6d.

Order granted as prayed.

AUSTRALIAN BRICKFIELDS CO. v. GRAHAM AND ANOTHER.

Mr. Close, for plaintiffs, said it had just come to their notice that there were a certain horse and a number or unburnt bricks that required to be dealt with in the defendants' estate, and he applied for the appointment of Geo. S. Firth, civil engineer, Sea Point, specially to deal with the assets.

Granted.

KANNEYMEYER v. CHETTY BROS.

Mr. Buchanan moved for provisional sentence on £100, due upon a certain lease.

Order granted as prayed.

HAVENGA AND DICKSON v. REDELINGHUYS.

Mr. J. E. R. de Villiers moved for a decree of civil imprisonment for £1,770, with interest, and £14 13s. 6d., taxed costs.

Order granted as prayed.

HAUPT v. WATSON.

Mr. P. S. T. Jones moved for a decree of civil imprisonment on a sum of £20 11s. 3d.

Defendant appeared, and said he was without means. He was a broker, but during the last eight months he had hardly made expenses. A number of valu-

able papers and receipts of his had been seized. He was bringing an action for £30 against one Van During, and he considered he had an extremely strong case. He could not at present make any offers.

De Villiers, C.J., said that the defendant had no means, and no order would be made, but leave would be given to apply again.

ILLIQUID ROLL.

S. CYPRIAN'S SCHOOL v. DALE. { 1903. May 14th.

Mr. Alexander moved for judgment for £25 6s. 11d., professional services rendered, with interest and costs of suit.

Order granted as prayer.

BOYD V. BRITISH WORKING MEN'S ASSOCIATION.

Mr. De Waal moved for judgment for £50, with interest and costs of suit.

Order granted as prayed.

PHILIP BROS. V. WEINTROB.

Mr. P. S. T. Jones moved for judgment for £60 12s. 4d.

Defendant asked for an extension of time until the end of the month. He said he had sold some property, but the transfer was not yet due, and he could not pay the money at present.

Judgment as prayed, with stay of execution until the last day of May.

GOLDMAN V. MEYER.

Mr. Buchanan moved for judgment under Rule 329 (d) for the transfer of certain seven lots of ground bought by the plaintiff from the defendant, the plaintiff tendering the purchase price. Since then the defendant had taken steps to give transfer, and counsel simply asked for judgment, with costs.

Order granted as prayed.

VAN REENEN V. WIGGINS.

Mr. De Waal moved for judgment in the sum of £26, for a horse sold and delivered, and also £54 5s. (minus £45 paid on account), for money advanced, the total amount of claim being £35, with costs of suit.

Order granted as prayed.

ASHBY AND ANOTHER V. SCHWARTKOP

Mr. C. W. de Villiers moved for judgment under Rule 329d for the sum of £1,250, purchase price of certain property, and also for interest on that sum at the rate of 6 per cent., from January 1, 1903, and costs of suit. The summons also set forth a claim for £75, as damages, but counsel did not ask for that sum.

Order granted as prayed.

MASTERTON V. BRAY AND TARRY.

Mr. Gardiner moved for judgment under rule 319 for the sum of £1,000, the purchase price of a certain house and land being lot 23, block A, situate on the Cape Flats, under conditions set out in a certain broker's note. By the said note it was, *inter alia*, provided that transfer should be taken on November 30, 1902, and further, that the said purchase price should be payable as to £250 on transfer, and the balance of £750 to be secured by bond if so required by the defendants. Plaintiff had tendered transfer, but the defendants failed to pay, and plaintiff now asked for judgment in the sum of £1,000 sterling, one defendant paying, the other to be absolved. Plaintiff, in the alternative, asked that the defendant should be ordered to pay the first instalment of £250, and to pass a kusting brief specially hypothecating the said property for the said sum of £750, the plaintiff tendering transfer as aforesaid. As a further relief the plaintiff asked for the cancellation of sale in case of failure to comply with the judgment on the two first prayers.

De Villiers, C.J., said that judgment will be given in terms of the two first prayers.

REHABILITATIONS. { 1903. May 14th.

Mr. De Waal applied for the rehabilitation of Coenraad Hendrik Loubser.

The estate was surrendered on the 30th May, 1898, and there was a deficiency of £918 14s. 2d. Insolvency was attributed to rinderpest. The Trustee's report was favourable.

Granted.

Mr. Van Zyl made a similar application on behalf of Hendrik Jacobus Welman. The estate was surrendered on 3rd October, 1898. The estimated assets were £89 12s., but they only realised £28 12s., and claims were proved amounting to £336 5s. 8d. Insolvent attributed his insolvency to losses in stocks. There was nothing unfavourable in the Trustee's report.

Granted.

Mr. Buchanan made a similar application on behalf of Eliza Jane Hodson.

Granted.

HERBERT V. HERBERT.

This was an action for the restitution of conjugal rights. The declaration stated that the plaintiff, Johanna J. Herbert, resided at Sea Point. The defendant was Ewald Herbert, formerly of Port Elizabeth, and was now at Johannesburg. The parties were married at Port Elizabeth on the 18th July, 1900, and shortly after the marriage the defendant deserted his wife, and had not since returned.

Mr. C. W. de Villiers for plaintiff; defendant in default.

Chas. William H. J. Smith produced a copy of the marriage certificate.

Applicant was called, and said she was married to the defendant at Port Elizabeth on 18th July, 1900, and she lived with him until 1st September, when she left, with his consent, to go to Bredesdorp to fetch some things. She was married out of community of property. She received a letter from her husband to say he had joined a corps. When she left him to go to Bredesdorp she did not know that he intended doing so. He was at that time in business, and at the time of their marriage he was in the Civil Service. During the war he went to Johannesburg, and during the year he sent her different sums amounting to £31 10s. She had often written to him to make a home for her.

Mr. De Villiers read a long letter which applicant said she had received from her husband at Johannesburg. In it he asked her to wait until the end of January, by which time he hoped to get a billet, and then he would be in a position to support her. If by that time he was unable to do so, then he would assist her to get a divorce "without unnecessary publicity or expense." Later on in the letter he remarked that if for any other causes she required a divorce he would not stand in her way, but he would not assist her to that end. He refused to see any relations she might send to him before the 31st prox. He would not write again until he could say he was in a position to support her, or that he had failed to get a better situation.

Applicant (continuing) said that on previous occasions her husband had promised to receive her back, but never did anything. She did not reply to the letter which had been read, and she got no further communication until the letter now produced. He did not do anything for her by January 31, when she issued a summons. On the 22nd April he wrote informing her that he contemplated leaving Johannesburg, and he had given instructions for a summons, if issued, to be served on his solicitor. He also asserted that he did not intend to pay any costs.

[De Villiers, C.J.: Have you got any copies of your letters to him?]

Witness: No. I said he must tell me once and for all whether he would support me.

[De Villiers, C.J.: Are you ready and willing to go back to him?]

Witness: Yes; I am willing if he will support me properly.

[De Villiers, C.J. (reading): "I now know from inquiries the real reason why you require a divorce." What does he mean by that?]

Witness: All I can make out is that his sisters seem to think I have another motive—that I want to get married again. There is nothing in that. The sisters are spiteful about me. They live down here.

[De Villiers, C.J.: It is a pity you did not keep copies of your letters. It is very important that I should know what you wrote to him. You are quite sure you expressed willingness and a desire to go back to him.]

Witness: I am willing.

[De Villiers, C.J.: Did you say so?]

Witness: I said I would go back if he would support me.

Mr. De Villiers: Have you heard that he had several billets in Johannesburg, and that he is very intemperate?

Witness: Yes. Shortly after my marriage. I had occasion to remonstrate with him.

[De Villiers, C.J.: If the defendant is willing to take you back, you must go and live with him.]

Witness: Certainly I will.

Mr. De Villiers said the applicant had entered into an antenuptial contract at Uitenhage, which settled upon her a life policy of £250.

[De Villiers, C.J.: That would fall to the ground should this application be granted.]

Mr. De Villiers: Yes, my lord.

De Villiers, C.J.: You may take a decree for the restitution of conjugal rights, defendant to return to his wife on or before June 30, failing which you may take a rule calling upon him to show cause by the 20th of July why a decree of divorce should not be granted.

Ex parte BRISENDEN.

Mr. Buchanan applied for the confirmation of the sale of certain property. The applicant, he said, was one of the sons of the late Lewis Jas. Brisenden, and was joint proprietor with Leonard Stewart Brisenden of a piece of ground at Graham's Town. He was for some time in the Cape Police at Douglas, and was now temporarily employed by the Plague Board at Port Elizabeth. There was some doubt about the applicant being a minor, but his mother-in-law, who was his only guardian, concurred in the petition.

De Villiers, C.J., said that according to the birth certificate applicant was a minor, and the application should come before the Master to see if the sale was for the applicant's benefit.

Ex parte VAN HEERDEN

Mr. C. W. de Villiers applied for leave to transfer certain property. The applicant was executor testamentary in the estate of G. Maria van Heerden. In liquidating the estate a certain piece of ground with building thereon at Graaff-Reinet was bought for £1,010 by the applicant, and it was therefore necessary to approach the Court for authority to have the property registered in his name.

Application granted.

Ex parte NEETHLING.

Mr. Buchanan applied on behalf of the petitioner for leave to transfer certain property, bought for £775, at a public auction from an estate of which he is executor, on the 12th February. Affidavits were read to show that the price was a good one, and the sale in the interest of the minors.

Application granted.

Ex parte PFLUGSTERT.

Mr. Buchanan applied for an order authorising the cancellation of certain mortgage bonds. On the 18th February, 1898, the petitioner passed to and in favour of William Wilkinson, now in England, bonds for £665 on certain buildings in Faure-street, Cape Town. Applicant desired to sell the property specially hypothecated, as he was about to leave for Germany, and wished to arrange the matter before doing so. Wilkinson had sent his power of attorney, giving the necessary authority, but it had been necessary to return it to England. He (Mr. Buchanan) asked for authority to cancel the mortgage bond on the authority of the power of attorney.

De Villiers, C.J., thought the proper course would be to make an order that on the production of a certificate of receipt from the Master that he was in possession of the money, that the Registrar of Deeds be authorised to cancel the deed.

Ex parte COETZEE.

Mr. Joubert applied for leave to sell certain property. The petitioner was the only guardian of seven minors, who were possessed of property valued at £250. She asked for leave to sell the property, the present being a most favourable time for disposing of the property, and pay the money into the guardian's fund. The Master was entirely favourable.

De Villiers, C.J.: The Court authorises the sale at a price, the minimum of which is to be fixed by the Master.

DYER v. DYER.

Mr. Buchanan, on behalf of the petitioner, Percy Dunsterville Dyer, moved for an order declaring the petitioner's brother, Stephen Dyer, now an inmate of the Valkenberg Asylum, to be of un-

sound mind, and appointing a curator of his person and property. Mr. C. W. de Villiers watched the case as *curator ad litem*.

Dr. Dods, medical superintendent of the Valkenberg Asylum, gave evidence to the effect that the defendant was admitted in August, 1899, and that he had been detained on an order of Mr. Justice Maasdorp, and had been under continual supervision. He was still of unsound mind, and was incapable of managing his person or his affairs.

Mr. Buchanan said he was instructed that the lunatic had certain property in the Transvaal. Counsel asked that the defendants' brother, the petitioner, who resided in the Transvaal, be appointed curator of his person and property.

Mr. C. W. de Villiers intimated that he was satisfied with the proposal to appoint Percy Dyer as curator. He had interviewed the lunatic, Stephen Dyer, and he was satisfied that he could not manage his own affairs.

Order granted, declaring defendant of unsound mind, and appointing Percy Dyer as the curator of his person and property.

BOZZETT V. BOZZETT.

Mr. Black moved, on behalf of the petitioner, for a decree of divorce from his wife, who resided at Poplar, England. Counsel stated that the petitioner had obtained a decree for the restitution of conjugal rights, and that notice had been served upon the respondent, who had been furnished with a passage to the Cape per the Union-Castle Steamship Co. Respondent refused to avail herself of this passage, and wrote to the petitioner: "You know as well as I do that I do not intend to use the ticket; as you are aware, as far as I am concerned, the case is at an end." The affidavit of Henry Macdonald stated that he was living with the defendant as her husband, not knowing that she was married.

Decree of divorce granted as prayed.

COWLEY V. COWLEY.

Mr. M. Bisset moved for a decree of divorce in default of respondent's failure to obey an order for the restitution of conjugal rights granted to Mrs. Cowley in the Circuit Court of Oudtshoorn on the 26th March.

Decree of divorce granted, plaintiff to have custody of the child of the marriage, and defendant to contribute to the maintenance of the said child until it attained the age of 16, at the rate of £2 10s. per month, and to pay costs of suit.

Ex parte BROSTER.

Mr. C. W. de Villiers moved for the rule *nisi* granted under the Derelict Lands Act, on the 17th April last, to be made absolute. Notice having been duly published.

Order granted as prayed.

Ex parte BEHUKE.

Mr. C. W. de Villiers moved for the rule *nisi* granted under the Derelict Lands Act to be made absolute.

Order granted as prayed.

BYRNE V. BYRNE.

Mr. Gardiner moved on behalf of the petitioner, who resides in England, for the appointment of a commission *de bene esse* to take her evidence for the purposes of a divorce suit which she had instituted against her husband, who resides at Wynberg, in the Cape Division, on the ground of his adultery in London, Port Elizabeth, and elsewhere, and also for the forfeiture of all benefits accruing to him by community of property. Petitioner stated that she had not sufficient means to come to the Cape in connection with the case.

Order granted as prayed.

Ex parte THE BUILDING SOCIETY OF THE SOUTHERN CROSS LODGE.

Mr. Gardiner moved for leave to make absolute a rule *nisi* for the winding up of the society, the appointment of a trustee, and the power to sell the immovable property of the said society, to be vested in the Southern Cross Lodge.

Order granted as prayed.

HADLEY V. CILLIERS.

This was a motion for leave to inspect certain registers in the recent election of Petrus Stephanus Cilliers as member of the House of Assembly for the Division of Prieska.

The petition of Robert George Hadley, now of Claremont, and formerly of Prieska, and a voter in the division of

Prieska, set forth that he objected to the election of the respondent as M.L.A. for the division of Prieska, on the ground that he had held certain offices of profit under the Crown. Petitioner had deposited with the Registrar of the Supreme Court £300, being the amount required to cover costs, etc. Petitioner, said respondent, was deputy sheriff of Britstown, Messenger of the Court at Britstown, and a Field-cornet, which offices he was informed were subject to confirmation of or held under the Governor of the Cape of Good Hope. He prayed that the said election be declared null and void, and that the seat be declared vacant. In his letter to the Registrar of the Supreme Court, the petitioner intimated that he would also apply for an order authorising petitioner and his agent to obtain access to, and inspect the marked register in connection with the said election. He asked that his application should be supplementary to the previous one. Petitioner stated that his object was to ascertain how many disqualified persons recorded their votes in the election with a view of obtaining a recount, as he was given reason to believe that several voted who had been struck off the list for political offences.

Mr. Burton read the petition of the respondent's attorney, Paul de Villiers, in which application was made for the postponement of the motion until Thursday, the 21st inst. Mr. Burton added that, so far as inspecting the marked copies of the register was concerned, there appeared to be no necessity to apply for an order of Court, as, under the Ballot Act. No. 9 of 1882, any person might go and inspect and obtain copies of the marked register from the Colonial Secretary.

[De Villiers, C.J., said that there was clearly no necessity to proceed by motion.]

Sir H. Juta, K.C., for applicant; Mr. Burton for respondent.

Mr. Burton said that in the petition the names of certain persons were not substantially objected to. Petitioner said they were persons "concerning whom the petitioner has ascertained by inquiries," and then, again, "he has reason to believe."

De Villiers, C.J., said the petition of the applicant embodied no direct prayer that the respondent be unseated. He thought it should be amended by the inclusion of a prayer that the respondent be unseated on the grounds set forth.

Sir H. Juta said that he applied for leave to amend the petition accordingly.

De Villiers, C.J.: The Court will authorise the amendment of the supplementary petition, as asked for, and addition of other names, provided that reasonable notice of such additional names be given before the day of trial. The Court will fix the day of trial for the 11th June, security of £300 to be sufficient security for supplementary, as well as original petition, costs to be costs in the cause.

Ex parte HOFMEYR. { 1903. May 14th. „ 22nd.

Attorney—Admission—Act 30 of 1892.

An attorney who had been enrolled in the late South African Republic applied to be admitted as an attorney of the Supreme Court. He, however, had not passed the examination prescribed by Sec. 1 (b) of Act 30 of 1892.

Held, *that as the Governor had not and did not intend to exercise the power vested in him by the aforesaid Act the applicant was entitled to admission.*

Mr. J. E. R. de Villiers moved, under section 2 of Act 30 of 1892 for the admission of the petitioner, who was formerly an attorney of the late South African Republic, as an attorney-at-law and notary public of this Court.

Mr. Gardiner, for the Incorporated Law Society, said that the section named provided for four qualifications before an attorney of the Transvaal could be admitted to this Court. In respect of three of these, the applicant fulfilled all requirements, but, as to the fourth, he had not complied with the stipulation laid down in the section, which stated that he must pass such an examination in the statute law of the Cape of Good Hope as the Governor may from time to time specify, and he must get a certificate to that effect from the Incorporated Law Society. Counsel added that a difficulty arose, inasmuch as the Governor had

not specified any such examinations. He also observed that the petitioner applied for admission as a notary public.

Mr. J. E. R. de Villiers said he with drew the latter part of the application.

De Villiers, C. J., said he did not think the applicant could be deprived of his right to be admitted if it were clear that the Governor did not intend to authorise such an examination, but that was not clear yet. Until there was some authoritative statement that the Governor had no such intention, he thought he should assume that His Excellency did intend to authorise one. The case must be postponed, either to enable the Governor to authorise such an examination, or else an affidavit that he did not intend to authorise one.

Postea (May 22).

Ex parte CARR BROS. AND ASH, LTD.

Mr. McGregor moved for leave to amend certain title deeds in accordance with a resolution of the company to change their name to Carr Bros. and Ash, Ltd., and to omit the name of Mr. Edmondson, formerly a managing director.

Order granted in terms of prayer.

LE. ROUX V. ZEEMAN. { 1903. May 14th.

Slander—Justification.

Where justification is pleaded to an action for defamation charging the plaintiff to have committed a criminal offence the plea must fail unless the offence is clearly proved to have been committed by him.

This was an action for slander in which the plaintiff claimed £500 damages, with costs, for slander.

The plaintiff, in his declaration, said he was a farmer and a retired field-cornet of seven years' standing, residing at Grassendalen, in the division of Malmesbury, and the defendant was a farmer, residing at Uitkyk, in the said division. On or about the 15th September, 1902, and the 2nd October, 1902, the plaintiff gave evidence in a certain suit instituted in the Resident Magistrate's Court at Malmesbury by one Anna Jordaan, against the defendant, for damage caused by the defendant to the property of the said Jordaan. On or about the month of October, 1902, and at Siebritskloof, in the division of Malmesbury, in the presence and hearing of Jan Daniels, Abraham de Klerck and others, the defendant falsely and maliciously spoke and published on and concerning the plaintiff with reference to the evidence given by him as aforesaid the following defamatory words in the Dutch language: "Ik heb de papieren in myne zak, en ik gaat Bart le Roux opbreng voor valsch eed," which, being interpreted into English, are "I have the papers in my pocket, and I am going to put this Bart le Roux in gaol for having committed perjury," meaning thereby that the plaintiff had committed perjury. On or about the 7th October, 1902, and at Waterfall and Uitkyk, in the said division, in the presence and hearing of Albert Louw, Casparus Steyn, Johan Liebetrau, and others, the defendant also said in Dutch: "Gij Bart le Roux, het valsch gesiveer, en jou plek was al in die tronk, en alsdie judge nie gezit het nie, dan was gij al daar, en ik zal jou mon gaan aangeef en met you werk," which, being interpreted into English, meant: "You, Bart le Roux, have committed perjury, and you ought to have been in goal already, and if the judge had not been sitting then you would already have been there, and I will now go and charge you, and will work with you."

The defendant denied that he spoke the words falsely and maliciously, and that they were defamatory. He said the words were true in substance and in fact, and were spoken without malice and in the public interest.

Mr. Burton (with him Mr. Van Zyl) for plaintiff; Sir H. Juta, K.C. (with him Mr. Close) for defendant.

Mr. Burton said it appeared the defendant's plea was one of justification. The plaintiff left the matter of damages on those words with the Court, and he would not lead any special evidence.

Sir Henry Juta said the case would not be unfamiliar to his lordship, after the case of Steyn. There was a furrow called Steyn's furrow, and at one portion Mr. Zeeman put down some zinc sheets in order to prevent the water that was coming from his and another person's sluits running into the furrow. According to his story, two of the zinc sheets were loosened by the rush of water, and he removed them, but the others were left. The result was that

a quantity of water flowed on to Jordaan's property, and Jordaan brought an action against Zeeman for allowing the water to go on his ground. According to the plaintiff, the zinc sheets had been removed. Jordaan's complaint was that by the removal of the sheets the water came on his ground, and it became very material to ascertain whether the zinc sheets were there. Mr. Le Roux stated that he had gone specially for the purpose of examining the place, and in his evidence he swore there were no zinc sheets there, but on a subsequent occasion before the Court he modified that statement. The second point was that there was a break in the furrow at Steyn's, which caused the water to go on to Jordaan's property. The case of Zeeman was ...at there was also a large break before the furrow came on to his property. Le Roux swore there was only one break, and that was on Steyn's furrow.

Mr. Burton: Is that on the record?

Sir Henry Juta: No.

Mr. Burton: Oh!

Sir Henry Juta said Mr. Zeeman said Le Roux's statements were false, and there was no concealment about what he said.

Defendant was called, and proceeded to give evidence in support of counsel's statement.

Counsel were heard in argument as to whether defendant could lead evidence that the plaintiff said more than appeared on the record.

Sir Henry Juta pointed out that the statements which defendant alleged were falsely made by plaintiff, and which did not appear in the record, were contained in the document prepared for the Magistrate when defendant made application to have plaintiff committed for perjury. Plaintiff had given notice that he would avail himself of this document.

In giving judgment on the point, De Villiers, C. J., said: I think if the plaintiffs had excepted to the plea he would have had good ground of exception, because there is no specific statement as to the line of defence that would be taken; but seeing that no exception has been taken, I think the defendant ought to be allowed to give this evidence, more especially as the plaintiff had some notice as to the line of defence that was going to be taken.

Witness, continuing, said it was important in his case to show there had been a break, which caused damage apart from his interference with Steyn's furrow. Mr. Le Roux said, in regard to these two breaks, that it was only at the zinc that the water flowed over. Witness's attorney asked Le Roux what he would say if he took him up and showed him a second break only three yards away from the zinc. Le Roux said he had not seen it. In every case in which witness was concerned Le Roux was against him. At the time when Le Roux said he went up to look the two breaks were there. The breaks took place at the beginning of the winter. After the case, witness saw the Assistant Magistrate.

Cross-examined by Mr. Burton: Witness had had a good deal of litigation in his time. In most of the cases in which he had been concerned, the witnesses on the other side had spoken falsely. In 1901, Mrs. Jordaan proceeded against witness for damages for witness having cut a furrow. She succeeded in that action. Witness then agreed to block up the furrow with zinc sheets. This was done to protect witness and the other parties. Witness blocked up the way through which the water had gone on to Jordaan's property with zinc sheets; he could not say how many sheets he used at that precise spot.

By the Court: One of the points upon which witness alleged plaintiff had spoken falsely was that he (plaintiff) said witness had taken all the sheets away. The other point was that he said there was not a break-away from witness's land.

Cross-examination continued: Witness put four sheets at the place, one and a half sheets below and two and a half across. The sheets across were to prevent the water washing back. Witness removed the sheets below Steyn's furrow. He, however, left about half a sheet below. He took these away, because they did not help to keep off the water; the others—the ones across—were just as useless. Witness could do nothing further. Le Roux must have seen the break between the zinc sheets and the junction of witness's and Losper's furrows. From that break the water would have to run into Steyn's furrow all the same.

Re-examined by Sir Henry Juta: The breach above caused the water to flow not only in Steyn's furrow, but

over it as well. Hence the importance of having the fact established that there was this second breach.

Stephanus B. Walters, farmer and field-cornet, gave evidence corroborating that of the last witness in regard to the statements alleged to have been made in court by Le Roux. Witness saw the zinc sheets, which were old. Part of the sheets were below, and part across the furrow. The second breach in Losper's furrow was a big one, and caused the water to go across the furrow above the zinc. Witness saw the break the day before the trial. It was not a breach of a day or two; witness could not swear the breach was there a fortnight before.

Peter Daniel Zeeman, son of the defendant, gave similar evidence as to what Le Roux saw. The zinc sheets were there a long time before the case came on; more than a fortnight before. Two of the sheets had been washed away. Le Roux swore distinctly that all the sheets had been taken away. The break at Losper's occurred at the beginning of the winter, before the time Le Roux said he saw the place. It was about six yards from the zinc, and anyone standing at the zinc must have seen it.

Henry P. van Eyk, the attorney for Zeeman in the case with Jordaan, said he cross-examined Le Roux in the case. Witness asked him, "Were all the zinc sheets away?" and he replied, "Yes; all." Witness also questioned him with regard to the breaches. He said he went up specially to examine the place. In examination in chief, Le Roux said there was only one break, and witness pressed him upon the point, and he said he had not seen the second. Anyone standing at the zinc could not help seeing the other breach.

Cross-examined by Mr. Burton: The only conclusion witness could come to was that Le Roux was trying to deliberately mislead the Court. He was very much surprised at Le Roux's evidence. A portion of the zinc sheets were still below.

Sir Henry Juta then closed his case.

Mr. Burton called,

Christopher John Sweeney, R.M., who stated that the case was heard before him. At the first hearing he did not think the question of the zinc across the furrow was raised.

Cross-examined: He could not remember what had transpired beyond what appeared on the record.

Bartholomeus Johanne le Roux, the plaintiff, a farmer, living in the Malmesbury division, and for a number of years field-cornet in the ward in which the parties resided, alleged that he was present when defendant agreed to close up the opening he had made in the furrow. This was in 1901. He was asked to inspect the damage, and then he noticed the spot where the zinc had been, and that it was gone. Some sheets of corrugated iron were still there. He did not see any other break. If he had been mistaken in anything he had not intentionally said anything that was not correct.

Cross-examined: He did not say before the Magistrate that there had only been one break. He was not asked to inspect the furrow—merely the damage.

Re-examined: When he made his examination his attention was not drawn to Steyn's furrow.

Mr. Burton then closed his case.

[De Villiers, C.J.: Will counsel please confine themselves to the question of damages?]

Mr. Burton: That is a question I must leave entirely to the Court.

Sir H. Juta: The Magistrate can state only what is on his record. He did not put down everything, and I therefore would ask that his evidence should be dismissed. The real point is—was Zeeman bound to make this furrow? and if so, by whose fault did the damage complained of happen; and when and where did it happn? The damage was caused by an overflow which took place on another man's property, but Le Roux's evidence gave the impression that there was only one break in the furrow and that that was on defendant's property. Now it is common enough for a man to swear that he has not seen a thing, but then the plaintiff does not merely say that he did not see this second break, but that he would have seen it if it had been there. In point of fact, the break was some six yards long, but Le Roux says he never saw it. Had it not been for Le Roux's conduct this action would never have been brought into Court, and how then can he come here and ask for damages? The statements he made before the Magistrate were clearly not correct; he has not produced a single witness to

prove that his character has been injured in any way by the statements of the defendant, and that being so, he cannot be entitled to any damages whatever.

Mr. Burton was not called upon in reply.

De Villiers, C.J.: It is common cause in the present case that on two occasions the defendant used defamatory language concerning plaintiff. On the first occasion the words used were: "I have the papers in my pocket, and I am going to charge Le Roux with perjury." On the second occasion the words used were: "You, Bart le Roux, have committed perjury, and you ought to have been in gaol already, and if the judge had not been sitting then you would already have been there, and I will now go and charge you." These words are admitted to have been used, and the defence is that they are true in substance and in fact and were spoken in the public interest and without malice. The plea is in effect a plea of justification, and such a plea must fail unless the offence charged is clearly proved to have been committed. There can be no evidence which has been given in justification no jury in the world would convict plaintiff of perjury. The two points on which he is alleged to have sworn falsely are, firstly, in regard to the zinc plates, and, secondly, as to the breakage. As to the zinc plates it is clear that the point upon which the examination took place was entirely in regard to the plates which prevented the water from rushing over to Jordaan's place. The plaintiff in his evidence stated that the zinc plates had been removed. Now, clearly, the plates to which he referred could only be the plates which helped to keep out the water. The bent plates would do very little, if anything at all, towards it, and the substantial point was whether the plates which kept back the water had been removed or not. It is clear that plaintiff would have confined his attention to that point, and if the question were asked: "Were all the zinc plates removed?" he might have answered "Yes" in good faith, and if we were satisfied that all the plates had not been removed I should not hold that he had been guilty of perjury. But I am not satisfied that these words were used. If the Magistrate had attached any importance to these words he would have taken them down, but they are not on the record. Then comes the important fact that before the case was finally decided the plaintiff had again an opportunity of giving evidence. When the merits of the case came to be inquired into, then the plaintiff was examined more in detail, and in his evidence he was asked whether the plates across the furrow were there, and he said "Yes." Clearly, therefore, the defendant ought to have seen that on the question of the zinc plates there was no desire on the part of the plaintiff to give false evidence against him. Before the Magistrate gave his verdict the plaintiff gave the Magistrate to understand that the plates were still across the furrow, so no possible injury was done to the defendant. I believe what he said was: "I did not see the breakage in the furrow." It seems to me extremely possible that he did not see it. His first object was to inspect the damage done to the vineyard, and he would not therefore examine above the furrow. His attention would be called to the place, and he would see that the plates had been removed, and he would not attach importance to a point which the parties themselves had not attached any imporance to up to then. Even in the evidence of the other witnesses no stress at all was laid on the point of this breakage. The proof is wholly insufficient to show that the plaintiff has been guilty of perjury. If the defendant had withdrawn the charge before action the Court would not have awarded more than nominal damages, but he has persisted in the charge, and the damages awarded must be substantial. The judgment of the Court will be for the plaintiff, for £500 damages, with costs.

Kotze, J., concurred.

[Plaintiff's Attorneys: D. Tennant. Defendant's Attorneys: Faure and Zietsman.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and a Jury.]

LEVIN v. COCHRANE AND CHERRY. 1903. May 14th.

This was an action brought by Benjamin Levin, merchant, of Cape Town, against

Cochrane and Cherry, building contractors, for breach of contract, and for the recovery of £1,250, being the half amount of profit realised on certain property on which the plaintiff claimed an option.

The plaintiff's declaration set forth that he was a merchant, carrying on business at Cape Town, and the defendants, builders and contractors, carrying on a partnership at the same place. About April, 1902, plaintiff entered into an agreement which was embodied in writing, whereby it was provided, *inter alia*, that plaintiff should have, during a period of twelve months, the right to purchase certain immovable property belonging to defendants in Roeland-street for the sum of £6,000, and whereby it was further provided that should the defendants, with the consent of plaintiff, sell the property to any other person, plaintiff should be entitled to receive one half of the price realised in excess of £6,000, which consent plaintiff should not be entitled to withhold if a price of £7,000 should be obtained. Defendants had since sold the property for £8,500, and plaintiff claimed the sum of £1,250. Defendants were further indebted to plaintiff in the sum of £131 5s. 11d., being the balance of an account. The plaintiff asked for (a) judgment for the sums of £1,250 and £131 5s. 11d. respectively; (b) interest *a tempore morae*; (c) alternative relief; and (d) costs of suit.

The defendants, in their plea, admitted entering into an agreement with the plaintiff relative to their property in Roeland-street on the 8th April, 1902. On the 5th April the defendants wanted money, and the plaintiff offered to become security to the African Banking Corporation for £500, the defendants to pay him £50 commission. The plaintiff subsequently offered to become security to the bank for £1,000 for the period of one year, instead of the £500 originally agreed on. The defendants accepted the offer, and it was agreed that the plaintiff should have a written agreement embodying the terms as to the sale of the Roeland-street property. The agreement was drawn up by the plaintiff's solicitors on April 8. The plaintiff did not enter into the agreement with the bank, which he had promised and undertaken to do, but merely signed a letter of guarantee to the bank for the sum of £1,000, to be withdrawn at any time on notice to the bank. On the 15th April he withdrew the guarantee, and refused to be bound by it, or in any manner to the defendants. On the 17th April the bank intimated to them that they could have no further facilities, and the defendants claimed that they were put to serious loss and inconvenience. They claimed that the plaintiff was not entitled to any benefit in respect of the provisions of the agreement of April 8. An alternative plea was put that by reason of the plaintiff's failure to keep the agreement, he could not sue on his option on the property in Roeland-street. The claim in reconvention claimed that the agreement of 8th April be declared null and void.

The replication denied that the security was to extend for a year. The plaintiff admitted that he withdrew the guarantee by notice on the 15th April, but, thereafter, as a matter of grace, renewed the guarantee until the month of May, 1902. He admitted signing a letter of guarantee to the bank for £1,000 to be withdrawn at any time on notice. He had no knowledge that the bank withdrew the banking facilities from the defendants on 17th April, or of their serious loss and inconvenience thereby. He admitted the allegation in defendant's plea with reference to the £131 5s. 11d., but claimed that the tender was wholly insufficient.

Mr. Benjamin (with him Mr. Russell) for plaintiff; Mr. Searle, K.C. (with him Mr. Upington) for defendants.

Mr. Benjamin called the plaintiff. He stated that on the 5th April, 1902, the defendant's asked him to guarantee them for £500, and stated that they would be able to pay the £500 and their overdraft by the 15th of the month. Witness signed a further guarantee for £1,000 at the bank, but there was no specific time, the understanding being that, when £1,000 or more was due, the defendants would pay that amount. A rough agreement was drawn up, and the original agreement was drawn up with the defendants on the 8th April, 1902. On the 16th April he made certain inquiries at the bank, and as a result of certain information he instructed the manager of the bank to close the account so far as he was concerned. Subsequently, he saw either Cherry or Cochrane, and told one of them to pay the overdraft, and the reply was that they had been disappointed. Cherry said if he would wait a few days the bank would get the money.

He further said that he would give the bank an order on the Harbour Works at Mossel Bay to cover the overdraft. The defendants were contractors for the Harbour Board, and the order was for the bank to receive the money due to the defendants. In addition there was a bill from Black for £400. Witness had tried unsuccessfully to sell the property in Roeland-street for £6,500, and the defendants also put up the property again in May, but only something under £6,000 was offered. Towards the latter end of May one of the defendants—he believed it was Cherry—asked him to give him a cheque in return for a crossed one for £60, which the defendant asked witness to hold over. On the 4th June the cheque was returned by the bank marked "N.S.F." When he interviewed the bank manager he instructed him not to let the defendants draw any more on his guarantee. On June 10 a deed of inspection was drawn up by the defendants' creditors, and a Mr. Mouat was given the same power as the defendants in their business. Witness received a letter from Mr. Mouat in December, 1902, stating that the property in Roeland-street had been disposed of for £8,500, and that it was expected the various jobs would be completed by January, and that there would be about £4,000 available for creditors after the bond of £2,750 had been paid. On the 17th December, witness wrote to the defendants pointing out that he had an option on the property until 8th April, 1903, and informing them that he would expect his share of the profits. They replied, saying that the plaintiff had withdrawn his guarantee, and, therefore, there would be no reason to consult him in the matter of their property. Witness then applied for an interdict restraining the defendants from dealing with the property until he could institute an action.

Cross-examined by Mr. Searle: His memory was fairly good as to what transpired at the time. He would be surprised to know that the letter which he said Cherry had shown him was not in existence. He did not give notice to the defendants before he withdrew his guarantee. He received his £50 commission for the £500, but it was not true that he suggested to let them have £1,000. The first guarantee of £500 was simply increased to £1,000. The defendants expected their money probably about the middle of the month, and witness thought he was justified in going to the bank on the 15th of the month without giving the defendants the slightest notice. He never mentioned to Mr. Mouat anything about the option on the Roeland-street property. When Mr. Mouat was instructed to draw up a rough statement of the assets, witness did not write to him about the most important asset, viz., the property in Roeland-street.

Re-examined by Mr. Benjamin: The guarantee was definitely fixed for April 15. He had nothing to do with the deed of inspection. He concluded that all the papers, including his option, had been handed over to Mr. Mouat.

For the defence, Mr. Searle called

John Edwin Cherry, partner in the firm of Cochrane and Cherry, building contractors, carrying on business in Cape Town, who stated that in April, 1902, he had two big jobs on, one at Mossel Bay and the other at the reservoir works at Newlands. On 5th April he wanted about £900 to pay his workmen, and saw the plaintiff. He never received any letter from the bank calling up his overdraft. He had had a verbal communication from the manager of the bank with reference to the matter. The £500 received from plaintiff, for which they gave him £50, was to be paid before the 5th May. When that was done the plaintiff suggested making the guarantee £1,000 for 12 months, on the understanding that the defendants would give him an option on the Roeland-street property at £6,000. It was further agreed that should the property be sold by either party for anything over £6,000 the profits would be divided. A rough agreement was drawn up that day, and the following Tuesday defendants and plaintiff went to Mr. Moore's office and signed the agreement. Witness would not have given him such an option if the plaintiff could call up the money at any time. When witness received the letter from the bank he asked the plaintiff what he meant, and he replied that he had been thinking over the matter and had really given no guarantee to the bank, as the defendants' creditors might be down on them at any moment.

Robert Cochrane, a partner in the defendant firm, gave corroborative evidence.

Cross examined by Mr. Benjamin: He placed a reserve on the property of £8,000, and after the defendants had received £500 the second £500 was accepted as a matter of convenience. At the time they entered into the agreement witness valued the property at £7,000, and according to that calculation the plaintiff was to receive £500 for the guarantee of £1,000 for a year, although the defendants were not pressed for the extra money at the time.

Maasdorp, J., in summing up, said the jury would have to consider from the evidence whether the agreement with regard to the £1,000 was for twelve months, or, as the plaintiff put it, for no specific time. The plaintiff said that he gave the defendants the first £500 for a few days, but the defendants said for one month. Did they think the agreement was likely to be entered into for a few days or for a month? Would the bank not have told the plaintiff to fix the time of the guarantee of the defendants' overdraft? If the defendants were so badly pressed to what extent would a few days have assisted them? The defendant was asked if he had signed any contract, and he said he must have done so, and when he was unable to produce it he replied that it must have been destroyed. The defendants' proposal was given as a fixed one for twelve months, and the plaintiff's a vague one till about the middle of April. The question was whether men of business would not fix a definite time when such assistance would come to an end. The jury would have to rely largely on the evidence in the case, and they would notice that the defendants said that when their facilities at the bank were stopped they immediately saw the plaintiff, who denied any such interview. When the trustee took over the affairs there was no evidence that the plaintiff drew attention to his option on the property in Roeland street. If they believed that the first £500 was guaranteed for a month, was it likely that the other contract would be entered into for 10 days?

The jury found a verdict for the defendants, who are to pay costs in the action up till the 14th February, the plaintiff to pay all subsequent costs and those of the interdict.

[Plaintiff's Attorney's: W. E. Moore and Son. Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice KOTZE.]

FORD v. FORD. { 1903. May 15th.

This was an action for divorce brought by Ada Ford, dressmaker, Cape Town, against her husband, Arthur Francis Ford, also of Cape Town, on the ground of his adultery. Petitioner also asked for custody of the minor child of the marriage, and for an order against the defendant to contribute £5 a month towards its maintenance. Mr. Upington appeared for the plaintiff, and Mr. Rainsford appeared for the defendant on the question of the custody of the child and of maintenance.

Plaintiff said she was married to her husband, on the 15th August, 1896, at S. Luke's Church, in the county of London. There was one child of the marriage, Winifred, aged 6 years. In January, 1899, they came to this colony, and her husband took up a position in Cape Town, which he had since continued to fill. After a while there were constant disagreements between them. He accused her of undue familiarity; even if she looked at anyone he said there was something between them. He always mistrusted her. In February, 1902, she returned to her parents in London in consequence of these disagreements. Her parents looked after the child. She came back to the Cape in February of the present year, and she inquired for her husband. She saw Mrs. Burton, of 20, Union-street, and in consequence of information she received, she instituted this action. When she left her husband he was earning £6 10s. a week. When she was in England he sent no money to her. She applied for custody of the child, and £5 towards maintenance.

Cross-examined by Mr. Rainsford: She was employed as a dressmaker, and earned £8 10s. a month. She had had to put out the child to nurse on account of her business.

Susie Brown, a Cape girl, said she had been in the employ of Mrs. Burton in October, November, and December last. She knew Mr. Ford, and she identified him in court. She used to take coffee to the rooms of the boarders in the morning. Ford was a boarder. On one occasion Ford seized her when she went in, and familiarity took place. The acts were repeated on subsequent occasions.

Mrs. Burton, of 20, Union-street, also gave evidence as to having taxed the defendant with misconduct with the girl. Witness insulted him at the table, and ordered him to quit the house. Defendant did not deny the accusation.

Mr. Rainsford said defendant's proposal was to send the child to a convent school at Wynberg, and he was willing to support her. The mother was at present unable to look after the child. Defendant also asked for reasonable access to the child.

A decree of divorce was granted, with costs, plaintiff to have custody of the child, but the defendant to have access at all reasonable times. Defendant to pay plaintiff the sum of £4 a month for the maintenance of the child until she shall reach the age of 16 years, with leave to the plaintiff to apply again for an increase, and with leave to the defendant to apply to the Court in case the plaintiff shall not attend properly to the child.

SOUTH AFRICAN MINERAL WATER CO. V. CAMP'S BAY TRAMWAY CO. { 1903. May 15th. June 16th.

Master and servant—Negligence of servant.

In an action brought by the owner of a horse for an injury done to it by the negligence of the defendant's servant in the course of his employment, it appeared that the servant was paid weekly by E., but that E. did so as a matter of convenience and as agent for the defendant.

Held, *that the defendant was liable.*

This was an action for damages, the plaintiffs claiming £50 from the defendants for the loss of a horse by a collision in Kloof-road, Cape Town, on the 9th October last, owing, it was alleged, to the careless and negligent driving of the defendants' servant.

The declaration set out that in October last a certain cart and two horses, under custody and control of a servant of the defendant company, acting within the scope of his employ, collided with a wagon and two horses belonging to the plaintiff company, owing to the negligent and careless driving of the said servant. In consequence of the collision, one of the plaintiffs' horses was killed, and damages were sustained in the sum of £50, being the value of the said horse. The defendant company neglected and refused to pay such sum or any portion thereof.

The plea of the defendant company admitted the fact of the collision, and that, in consequence of such collision, plaintiffs' horse had to be killed, but they denied that the said cart and horses were under the control of a servant acting under their authority. They denied that the driver was their servant, or that the collision was caused by the careless and negligent driving of such driver, and said that it was caused by the careless and negligent driving of the plaintiffs' servant. The defendants, therefore, prayed that the claim be dismissed, with costs.

Mr. Gardiner for plaintiffs; Sir H. Juta, K.C. (with him Mr. Rainsford), for defendants.

Charles Eade, contractor, said he had stables and let out horses. He had let out horses to the Camp's Bay Tramways Company. He was not in the habit of doing so. He had let them have horses on the occasion in question. He was to be paid so much per day for the horses. The Tramways Company provided both the cart and driver. The horses in the colliding vehicle were his. The driver was a Kafir boy named Johannes, who was to be paid through witness. Witness was to have a refund from the Tramways Company at the end of the month. He had no control over the boy at all. One horse

belonging to witness was also killed in the collision.

Cross-examined by Sir H. Juta: His predecessor was Mr. Makin. He had entered into the business about three weeks or a month before the accident occurred. He denied that he engaged the driver. The foreman of the road (Mr. Dyer) sent the boy to him. He charged the Tramways Company with the pay of his boys. In this case he supposed that if the company were not liable he should be. He did not engage a single driver during the month of September or October, nor did he dismiss one.

By De Villiers, C.J.: He was paid 8s. per horse per day. He fed the horses. He had no say in the matter of who should be the driver. There was no written agreement with regard to the driver. He kept baiting stables at the time of the occurrence.

Louis Simon, driver in the employ of the plaintiff company, spoke to the collision in October last in front of Mr. Marley's shop in Kloof-road. The plaintiff's wagon was at a standstill on the left side of the road close to the kerb. He was standing near to the wagon, and two boys were taking bottles into the shop. He saw two runaways coming down the road with a Scotch cart and without driver. They were in the middle of the road. The cart was loaded. The runaways turned and ran into his horses. One of his horses was killed and one of the runaways was also killed. There was a traction engine on the other side of the road. The horses were killed by the disselbooms of the respective vehicles. After the accident a coloured man, the driver, came up.

Cross-examined: His horses had their heads towards the top of the Kloof. He could see straight up the road for a long way, equal to the distance from the court to Cartwright's corner. He was attending to the bottles on the stoep. If he had been in the cart he should have got killed as well. The whole thing only occupied about a second. He did not have a chance to avert the accident.

Sir H. Juta (to witness): What could have prevented you from going behind the engine?

No answer.

Re-examined by Mr. Gardiner: He could not have taken his horses across the road to escape the oncoming horses.

Edward McGrath, engine-driver, said he was driving a steam roller for the Tramways Company in Kloof-road when the accident occurred. He saw the runaways from his engine on the right. He stopped the roller as soon as he saw the runaways; it was in a line to the shop and the plaintiff's wagon. He did not think that if the driver had been on the plaintiffs' wagon he could have got the horses out of the way. When the runaways got close up they swerved and collided with the plaintiffs' horses; he fancied they were scared by the engine. He thought if the runaways had not swerved they would have cleared both the plaintiff's horses and the engine.

Cross-examined by Sir H. Juta: He did not think sufficient warning was given of the approach of the runaways to enable the plaintiff's driver to move behind the engine.

George Charles Marley, general dealer, Kloof-road, also gave evidence. He thought that the runaways would have cleared had it not been for the presence of the engine in the road. He did not consider plaintiffs' driver had sufficient warning to move to the other side of the road.

Sir H. Juta: But, supposing you had been in the cart, what would you have done?

Witness: If I had been in the cart I don't know what I should have done. If I had tried to cross the road both my horses might have been killed. Under the circumstances, I think I should have stopped on the cart and seen what developed.

Harry Evans, one of the plaintiffs, said he valued the horse that was killed at about £40.

For the defence,

James Allan Barkly said that he had charge of the construction work for the defendant on the Kloof-road. He had an arrangement with Eade for the supply of horses. Mr. Eade also supplied the drivers. It was not true that the defendant company kept any reserve supply of drivers for Eade. They hired many carts and horses and drivers from Eade. They agreed to pay 22s. per day for team, harness, and drivers. The drivers, as far as he knew, were paid by Eade. The defendant company simply paid the accounts sent in by Eade.

De Villiers, C.J., said he noticed from the accounts sent in by Eade that the wages of the boys were charged for.

Witness, further examined, said he had nothing to do with the hiring or the dismissal of the boys. That arrangement was in force in October. The defendant company's own drivers were busy with their own carts.

Cross-examined by Mr. Gardiner: The arrangement was made before witness or Mr Eade had any interest in the matter. Mr. Dyer was witness's assistant. The arrangement entered into between Mr. Wilson (witness's predecessor) and Mr. Eade's predecessor continued afterwards. He identified notes produced as being in the handwriting of Mr. Dyer, one of which read: "Kindly give the horses to driver I am sending you." His assistant had to do with the engaging and dismissing of boys.

Shapiro Cherewitz, construction overseer for the Camp's Bay Tram Co. on the work referred to. said he used some carts of his own and others he got from Eade. He had nothing to do with the drivers.

Sir Henry Juta said he had several times sent for Mr. Dyer to Fish Hoek, but he had not arrived, and as he was the most important witness in the case, and was the only one who could give the information about the carts and drivers, he must ask for a postponement.

[De Viiers, C.J.: Has he been subpœnaed?]

Sir Hy. Juta: No, my lord. Being in the company's employ, one took it for granted he would be here.

Mr. Gardiner said the case had already stood over one term, and the witness should have been subpœnaed. The amount involved being so small, it seemed a pity that costs should be piled up by a postponement. He asked for costs of the postponed.

De Villiers, C.J., commented on the fact that in postponing the case, owing to defendants' neglect to subpœna their witness, it could not be heard for another month on account of the mass of cases on hand. The Court was quite prepared to proceed with the case, and had adjourned other cases in order to do so. He quite saw the witness was a very important one, and, seeing the amount was not much, and the defendant company were not likely to suffer very much inconvenience, the case would be postponed, although he was afraid they could not hear it before the 16th June, costs occasioned by the postponement to be paid by the defendants.

Mr. Gardiner: Only I suppose for the production of Dyer.

De Villiers, C.J.: Yes. I think if the driver can be found he should be produced as well.

Postea (June 16th):

John C. Dyer, called by Sir H. Juta, said that in October last year he was in the employ of the Camp's Bay Tramways Co. as engineer in charge of construction, but he was not now in their employ. The man Eadie, who supplied horses to the company on the day in question, was successor to one Makin. Makin used to buy mules for the company, but he did not buy horses and carts. The arrangement was that inasmuch as they could not get drivers at Camp's Bay for their mules, Makin should supply drivers in town, and the mules should be sent to town. Eadie took over from Makin, and he was aware that he was taking over on the same terms as Makin. Witness did not engage any of the drivers for the carts. He remembered having sent a letter to Eadie in these terms: "I will take your horses at the price arranged, 16s. per day; kindly give them to the driver we are now sending you, and send them off with the cart at once. This was one of the drivers in the employ of the company, and witness sent him down to Eadie to bring the horses back, as they wanted a water cart at once. He remembered the accident in October last. He remembered the driver of the remaining horses. He was not the driver whom witness had sent to Mr. Eadie. He had nothing whatever to do with the engagement of the driver in question or his dismissal. The driver of the runaways continued at work for a couple of days after the accident. If he had wanted any driver to be dismissed, he should have sent him to Eadie.

Cross-examined by Mr. Gardiner: Witness was anxious to have the time of the drivers from Eadie in order to pay according to the amount of work done. The defendant company supplied the cart that was involved in the accident. Witness did not dismiss the driver. He had no knowledge personally of the accident.

Re-examined by Sir Henry Juta: He never treated the drivers as belonging to the company.

By De Villiers, C.J.: He had no notice of the last trial, and was not subpœnaed for that occasion. Eadie engaged and discharged "boys."

By Maasdorp, J.: The driver remained at the works for a couple of days after the accident, and then disappeared.

Mr. Gardiner intimated that the driver was present, and might be called by his learned friend.

[De Villiers, C.J.: Very well, if he is here, the Court might call him, and let both counsel cross-examine him.]

Johannes, the native driver, was then examined by the Chief Justice, and stated that at the time of the accident he had planks on the wagon, and was going up an incline. He inclined the load to the side as, had he driven straight, the wagon would have come back. He was urging the horses along, when the planks struck the animals on the back, and they got fractious, and the load fell off. Mr. Dyer engaged him as driver. Witness also fell off the wagon.

In reply to Sir Henry Juta, witness said he was engaged at the Camp at Camp's Bay. He had not been engaged previously by anyone else. Mr. Dyer gave him a paper to go to Mr. Eadie. Mr. Dyer sent him along in one of Mr. Eadie's carts, and Mr. Eadie said that next morning he was to have a horse and cart. He fell off the cart when the horses ran away. He did not put the planks on the cart. He did not drive after the day of the accident. Mr. Dyer told him to go away. He denied having told Mr. Dyer, in the presence of witnesses, that he was engaged by "Baas Charlie," meaning Mr. Eadie.

This concluded the evidence.

Mr. Gardiner: In this case two points have to be considered—(1) in whose control was the driver at the time of this accident, (2) was he guilty of negligence. As to the first point, there is a conflict of evidence bttween Dyer and Eadie. It may easily have escaped Dyer's memory that he engaged these drivers. Eadie's evidence is supported by that of the driver, and that evidence shows that Dyer engaged, dismissed, and paid the drivers. As to the second point, defendant's Scotch cart was left unattended and ran down the road into our waggon. Then the fact that the planks were not properly secured on this cart contributed to the accident. They were loaded up by the company's servants, and it was their duty to see that the cart was properly loaded. There was no contributory negligence on our part. Our driver could not possibly have got out of the way. As to damages, we claimed £50, but as the evidence shows that the value of the horses was only £40 I only ask judgment for that sum.

Sir H. Juta, K.C.: The plaintiff has to prove (1) that the driver of the cart was our servant and (2) that he was guilty of negligence. As to the evidence Eadie has a great interest in this case, while Dyer has no interest whatever, as he is not now in the employ of the Tramway Company. At the last moment Eadie produces the driver of the cart. If he was in our employ, why did we not pay him and enter his wages on our pay sheets? Neither the manager nor any of the officials of the Tramway Company ever considered that these drivers were in the Company's employ. It is most improbable that Eadie (a livery stable keeper) should have trusted his horses to be driven by the first Kafir Dyer liked to send. I would submit that the *onus* is on the plaintiff, and that he has not discharged it. Then again, there is no proof of our negligence. Planks put on a cart will often slip, no matter how carefully they may be packed. These did slip, they hit the back of the horse, and then he naturally became restive. If the driver was not under our control, we are not liable. It is hardly necessary to cite authority for this but see *Jones* v. *The Mayor, Aldermen, etc., of Liverpool* (14 Q.B. D., 890).

Mr. Gardiner was not heard in reply.

De Villiers, C.J.: There is no doubt in this case that a serious accident happened to the plaintiff's horse in October last. The accident was caused by two runaway horses coming down Kloof-road with a Scotch cart and striking one of the plaintiff's horses. In the course of the examination no attempt was made to prove that there was contributory negligence on the part of the plaintiff, and that the plaintiff's driver had not taken sufficient trouble and care to avoid an accident. Defendant's counsel in the course of his address said much on the subject of contributory negligence. Therefore I say no more on

this subject than that there is no evidence whatever of contributory negligence. It appears to me that the plaintiff's driver did everything that a skilful driver could have done to avoid an accident, he was standing still there, and the best course under the circumstances was to remain standing still. If he had moved, as it was suggested he should have done, probably instead of one horse being killed two might have been killed. Now the question arises, who is responsible? *Prima facie* it would be the person who employed the driver, because the horses were without a driver, and the driver ought to have been on the cart to manage the horses. The plaintiff says that the driver had been appointed by the defendant. The defendant says that the driver had been appointed by Eadie, to whom the horses belonged. Eadie has been called, and he is positive, he gives his evidence with great certainty that the agreement was that the drivers should be appointed by the company, and that for the sake of convenience he was to pay them because the drivers would come to the stable with the horses and take them out of the carts. He paid them there as a matter of convenience. On the other hand, Mr. Dyer has been called, and he says he did not engage the driver in the present case, the man Johannes. In matters of this kind, where there is a conflict of evidence, it is always of importance to consider the terms of any documents that may be produced in the course of the trial, and certainly all the documents that have been produced in the present case are more favourable to the plaintiff's version that the driver had been engaged by the company than to the defendant's version that the driver had been engaged by Eadie. There is the letter of August 2, in which Dyer writes: "I will take your horses as per arrangement, kindly give them to the driver I am sending you, and send him off with the cart at once." Well, Mr. Dyer says this was a special occasion, but still it is strange that on this side of the case there should be writing to support the plaintiff's version. Then there is another letter, which was written by Mr. Dyer to Eadie's predecessor. It is dated the 7th June. He gives the time of the drivers, and says: "Please see them paid for this time only." Now, it is strange that Dyer should be so particular about their being paid for that particular time only if the arrangement were that which he contends for. It would matter very little to him what Eadie paid to the drivers, because he was liable only for the time during which these people were actually employed. As to that, he kept the time, and he could not be held liable for more, but if he had engaged the drivers, it was a matter of importance to him that they should not be paid more than they were entitled to, because Eadie would be entitled to recover back from him everything that had been paid. Then, if there was any doubt on the subject, all doubt is removed by the evidence of the driver himself, who has since been discovered. It is suggested that he is not speaking the truth, because he gave his evidence in his own native tongue. But we see that often, that Dutch, as well as native witnesses, prefer to give their evidence in their own language, even if they can speak English. The witness does not speak English fluently. The driver is positive that he was engaged by Dyer. I do not wish to say that Mr. Dyer intentionally swore what is false; he may have forgotten the incident, but I am perfectly satisfied that he is the man who engaged Johannes, the driver. Under these circumstances, I am of opinion that the defendant should be held liable. It is said that according to Johannes' own evidence there is not proof of negligence. I am quite satisfied, however, that there has been negligence, because, according to his evidence, the negligence consisted in the cart not being properly loaded; it was loaded in such a way that the planks that were on the cart struck the horses, and caused them to run away, and this loading was done by one of the company's servants, an Italian. This defence of want of negligence really never was raised in the plea and during the course of the trial. Now it appears that Mr. Dyer did see Johannes after the accident, and spoke to him about the matter. If the company had then satisfied themselves that there was no negligence on the part of the driver, they should, and would, have raised that point in the pleadings or in the course of the trial, but it was taken for granted throughout the trial that there was no negligence. The value of the horse is set down at £40, and for that amount judg-

ment will be given for the plaintiff, with costs.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendants' Attorneys: Silberbauer, Wahl, and Fuller.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.) and the Hon. Mr. Justice KOTZE.]

THOMAS V. THOMAS. { 1903. May 18th

This was an action for the restitution of conjugal rights, and, failing compliance, for a decree of divorce on the ground of defendant's malicious desertion. The plaintiff was Mrs. A. Thomas, of Woodstock.

Mr. Alexander appeared for the plaintiff, and the defendant was unrepresented.

Plaintiff stated that she did not know her husband's address. They were married at Bloemfontein in 1884. There was one child born of the marriage, but it only lived 14 days. In 1886 they removed to Kimberley, where they lived together until 1888, when her husband left Kimberley, and she had not since heard from him. Witness remained in Kimberley until two years ago, when she came to Cape Town. She was now supporting herself by dressmaking.

By De Villiers, C.J.: Her husband was a printer. When he left Kimberley he said he would seek work in Johannesburg. She did not know where he had gone. She did not even know whether he was alive.

Mr. Alexander said that they had attempted service in Cape Town, but had been unable to trace the defendant. Counsel, replying to the Chief Justice, said the parties were married in community, but no order was asked as to property

Decree of restitution granted, with costs, the defendant to return or receive the plaintiff on or before 30th June, failing compliance a rule being given calling on the defendant to show cause on the 12th July why a decree of divorce should not be granted to the plaintiff with costs.

CONSTABLE V. CONSTABLE.

The plaintiff, who resides in Cape Town, sued her husband, who is believed to be residing in Johannesburg, by edictal citation, for restitution of conjugal rights, and, failing compliance, for a decree of divorce on the ground of malicious desertion. Mr. Benjamin appeared for the plaintiff, and the defendant was unrepresented.

Charles Wm. Henry Smith, clerk of marriage records, Colonial Office, gave evidence as to the marriage of the parties to the suit at Fraserburg in April, 1884.

The defendant, Susannah Wilhelmina Constable, said they were married by ante-nuptial contract. Defendant had no occupation. They left Fraserburg on the day of the marriage, and they continued to travel. Defendant was a blacksmith, and travelled with her parents. Subsequently she returned to Richmond. He had been charged with a crime at Britstown. He afterwards returned to her at Richmond, but he then left after staying a day. He came to her again in August, 1886. She had not since seen or heard from him. Her latest information in regard to him was that he was at Johannesburg. They did not live unhappily together. At the time of the marriage, he gave her a promissory note of £3,000, but she had received nothing. He said he had an interest in a business in England.

By De Villiers, C.J.: It was about seven years since she had heard anything as to defendant's whereabouts. She had received a paper from Johannsburg, in which it was stated that a man named Constable was living with another woman.

Decree of restitution granted with costs, defendant to receive or return to the plaintiff on or before June 30, a rule being granted calling on defendant to show cause on the 12th July why a decree of divorce should not be granted to the plaintiff with costs, rule to be served personally, failing which publication as directed in regard to previous service

MALCOMNESS V. CHETTY.

This was an action brought by Malcomess and Co., carrying on business at Cathcart, against the defendants, two brothers, who carry on business in Cape Town, to recover £393 15s. 10d., less £75 16s. paid on account, leaving a net amount due of £317 19s. 10d., with interest, *a tempore morae*, and costs.

The case arose out of a transaction in potatoes The plaintiffs stated that they sold to defendants 500 bags of potatoes at 15s. 9d. per hundred lb., delivered on trucks at Cathcart Station. The defendants, in their plea, stated that on the 21st June they entered into a contract with Messrs. Bergh and Co., as agents for the plaintiffs, for the delivery of the said potatoes. They were to be good, sound table potatoes, and the first consignment was to be delivered on the 25th June, and the remainder on the 27th June. On or about the 1st July the defendants received the first consignment, and in consideration of what had happened the plaintiffs agreed to reduce the price to 16s 6d. per bag delivered at Cape Town. On the 7th July the plaintiffs tendered further consignments, but these were in such a bad condition that the defendants refused to accept delivery, and the potatoes were afterwards sold at the public market, realising £41 11s. 9d., after deducting costs and charges. On or about the 9th and 10th July the plaintiffs tendered 250 bags more. These potatoes also were in a rotten condition, and defendants refused to accept delivery, and had intimated to the plaintiffs that the potatoes would remain at their stores pending further directions from plaintiffs as to their disposal.

One of the defendants appeared, and asked that the case should be postponed, owing to the illness of his brother, who was more fully acquainted with the matter than he was.

De Villiers, C.J., asked defendant why their attorneys had now withdrawn from the case?

Defendant said he supposed it was because they were a little short of ready money.

De Villiers, C.J., said that as witnesses had come from Cathcart he thought the case had better go on as far as their evidence, at any rate, was concerned.

Mr. Benjamin (with him Mr. Russell) for the plaintiffs.

Percy Rose Innes said he carried on business as an agent in Cape Town. He saw the defendants on the 21st June last, and arranged the sale of the potatoes. On the 23rd June he had a broker's note drawn up for the sale of 500 bags of potatoes from plaintiffs to defendants, delivered on trucks at Cathcart Station, "delivery to be made with the least possible delay in good and sound merchantable condition." On the 24th June he received a letter from the defendants, complaining that the first portion of 250 bags had not been received, and asking, seeing that they had sold part of the consignment, when they might expect the potatoes to be delivered. The price was to be 15s. 9d per bag of 150 lb., delivered on trucks at Cathcart Station, which worked out approximately at 18s. 6d. per bag, delivered on trucks at Cape Town Station. He saw the defendants, and explained to them that he had wired on the 21st, and that after he had received confirmation in about two or three days' time from Malcomess and Co. he had prepared his broker's note. After that, the first consignment of potatoes arrived. The defendant called at his office. He complained that the market had dropped from 23s. to 17s. This was owing to a fresh shipment of potatoes having just arrived. Eventually it was arranged, in order to save further expense, that the defendants should pay 16s. 6d. per bag delivered in Cape Town, an allowance being made on the railage, but not on the price of the potatoes. Witness saw the potatoes when they arrived; they were in good condition. He also stated that the whole of the 500 bags were delivered.

Thomas Muller Preston, a clerk in the employ of Malcomess and Co., at Cathcart, stated that 250 bags were delivered at Cathcart Station on the 26th June, and the remaining 250 on the 29th June. Each bag was weighed; and the potatoes were in good condition when they left Cathcart. The reason of the delay in delivery was that they had to wait for trucks. It was just after the cessation of the war, and there was great difficulty in obtaining trucks. The potatoes were all grown in the Cathcart district, and most of them had just come from the farms.

George Cooper, stationmaster at Cathcart, spoke to receiving the consignment at the station on the dates

named. At the time, he said, there was great difficulty in obtaining trucks, and considerable delay occurred in the forwarding of goods on the railway.

The defendant said that in the first consignment there was a shortage of 10 lbs. in each bag, making 1,200 lb. in all. The other potatoes were in a very bad state. Replying to the Chief Justice, defendant added that he had no evidence as to the quality and weight of the potatoes when placed in the trucks at Cathcart, and that his brother, even had he been present that day, would have been unable to give the Court any information on that point.

De Villiers, C.J.: It is clear from the broker's note what the contract between the parties was—the plaintiff had to deliver 500 bags of Cathcart potatoes at so much per lb., delivered on trucks at Cathcart Station, "delivery to be made with the least possible delay in good and sound merchantable condition." The delivery was to be made in "sound merchantable condition" at Cathcart Station. If the defendant had assured the Court that he could produce evidence as to the condition in which the potatoes were on delivery at Cathcart Station, then the Court might have postponed the case for the purpose of hearing such evidence. The witnesses for the plaintiff state positively that the potatoes were in good condition when delivered at Cathcart Station, and that they were delivered at Cathcart Station within a reasonable time, that they were delivered as soon as there were trucks available to receive them. The defendant's potatoes seem to have been knocked about in the railway trucks. By the 28th June the defendant received the first consignment of 120 bags of potatoes. We do not know what had happened to those potatoes on the railway. They might have been damaged by the Railway Department, and in that case the defendants would have their remedy against the Railway Department. If the requisite quantity was delivered the defendants are liable to pay the amount, and no good purpose can be served by postponement, which would only add to the costs of the case. The Court will now give judgment for the amount claimed with costs.

[Plaintiff's Attorneys: Godlonton and Low.]

BRAUN V. COHEN.

Slander—Magistrate Court costs.

This was an action for £500 damages for slander.

The declaration set forth that the plaintiff was a farmer and brickmaker residing at Cape Town, and defendant also lived in Cape Town. On or about the 12th February, 1903, the defendant, speaking to one Max Jaffe, in the Yiddish language, accused the defendant of having stolen the clay with which he made his bricks, and afterwards he said to the plaintiff, "Yes, you (meaning the plaintiff) stole the clay over there, and I am going to prove it," thereby meaning that he was dishonest, and guilty of fraudulent conduct in his business. Damages to the amount of £500 were claimed with costs. Defendant's plea denied that he used the words or had used at any time words intended to mean that plaintiff had committed an indictable offence. He also denied that plaintiff had sustained any damage to which he (defendant) was liable.

Mr. Rainsford for plaintiff; Mr. Gardiner for defendant.

Max Jaffe, plaintiff's foreman, who gave his evidence in Yiddish, was called to prove the use of the words complained of, which, he said, were used in the presence of about twelve people.

Julius Braun, the plaintiff, and John Stewart, brickmaker in the plaintiff's employ, also gave evidence.

For the defence,

Jesse Cohen, the defendant, said he had some words with Jaffe about the use of a road which had been granted to him (defendant) by the Town Council. He never spoke about clay to Jaffe, but he said that plaintiff had charged him too much for water. On the following day, when he spoke to the plaintiff on the subject, he (defendant) said to him, "You are taking my water; you think it is the clay." He never accused the plaintiff of having stolen the clay, and he did not think the conversation could have been overheard by the workmen.

Mr. Gardiner, on behalf of his client, commented on the fact that no disinterested witnesses had been called, and he contended that, even had the words been used, plaintiff had not

suffered either in his character or business. It had been proved in another case that plaintiff was entitled to the clay, and no one would believe the insinuation that he had stolen it.

De Villiers, C.J.: There is a conflict in the evidence as to the language actually used by the defendant. One thing is clear, that there was a dispute between the parties as to the right of road and as to water. A dispute then arose as to the clay, in the course of which the plaintiff and his witnesses said, the defendant had said the plaintiff had stolen the clay. The defendant, on the other hand, denies it. I am inclined to think some words to that effect were used; that in the heat of the moment the defendant did not measure his words; that he was annoyed about the road and about the clay, and he did use such words which might lead the bystanders to believe that he accused the plaintiff of taking the clay. At the same time, the bystanders would not be much affected by the use of the words. Only two witnesses were called on behalf of the plaintiff to prove the use of the words. They were employed by the plaintiff, and were still in his employ. It is said there were strangers present, but none were called on behalf of the plaintiff. There is no plea of justification in the present case; there is no attempt on the part of the defendant to throw any slur on the plaintiff's character; and I think this is not a case which the plaintiff should have brought into this Court. If his object was to clear his character, he might have done it in the Magistrate's Court instead of coming into this Court with a paltry case of this kind. The damages are such that no Magistrate would have awarded more than £10, which is quite within the jurisdiction of the Magistrates to award. Judgment will be, therefore, for plaintiff for £10, with Magistrate's Court costs.

STRAUSS v. LOUW.

This was an appeal from a judgment of the R.M. of Calvinia.

The appellant had brought an action in the Court of the R.M. at Calvinia to recover a certain mule, or its value. £20. The plaintiff purchased the mule from the military after the cessation of hostilities, and the point argued before the Magistrate was whether the military did or did not acquire a good title to this animal under certain circumstances under which they took it. The Magistrate gave absolution from the instance, and from that judgment the present appeal was brought.

Mr. Benjamin for appellant; Mr. Van Zyl for respondent.

[De Villiers, C.J.: When was the mule sold; after peace?]

Mr. Benjamin: It was sold after peace. My contention is that the animal had come into possession of the military, and that it was actually commandeered by them, and paid for by them. I think the doubt in the case is as to the identity of this animal. It is admitted on the record that certain mules were commandeered by the military, and commandeer notes were passed for them and payment actually made. The defendant says the particular mule in question was returned to him by the military.

[De Villiers, C.J.: The Magistrate found that?]

Mr. Benjamin: He seems to have found that as a matter of fact.

[De Villiers, C.J.: Then the military officials, believing that this was the same mule which had been commandeered, sold it?]

Mr. Benjamin: They sold certain animals afterwards, and they sold this particular mule after the cessation of hostilities, and the plaintiff bought it.

[De Villiers, C.J.: How did it get into the defendant's possession?]

Mr. Benjamin: I suppose it must have strayed. The question, I think, is entirely one of credibility of the evidence before the Magistrate. There was certainly a conflict of evidence. The evidence given by the plaintiff himself was very largely hearsay evidence, and his wife, who was said to have been in possession of this particular animal during his absence on commando, was not called as a witness. There were two other witnesses called, who deposed to the fact that the animal had remained in possession of the wife, but the wife herself was not called.

[De Villiers, C.J.: There was an interdict granted after peace had been declared. Is this one of the animals?]

I should think so, although the record is not quite clear. My submission is

that the military acquired a good title to this animal during the course of the war.

Mr. Van Zyl, for the respondent, contended that no sufficient reason had been adduced for setting aside the judgment. He quoted the Magistrate's reasons for judgment, which were firstly that the mule in question was the property of the defendant; secondly, that it was in his possession on or about the 13th January, 1901, and remained in his possession until on or about 14th July, 1902, after peace was declared; and, thirdly, that it was never requisitioned by the military authorities for the suppression of hostilities, or the establishment or maintenance of good order and government, and for the safety of this colony between the 12th October, 1900, and the passing of the Indemnity Act of 1902.

De Villiers, C.J.: It is entirely a question of credibility as to whether the mule was in the possession of the defendant all through the war. It has been candidly admitted on behalf of the plaintiff that if the Magistrate is right in his finding on the question of fact, the plaintiff has no case. On the question of credibility, there appears to be evidence on both sides. Some of the witnesses for the defendant swear positively that this mule was during that time in the possession of the defendant. The military authorities had allowed the defendant to retain the mule and bring it back to his place, and it was in his possession from February, 1901, to July, 1902. That is the defendant's version also. In opposition to that, there is certain evidence of some witnesses who maintained that this mule was in the possession of the military throughout; but it may well be a case of mistaken identity. Be that as it may, the Magistrate's finding is clear on this point, and he has had better opportunities than this Court has had of judging as to the credibility of the witnesses. The appeal must, therefore, be dismissed, with costs.

DE KLERK V. HOLTMAN. { 1903. May 18th.

Interpleader—Pledge—Delivery.

A., being indebted to the claimant in the sum of £30, gave him as security two mules, which, however, A. retained in his possession. Subsequently B. having obtained judgment against A. the mules were attached by the messenger.

Held, *in an interpleader suit that the claimant was not entitled as against B. to claim the benefit of the pledge.*

This was an appeal from a judgment of the R.M. of Tulbagh.

From the record in the Court below it appeared that the present appellant obtained judgment against one De Villiers, and on the 6th April last two mules, found in the possession of De Villiers, were attached by the messenger of the R.M.'s Court. These mules were subsequently claimed by one Andries Holtman, the present respondent, who said that they were his property, and thereupon instituted an interpleader action to have determined the question whether these mules were executable or not.

The Magistrate, in his reasons for judgment, stated that it was shown by sworn evidence that the full purchase price of the animals in question was paid by the claimant, who was secured by the document "A" until their full value should be paid. From the character of De Villiers, who was known both to the Court and to the public living near him, it would be highly improbable that he would secure a loan of £30, except on very good security.

Mr. Van Zyl (for the appellant) argued that the Magistrate's judgment was not supported by the evidence.

De Villiers, C.J.: The burden of proof as to ownership in this case lay with Holtman, the claimant. In order to discharge this burden, he gave evidence that he (Holtman) had bought the mules from Theron, and on that point he is supported by De Villiers, who was the defendant in the original action. Unfortunately, however, for their case, a document was put in by the claimant himself, the contents of which were known to both De Villiers and the claimant at the time it was drawn up. In this document De Villiers acknowledges to have borrowed £30 from

the claimant, which he promises to repay with interest at 7 per cent. As security for repayment, he declares that the two mules he bought from Mr. Theron, and now in his possession, shall be the property of Mr. Holtman until the said sum is repaid. The claimant and De Villiers appear to have acted under the belief that the owner of the mules could make a valid pledge of them and at the same time retain possession of the mules. It has frequently, however, been decided that, whatever the effect of such a transaction might be as between the immediate parties, it could not affect the rights of an execution creditor on whose behalf the mules had been attached by the messenger. As against him the pledge has no validity, unless the mules had been delivered to the claimant. The appeal must, therefore, be allowed, with costs.

[Attorneys for Appellant: Van der Byl and Van der Horst, Respondent in default.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice KOTZE.

WALTERS V. WALTERS. { 1908. May 19th.

This was an action for the restitution of conjugal rights, in which the plaintiff, Martha Magdalena Walters, sued her husband, one Daniel de Waal Walters.

Mr. Gardiner for plaintiff; defendant in default.

Mr. Gardiner stated that some difficulty had arisen with regard to the date of trial. The defendant, he was instructed, had been served personally with notice of trial for the 13th inst., but, unfortunately, a few days before the trial it was discovered that the plaintiff, who lived at Carnarvon, could not be in Cape Town by the 13th inst. It was then set down for the 19th inst. Unfortunately there had been no notice to the defendant of the alteration of date.

De Villiers, C.J., intimated that the case might be proceeded with.

Charles William Henry Smith, clerk in the Colonial Office in charge of the marriage registers, produced the record of marriage.

The plaintiff, Martha Magdalena Walters, said she was married to the defendant in February, 1896. There were two children. Witness and her husband had not lived happily together. They had had quarrels. He was not of sober habits, and when under the influence of drink he quarrelled. Defendant had left her on March 21, 1900. He joined the Boer forces; he told her that he would join, but he said nothing about returning. She knew nothing as to his present whereabouts. He had been an agent, and previously he was a schoolmaster. She had had no letters from him since he had left her. They had no property. She was now living with her father. Since defendant left her she had inherited a small legacy of £50. She was not aware that he had any property. Witness asked for the custody of the children.

A decree of restitution of conjugal rights was granted, defendant to return to or receive the plaintiff on or before the 30th June, failing which a rule be made calling on the defendant to show cause on the 12th July why a decree of divorce should not be granted, with costs, and plaintiff declared to be entitled to custody of the children, and defendant declared to have forfeited all benefits under the marriage in community, and why defendant should not be ordered to pay the sum of £4 per month until the youngest of the children attains the age of 16 years, personal service to be effected.

VAN BLERCK V. VAN BLERCK AND ANOTHER.

This was an action brought by one Charles C. van Blerk against his wife for divorce, on the ground of her adultery with one, Bodell, from whom costs were claimed.

The declaration set forth that the plaintiff resided at Kimberley, and the defendants resided at Observatory-road, Cape Division. The parties were married at Kimberley in 1892, and there were two children of the marriage. The first-named defendant left the plaintiff in 1898, and had since cohabited with the se

cond defendant as his wife in Cape Town and Observatory-road. The plaintiff claimed a decree of divorce against his wife and forfeiture of the benefits of marriage in community and costs of the suit as against the second defendant.

Mr. Buchanan for plaintiff; defendant in default.

Charles William Henry Smith, clerk in charge of the marriage registers at the Colonial Office, produced the original entries in the register of the marriage.

The plaintiff, Charles Carl van Blerck, said he was married to defendant on the 26th September, 1892, at Kimberley, in community of property. They lived happily together for some years, and a child was born, who was now seven years of age. His wife came down to the coast to visit some relatives in February, 1898. She was accompanied by their son. She was to stay with her relatives at Salt River. When she had been down here a little time she sent a letter for more money. In consequence of something that came to his notice, witness came down to the coast and made inquiries and he found that his wife was living at a boarding-house in Bree-street under another name, with the second defendant. Witness saw his own son coming downstairs. He asked Bodell where his wife was. Bodell replied that it was not his fault. He also saw his wife, and she admitted that she had been living with the other defendant as his wife. Witness told her that he would forgive her of she would return with him to Kimberley. She promised to do so. He took his son with him. She asked for a sovereign, which he gave to her. He arranged to meet her at the station in the evening, but she did not appear. Since that time they had not lived together. On Friday last he went to Observatory-road and found that she was living with Bodell as his wife. He also found that she had had a child since she had been living with him.

Corroborative evidence having been given by Joseph Abrahams, Cape Town, and Cornelius Silbert, of Woodstock,

The Court granted a decree of divorce, plaintiff being given custody of the child of the marriage, the second defendant to pay costs of the action.

LEGG V. HANDS.

This was an action in respect of certain brokerage.

Mr. Buchanan (with him Mr. Gardiner) for plaintiff stated that in this case the plaintiff, after consultation, found that he was principally induced to take the action by reason of a certain letter that he had got from a Mr. Stableford, who was the purchaser of the property, and with whom he had been in negotiation with regard to the sale of it for some time, but they found that Mr. Stableford now differed from what he said in the matter to them. Counsel read the letter upon which the action was based The letter said that he had made an offer of £1,500 for certain property, and added: "It was in consequence of the inquiries I made after your introduction that I eventually decided to purchase and pay the sum of £2,500 for it." It was on that letter, said counsel, that the present action was instituted, but it was now found that Mr. Stableford had receded from that statement of fact, and, consequently, the plaintiff was not in a position to go on with the action. He would, therefore, have to submit to absolution from the instance.

Mr. Searle, K.C. (with him Mr. Close) for defendant consented.

Absolution from the instance granted, with costs.

INSOLVENT ESTATE MUSTERS } 1903.
V. VAN DER SPUY, } May 19th.

Insolvency—Undue preference—Act 38 of 1884, Sec. 8.

This was an action brought by Thomas Herbert Hazell, as trustee in the insolvent estate of one, Musters, against Sybrand Johannes van der Spuy, of Durban-road, to have set aside an alleged preferential cession made by the insolvent out of his estate to the defendant.

The declaration set forth: (1) The plaintiff is Thomas Herbert Hazell, who sues in his capacity as sole trustee in the insolvent estate of Arthur Henry Chaworth Musters, hereinafter called the insolvent. The defendant is Sybrand Johannes van der Spuy, a farmer and speculator, residing at "Oakdale," near Durban-road, in the Cape Division. (2) The insolvent surrendered his estate voluntarily on February 5, 1902. (3) On or about September 21, the insolvent, who was then indebted to the defendant in certain sums of

money, ceded, made over, and assigned to the defendant a certain claim for damages against the Imperial Government in settlement whereof the insolvent had agreed to accept the sum of £500 from the said Government, and authorised the defendant to receive the said sum from the said Government, and on or about September 14, 1901, the defendant received the sum of £467 0s. 8d. from the said Government by virtue of the said cession and assignment. (4) At the date when the insolvent made the aforesaid cession, and at the date when the defendant received the aforesaid sum by virtue thereof, the liabilities of the insolvent, fairly calculated, largely exceeded his assets fairly valued, and at the said dates the insolvent contemplated the sequestration of his estate, and intended to prefer, and did by the aforesaid means prefer, the defendant before his other creditors, and the plaintiff is entitled to have the said transaction set aside as an undue preference under Section 84 of Ordinance 6 of 1843. The plaintiff claims (a) that the cession and assignment as aforesaid be declared to be an undue preference, and null and void; (b) that the defendant be ordered to pay to the plaintiff for the benefit of the said estate the sum of £467 0s. 8d., with interest from September 14, 1901; (c) alternative relief; (d) costs of suit.

Defendant, in his plea, admitted paragraphs 1 and 2. He admitted paragraph 3, save that the sum of £467 0s. 8d. was not received by him from the Imperial Government, but was paid to his attorney by the attorney of the said insolvent. The defendant denied the allegations in paragraph 4, and he specially denied that the said insolvent contemplated the sequestration of his estate at the said date, or that the said insolvent intended to prefer, and did prefer, the defendant before his other creditors, or that the payment constituted undue preference. Wherefore he prayed that the plaintiff's claim might be dismissed with costs.

Mr. Searle, K.C. (with him Mr. Upington) for plaintiff; Sir H. Juta, K.C. (with him Mr. Benjamin) for defendant.

Thomas Herbert Hazell, accountant, of Cape Town, said he was elected trustee in this estate. After his appointment was confirmed, he obtained possession of the books of the estate. He framed an account in the estate, showing how the estate worked out. The account had not yet been filed. It was a liquidation and distribution account. This showed expenses of administration, £24; certain movables, sold for £14 10s.; outstanding debts, £2 18s. 3d.; contribution account, £5 10s. 3d.; and claims proved against the estate, £1,735. There were certain outstanding debts brought up in the schedule to the amount of £70 odd, but witness's efforts to recover these moneys were unavailing. The debts brought up in the schedule were £3,009 odd, but a number of creditors had not proved against the estate. The insolvent stated that he was entitled to certain moneys from a joint enterprise between Francois Duminy and himself, and that a sum was due to him in excess of a certain claim which had been brought against him by his brother-in-law, Duminy. Insolvent admitted that he owed £1,176 odd to Duminy. Insolvent went to England in November or December last, without any objection being raised by witness. The insolvent surrendered his estate on the 5th February, 1902. At that date the action commenced by Duminy was pending. Musters set up a counter-claim in re-convention on account of being entitled to share in the proceeds of certain transactions in property which he alleged he had with Duminy as partner. That action was set down for the November term, and was postponed until the February term, and the case was set down for trial two days after Musters surrendered his estate. The action was abandoned. It was left to witness's discretion at the third meeting of creditors to dispute Duminy's claim. To strengthen his position, he called a meeting at his office of the creditors except Duminy, and submitted the position of affairs to them, and he was then instructed to take counsel's opinion. A case was duly stated, and, in consequence of counsel's opinion being unfavourable, the action was abandoned. There was nothing in the books of Musters to support these claims in re-convention, no records whatever. There were no papers in the estate to show that Musters had ever paid a penny in connection with the property transactions. Witness called upon insolvent to state the causes of his insolvency. Musters stated that he had been joined with his brother-in-law, Duminy,

in certain transactions, that Duminy had commenced an action at law against him, that he (insolvent) could not afford to fight the case, and that, acting on advice, he had decided to surrender his estate, to give his trustee an opportunity of contesting the claim, and establishing the claim in re-convention. Insolvent also stated that he had had a contract with the Government, and in consequence of the breach committed by the Government, he lost £2,000, for which he received an offer of only £500 compensation, his attorney advising him that it was unwise under the circumstances to take action. That was the £500 which formed the subject of the present action. Certain resolutions were passed by the meeting of creditors with regard to taking the evidence on commission of Mr. and Mrs. Musters, and the attorney, Mr. Brady. Their evidence was taken on commission, and, in consequence, certain resolutions were passed at a special meeting of creditors. Mr. Nash, of Messrs. Nash and Muirhead, was appointed to go into the books. After he had made his report, the present action was instituted. Witness did not anticipate that there would be any further assets in the estate. He found in the estate a document purporting to be a copy of the contract with the Government which Musters had entered into in respect to which the sum of £500 was paid as compensation, and he also found a letter from the Government in which they offered the sum of £500.

Cross-examined by Sir H. Juta: This action was brought on the security of the principal creditor, Mr. Duminy, through witness. The commission as to the examination of certain witnesses was also carried out on the security of Mr. Duminy. After the commission had been taken, he presented a report to the creditors, at the end of which appeared the passage: "Your trustee has read the evidence through, and, so far as he can see, there are no grounds for any further steps to be taken, and would recommend that the estate be closed." He made no inquiry into the value of the farms which were sold by Duminy. He was not aware that one was now valued at £15,000, and that the other had been sold for £4,000.

The Chief Justice said it was not clear what the relations of the parties were with regard to the farms.

Sir H. Juta said that Duminy had bought these farms, and Musters' case was that he had gone into partnership with Duminy as a speculator in buying the farms in question. Originally Duminy and Musters were in partnership, and they entered into contracts with the Imperial authorities, and accounts ran on for about eighteen months.

Cross-examination continued: If Musters' claim against Duminy had been a good one, he thought the insolvent would have been solvent. He saw Musters several times after his insolvency. The insolvent was very keen on the case being fought. He maintained that he was entitled to a share of the proceeds of the farms. Witness took steps to see if this action could be fought, but he came to the conclusion that no further steps should be taken.

Re-examined by Mr. Searle: At the time that witness made his report to the creditors, recommending that no further steps should be taken, Mr. Nash had not carried out his investigations into the books.

Maynard Nash, accountant, Cape Town, a member of the firm of Maynard Nash and Muirhead, said that on the 18th October last year he was instructed to investigate the books of the insolvent Musters, and prepare a report. On the 18th December he presented a report. As to the method of keeping the books, he found that they were well kept until the 30th June, 1901. After that date the books were hardly kept at all. He annexed to his report a balance-sheet, showing, according to the insolvent's own figures, on the 30th June, 1901, a deficiency of £792 odd. After that he made a balance-sheet up to the 31st August, when that deficiency, according to the books of the insolvent, was £1,127 10s. 2d. The assets, according to the insolvent's books, from which the figure was drawn, were not correctly stated. Insolvent in his balance-sheet set down sundry creditors, £48 4s. 10d. Witness could not see that any part of this was ever recovered. There was an item of furniture, £294. He ceded to his wife under the ante-nuptial contract furniture to the value of £250. There was also an item of £127 for options, which he could not trace. That referred apparently to some coal options. There was also an inventory, which figured out

at £955. He could not tell exactly what the inventory was, but when the insolvent sold his property on the 31st August, he sold all moveables in the property to Mr. J. A. Reid. So far as he could trace, the genuine assets included £150 cash in hand, and possibly some of the furniture belonged to insolvent. He could not trace between August 31 and the insolvency that insolvent ever received any cash at all for any of the movables, beyond a small sum of £40 for a Cape cart and £20, evidently for a piano. On the 31st August his total liabilities to his creditors were £2,729. With regard to his claims against Duminy for a half-share in his farms, there was nothing referring thereto in his books or with regard to Furber's mules.

In cross-examination, witness said Musters' claim against the military authorities did not figure in the books. Witness only spoke from what he could find in the books, and they were not well kept.

The Chief Justice: If you add the £500 which was paid by the Government to his claim against Duminy, would he have been solvent?

Witness: He would have been insolvent.

Sir H. Juta: You know he claims against Duminy for a half-share in the farm Leovenstein?

Witness: No, I do not know.

Sir H. Juta: I put it to you, that if in September, 1901, Loevenstein was worth £10,000, and Musters had a half share, would he then be solvent?

Witness: Certainly.

Sir H. Juta: And very well solvent, too.

Francois Jean van Helslandt Duminy, jun., said he was a farmer, a Justice of the Peace, and formerly a member of the Cape Divisional Council. He was principal creditor in the estate of Musters. He lived at Fairfield, formerly part of the farm Loevenstein. Musters bought the farm Welgemoed from him, and lived there until about a year ago, and then he went to live at Kenilworth. Witness had a contract for grazing certain mules, and supplied certain forage. Musters entered into a contract with the Imperial Government in his own name. On that contract, witness advanced him a large sum of money. Musters himself acknowledged his indebtedness to him of £1,176, arising out of money advanced by him in connection with this contract. Musters kept the books of the venture, and witness from time to time supplied moneys. This was the contract under which Musters claimed compensation from the Imperial Government. The contract commenced between Musters and himself at the end of 1899, and terminated in August, 1900, when the mules and horses were taken away by the military authorities. After that Musters and he made up their accounts. He pressed Musters constantly for a settlement. Musters was unable to pay him, and the position he took up was that he would pay him when he got his money from the Imperial Government. On October 22, 1900, they both agreed that a certain Mr. Blake should look into the books, and arrive at the amount that was due. Witness claimed £1,369, and Musters put the sum at £1,302, and a balance was struck at the latter figure, witness agreeing to waive the difference. Musters made no claim then to a half-share in the farms Loevenstein and Zandgat. Witness bought those farms on June 5, 1900, nearly six months before the settlement, for £4,000. He bought them by public auction, through Mr. Baxter, a field-cornet. It was utterly false that it was suggested that he should buy in partnership with Musters. The first intimation he had that Musters claimed a share in the farms was on September 10, 1901, when he received a letter from Musters claiming an account of the farms. Witness raised a bond, and pledged other bonds, and so paid for the farms. He paid the transfer and all other expenses. He never asked Musters for any money, and he (Musters) never tendered any money in connection with the transaction. Shortly before this claim was made, he had issued a summons against Musters for the recovery of £1,176, which he acknowledged owing him on the 28th August. There was no document connected with the purchase of the farms showing any reference to Musters. Musters also claimed against him £1,087 in connection with Furber's mules. There was no foundation for that claim. Musters had nothing to do with the contract with Furber. In June and July witness's farm got very wet, and he asked Musters to allow the mules to graze

higher up on his ground, and for this Musters received £41 16s. 6d. Witness had an option to get half the profits of the sale of mules over £25 each. Musters had no claim for that half-profit. He believed Musters and Furber were strangers. Musters claimed £1,097 on that account, and even on his own showing, supposing there had been such a contract, the amount would not have been correct.

Mr. Searle: He admitted when he was examined that he made a mistake of £300 in this amount.

Witness (continuing) said Musters promised to pay him £1,176 as soon as his claim was settled against the Government. The Government had to give certain notice before the animals could be removed, but owing to glanders breaking out amongst the horses the animals were removed without due notice. That was how the claim arose.

In cross-examination, witness said he sold Zandgat for £2,000 in September or October, 1901. He paid £4,000 for Zandgat and Loevenstein. He should estimate the value of the latter farm, with the improvements he had made, at £5,000 or £6,000. He would not say now that he would take £15,000 for it.

The Chief Justice: If there was a contract, we may take it Musters would be solvent.

Sir H. Juta: You know there was a contract. You know your father was bidding, and your father said he stopped bidding because he thought you and Musters were bidding in partnership?

Witness: I don't know what he said.

By the Court: Witness said he never heard Musters wanted to bid, and he did not think he would because he had no money left. If his father was bidding, it was for witness's brother Charlie, and not for Musters.

Geo. Milne Baxter said he was Field-cornet for the Durbanville Ward, and carried on the business of a wagon-builder. He bought the farm Zandgat for Duminy at public auction. Mr. Musters never instructed him, and he knew nothing about him in connection with the transaction.

Chas. Arthur Wells Blake, clerk in the employ of the Board of Executors for the last ten years, said he knew Mr. Musters and Mr. Duminy well In October, 1900, he was asked to go down to D'Urban-road to arrive at a settlement of accounts between the two. Mr Duminy claimed £1,389 12s 8d., and Mr. Musters only admitted £1,302 0s. 4d. Upon witness's suggestion, Mr. Duminy waived his claim to the difference, and Mr. Musters admitted indebtedness to the amount of £1,302. Afterwards sums of £25 and £100 were paid off. Musters did not give him to understand he had other claims against Duminy. He only heard of the counter-claim, and then from another source, just before the insolvency.

Geo. Montgomery Walker, of the firm of Walker and Jacobsohn, attorneys, Cape Town, said he acted as attorney for Mr. Duminy. This claim was first put into his hands about March, 1901. There was a meeting in his office on 10th April, 1901, of Musters and Duminy in order to come to a settlement. The parties settled the amount due to be £1,302, and Mr. Duming was to get a promissory note for that, with a security. He noted that down in the presence of both of them. Musters never raised at the interview a claim in re-convention, and witness only heard of it when the summons had been issued on 28th August. From what witness was told, the account was settled at his office as a final account. The amount proved against the estate was £1,176.

Cross-examined: When the case was postponed, Mr. Musters said he could not get his witnesses. The Court said the case would have to come on in February whether the witnesses were there or not.

Sir H. Juta: Do you know that he swore that in the conversation in the office of Walker and Jacobsohn he had mentioned his claim to a share in the farms?

Witness: I cannot recall that.

James Moore, accountant for the National Mutual Life Insurance Company, gave evidence of the surrender value of two life policies on Musters' life that were ceded to Miss Duminy.

This closed the plaintiff's case.

For the defence,

Mr. Benamin read the records in the case Musters v. Duminy.

Christopher Brady said he was an attorney, and acted for Musters before August, 1901, and continued to act until the following year. In the month of August he received £451 belonging to

Musters, and paid it out to various creditors. Subsequent to that there was the arrangement between Musters and Van der Spuy, by which he received £467 0s. 8d. £205 of that was represented by a promissory note which had been made by Musters, and for which Van der Spuy had been security. The £451 were the proceeds of the sale of Musters' farm. Musters instructed witness in writing to pay the creditors. He paid Mrs. Musters £195, Messrs. Hall £52, the insolvent £24 14s., Hudson's note £100, and another creditor £18 14s. Subsequently the payment was made to Mr. Van der Spuy's attorney of £205. He acted as attorney for Musters throughout this action. In the month of November there was a postponement owing to the difficulty of Musters getting his witnesses. The defence was a bona fide one. Between November and February he (witness) made every endeavour to get the witnesses, and received certain moneys from Musters for the purposes of his case. The case was set down for the 7th February, and on the 5th Mr. Musters surrendered his estate. He (witness) was unable to get the witnesses ready for the 7th, though he made every possible effort. He understood the witnesses were in Pretoria, and he tried to get them. Musters was very unwilling to surrender. That seemed to witness to be the only course open to Mr. Musters at that time to enable the trustee or someone else to fight the action, or else judgment would go by default.

Cross-examined, witness said the papers in Musters' claim against the Imperial Government passed through his hands. In June the Government tendered £500 in settlement, after a cheque for £250 had been returned. This was done on the advice of counsel.

Mr. Searle: What were you going on in that contract against the Imperial Government? What was your case?

Witness: I did not go into the details.

You wrote some very strong letters to the Government, though. You did not satisfy yourself he had any case at all?—I was satisfied he had a substantial case, and he got a substantial amount. His claim was for £2,000. In consequence of the advice that we could not take proceedings here, I thought it was the best thing to do to accept the £500.

Mr. Searle read plaintiff's counsel's opinion that plaintiff would not have a chance of succeeding for breach of contract, afterwards remarking: You wrote these letters to the Imperial Government on the principle of "bluffing," I suppose?—I looked upon it as a principle of justice.

Upon what principle could he have succeeded?—He had a good claim at that time.

For what?—I cannot go into details. I dare say my chief clerk can tell. He had it in hand.

Of course, you put it on your chief clerk. Until he established his counterclaim, you knew he was hopelessly insolvent?—No, why should I know it? I am not acting in every affair he has got.

You are his attorney?—Yes, in one matter.

You knew he had nearly £3,000 debts apart from this? I did not know that.

You made no inquiry about it?—What business was it of mine? I should say not.

Did you ask him for any documents in order to satisfy yourself about this claim on Zandgat?—If I did not, my clerk did.

Did you ever see any document that would have supported his claim in reconvention?—I do not think I have—a written document. I took my client's instructions.

Did you ever see any document relating to his claim about Furber's mules? I do not think so.

You drew up the case for opinion of counsel?—With regard to this case, yes.

You naturally laid stress on the fact there was no tittle of documentary evidence to support the case? I satisfied myself he had a good case.

However, you did not succeed?—I don't know that.

You have only to read this (counsel's) opinion.

Frederic Benjamin Andrews, now an attorney of this Court, said that in 1901 he was chief clerk to Mr. Brady, and he had the case of Musters and Duminy in hand. He corroborated Mr. Brady in most details. There was a bona fide defence and claim in re-convention. Musters could not obtain his witnesses. He endeavoured between November and February to obtain the witnesses. The insolvent Musters was most unwilling to surrender his estate. The suggestion to surrender came from witness under the advice of Mr. Brady. Mr. Duminy was

present when Musters was unwilling to surrender. As to the cheque for £451, that payment was made by Mr. Herholdt direct to Musters.

Cross-examined by Mr. Searle: He did not remember whether he drew up the case for counsel's opinion; if Mr. Brady did not, witness probably did draw up the case. In regard to the Furber contract, the military witnesses would have given evidence to show that the actions of the parties would tend to prove that Musters and Duminy were partners. He admitted the statements made in the case submitted to counsel as having been in his writing, and added that of course they did not put the case in the most favourable light that they could.

Mr. Searle: At any rate, you might have put it fairly.

Francois J. H. Duminy, father-in-law of Mr. Musters, and father of the plaintiff in the other action, said he remembered the surrender of Musters' estate. Musters said he was not insolvent, and that it would be a disgrace if he surrendered.

Cross-examined by Mr. Searle: Musters made the statement some time before he surrendered the estate.

By the Chief Justice: He was at the sale of the farms which his son bought. The purchase was made by Baxter for Mr. Duminy, he thought. Before that, he had had some communication with his son about the purchase. Two of the sons, John and Charlie, both wanted portions of the farm. One of his sons did not say he would like to buy it for Musters; Musters' name was not mentioned. Witness made a bid, but his son Charlie afterwards came up to him. His son did not say Musters had any interest in the purchase.

Counsel having been heard in argument,

De Villiers, C.J.: This is an action for undue preference. The undue preference alleged in this case consists in the payment to the defendant of the sum of £467 during the time when, undoubtedly, the assets of the insolvent were less than his liabilities were fairly calculated to be. By Sec. 8 of Act 38 of 1884, such being the case, the onus of showing that the insolvent did not contemplate the sequestration of his estate is thrown on defendant. If at the trial of any action brought for the purpose of setting aside any alleged undue preference it be proved that the preference forming such action was made within six months before the sequestration of the estate, and at a time when his liabilities were fairly calculated to be in excess of his assets, it may be presumed that insolvent at such time contemplated the sequestration of his estate, unless it is proved to the contrary by defendant himself. The evidence clearly proves that at the time when the payment was made to the defendant the insolvent's liabilities fairly calculated did exceed his assets. The evidence also shows that the payment was made within six months previous to the date of sequestration, and therefore, in the present case, it is clear that the plaintiff must succeed unless the defendant discharges the onus cast upon him by the Act. The question the Court has now to decide is has this been done? The defendant's counsel relies upon two circumstances as proof, one circumstance being that a few days before the defendant was paid the insolvent paid certain other claimants, and the other is that at the time these payments were made the insolvent honestly believed that he had a large claim against Duminy, who was really the creditor in the present case, and that if he succeeded in the claim he was not insolvent, and therefore he could not at that time have contemplated the sequestration of his estate. As regards the payments of creditors on the 31st August Mr. Brady was authorised to pay certain creditors. The Court cannot lose sight of the fact that this authority was given two days after the summons had been served on the insolvent at the suit of Duminy for a considerable sum. The creditors who were paid were insolvent's wife, the largest sum, £195, a certain sum paid to himself, and then a certain sum to the Mutual Insurance Company, to keep policies alive, and the only two bona-fide creditors who were paid were Hudson, who was paid on a promissory note falling due that day, and therefore this must be taken to be payment in the ordinary course of business and Messrs. Hall were paid £52. There was, therefore, not such a general payment of all creditors at that time as to justify the Court in allowing this payment to two creditors to override the presumption which has been raised by the eighth section of the Act 38 of 1884. Coming next to the claim which

the insolvent alleged to have had against his brother-in-law, Duminy, there is really nothing substantial before the Court to show that any such claim ever existed. Mr. Duminy has himself been called, and he swore positively that there was no agreement at the time he purchased the two farms in question that the insolvent should share, and no other witness has been called to prove that there was any such understanding. I understood from the cross-examination that the father of Mr. Duminy would have been called to prove that there was such understanding, but far from proving it, he entirely disproved it by saying he himself had spoken to Duminy about the purchase, but not on behalf of the insolvent, but on behalf of his son, so that he at all events does not support the view that the insolvent had been led by Duminy to believe that he would be allowed to share in the profits of the purchase of the farms. Not a single document has been produced to show that there was ever such an understanding, and throughout the correspondence it is admitted that there was no such claim put forward until some time in September, when a letter, which has been produced, was written, and after the summons had been served upon the insolvent. Under these circumstances, it was of the greatest importance that the insolvent himself should be examined in order to give his version, and it was almost hopeless for defendant to expect that without some clear statement from the insolvent himself on oath before the Court that the Court would come to the conclusion that he himself believed that he had a *bona fide* claim to this extent. The court must now hold that he contemplated sequestration. In my opinion the defendant has not sufficiently discharged the onus; he has not proved—and the best proof would have been the evidence of insolvent himself— that the insolvent did nit contemplate the sequestration of his estate, and therefore the presumption raised by the eighth section of the Act does apply in the present case. It is said, there was no intention to prefer one creditor before another. If in the present case there was a contemplation of sequestration of the estate, the inference is clear that he must have intended to prefer one creditor to the others. If at the time when he made this payment he contemplated the sequestration of his estate, he must have known that the effect of the payment would be to deprive the other creditors of a portion of their debts and to give the defendant a considerable preference over his other creditors, and that his act arises necessarily from the contemplation of the sequestration. For these reasons I am of opinion that the plaintiff is entitled to succeed, and judgment must be for the plaintiff, with costs.

[Plaintiff's Attorneys: Walkey and Jacobsohn. Defendant's Attorneys: Herold and Gie.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZE.]

JONES v. JONES. { 1903. May 20th.

This was an action, instituted by Alfred Herbert Jones, of Cape Town, for divorce from his wife, Helena Maria Jones (born Adams), on the ground of her adultery with one Georgia, and plaintiff also asked for custody of the child of the marriage. Mr. Close appeared for the plaintiff, and the defendant was unrepresented.

Charles Wm. Henry Smith, clerk in charge of the marriage registers at the Colonial Office, produced evidence as to the marriage.

Alfred Herbert Jones, the plaintiff, said he was married in August, 1893, to the defendant at S. Paul's Church, Cape Town. For two years he lived ashore with his wife. Then he went away as a sailor on one of the coasting steamers. He left his wife with her mother; she was provided for. When he came back, her mother made a statement as to his wife's misconduct with another man. Witness forgave his wife, and they went to Johannesburg together, but afterwards returned to Cape Town, and took a house in Primrose-street, where they remained in 1897 and 1898, and then witness went as cook on a coaster. He left his wife in a house with sufficient money to meet her requirements. When he returned, he found that she had gone back to her

mother, and a quarrel ensued between them. He endeavoured several times to induce her to return to him, but she declined. He then went to Natal, and on his return he found that his wife was living with the man Georgia. This was early in 1901. He instituted proceedings for a divorce, but the action collapsed, because he could not serve the papers on his wife, as she could not be traced. He again went to Natal, and took with him the little boy born of the marriage. In December last he discovered that his wife was again in Cape Town, and he made inquiries, with the result that he found that since 1898 she had given birth to three children, of whom the man Georgia was the father. When he told her that he would proceed against her for divorce, she said "Yes, you can go; here's the proof" (pointing to the children).

Rachel Combrinck gave corroborative evidence.

Decree of divorce granted, with custody of the child of the marriage to the plaintiff.

DAVIS BROS. AND BEEN V. DOYLE AND CO. } 1903. May 20th.

Sale and purchase—Latent defect—Redhibitory action.

The purchaser of certain gramophone slot machines accepted them and credited the seller with the price, but after keeping them for several weeks he claimed the right to return them on the ground that they were in a defective condition. The defect complained of was not latent, but could have been discerned on the slightest examination, and, moreover, the purchaser knew that the machines were sold because they did not work properly.

Held, *that the purchaser was not entitled to succeed in the redhibitory action.*

This was an action for breach of contract.

The declaration set out that the parties to the suit resided in Cape Town, that they entered into a verbal agreement on the 1st July, 1902, by which the plaintiffs were to be supplied by the defendants with six phonograph machines, which were to be delivered within two months, that that agreement was reduced to writing on the 21st July, but that this document omitted all reference to the period in which the machines were to be delivered; that the defendants, although repeatedly requested to deliver the said machines, had failed to do so, that plaintiff paid on deposit £8 in cash, that the parties afterwards agreed that the plaintiffs should return to the defendants two gramophone machines, that the said gramophone machines were returned on the 20th October, and that plaintiffs were entitled to £16 therefor, that plaintiffs had, by reason of the breach of contract in connection with the phonograph machines, lost the profits which they would have derived on the said machines, and they asked for judgment in the sums of £8, £16, and £100 damages; also, for alternative relief and costs of suit.

The defendants, in their plea, admitted that on the 1st July the parties entered into a verbal agreement, which was subsequently, on the 1st October, reduced to writing. In the said agreement it was arranged that the defendants should supply the plaintiffs with the said phonograph machines upon a deposit of £10, and a further sum of 30s. per week, until the purchase price of £82 was paid off, when the said machines should become the property of the plaintiffs. Defendants denied that they agreed to deliver the said machines to the plaintiffs within two months, or that the said written agreement was entered into about the middle of July; they also said that they tendered delivery of the said machines within a reasonable time after the said agreement was entered into, and that the plaintiffs refused to accept delivery. The said machines were still held at the disposal of the plaintiffs, and were hereby tendered. As to the gramophones, they were delivered to the defendant, but were not in good order, and were in a defective condition, and defendants denied that any sum of £16 was due to the plaintiffs. Defendants prayed that the plaintiffs' claim should be dismissed, with costs. The defendants

also filed a claim in reconvention, in which they said that the plaintiffs only paid to them £8, and not £10, as alleged, and they claimed to be entitled to £2, in addition to the deposit already received on account of the plaintiffs' breach of contract, and also to £27, being the rent of the said machines from the 1st November, 1902, to the 28th March, 1903, at 30s. per week.

Plaintiffs, in their replication, said that the verbal agreement was entered into with the defendants on the 1st July, and that the phonographs were to be delivered within two months. They denied that they were indebted to the defendants in the sum of £27, and prayed that the claim in reconvention be dismissed, with costs.

Mr. Rainsford for the plaintiffs; Mr. Gardiner (with him Mr. Alexander) for the defendants.

David Davis, one of the plaintiffs, said he saw the defendant Doyle in July last. Witness was accompanied by his partners. They gave him an order for six phonograph machines, and a deposit of £8 was paid. The arrangement was that the machines should be taken on the hire purchase system, with option to purchase. They agreed to pay £26. £8 was paid in cash. Mr. Doyle owed witness £2 at the time, and he agreed to accredit witness with the sum. The contract was not reduced to writing. The order was put in the book, and witness signed it. It was agreed between them that the machines should be delivered within two months.

Mr. Gardiner objected to evidence being led on this point, seeing that the contract between the parties was subsequently reduced to writing.

Mr. Rainsford urged that he was entitled to lead parole evidence, as long as it was not inconsistent with the written document.

The Chief Justice said he thought they might take it that two months was a reasonable time for delivery.

Mr. Rainsford called on the other side for the production of the order book.

Mr. Gardiner said he was instructed that there was no order book.

Witness, continuing, said he signed the document produced. At that time the blanks were not filled in. Doyle said he had not time then to fill in the blanks, but he would fill them in afterwards and send witness a copy. The contract was signed about the 1st July, and not in October. They agreed to take six phonograph machines of the value of £82 under this contract. Witness got a copy sent in to the Magistrate's Court. He had had previous business with Doyle. He called on Doyle about the end of August respecting the machines; he was accompanied by his two partners. Doyle showed him a letter, which stated that the machines could not be made in London, and that they would have to be made in New York, and that it would take a month longer to execute delivery.

By the Chief Justice: He signed the document two or three weeks after the 1st July, when the document was produced.

Witness, in further evidence, said he next went to see Doyle on the 1st October. Doyle was away, and he left a message with his manager, who said it would take another one or two days; they were expecting the machines. Witness did not get the machines. They called in every day two or three times a day, but he never delivered the machines, although he always said he would deliver them in a day or two. He had engaged places for the machines, and had lost the places, as he could not put in the machines by the 28th October. He sustained £100 damage in consequence. The machines were lying in Doyle's shop in Plein-street in October. He said he should want some time to fix up the machines. On the 28th October they again called, and witness told him to give him the reason why he did not want to let him have the machines. Doyle's manager said he did not want to let him have the machines, as he could sell them for cash every morning. Doyle agreed to credit him with £16 on the gramophone machines returned by witness to the defendant. Witness returned the gramophones to the defendant, who was still in possession of these machines. This was on the 24th October; the defendant gave them the receipt for £16. It was not until witness had instructed his attorney that the defendant wrote, complaining about the condition of the gramophones. Witness estimated his loss at £6 a week owing to the non-delivery of the machines. He had secured places in Long-street, Waterkant-street, and elsewhere. The receipts on the phonographs varied from 25s. to 35s. a week.

Cross-examined by Mr. Gardiner: The document was not signed in the presence

of any witnesses. He considered that a reasonable time for delivery would be two months. On the previous order it might have taken two months and 14 days to carry out delivery; he did not remember exactly. That order was cabled, and witness paid the costs of the cable. In the present case the order was not cabled. The first machines which he received in November of the previous year came from America. The machines were similar in this case, and were ordered from the Edison Bell Company. He saw Byrne (defendant's manager) in October, and the latter told him he might take them. The machines were not fixed up. He told Byrne that he would go and look round for public-houses where he could put machines. He had had places arranged from the beginning of October. Witness and his partner called at the store, and fixed up the machines. He did not take them away, however, because Doyle "chucked out" witness and his partner. Doyle would not let them have the trumpets of the machines. Byrne was going to palm off old trumpets instead of new ones. It was not true that he refused to take the machines on the 20th, because he had no places to fix them in. Byrne said that they would have to order the trumpets specially. The £2 he referred to was commission on a sale of a machine to Fernando at five per cent. It was not a condition that he should receive his commission when Fernando paid the bill. The amount really due to witness was £2 10s. As to the gramophones, he sent one back in July, and the other in October. The machines were both in good working order. Witness was summoned in the Magistrate's Court for rent. Exception to jurisdiction was upheld.

Re-examined: There was no complaint before the 31st October as to the condition of the gramophones. He had had previous transactions with Doyle, and trumpets had in each case been supplied with the machines. Doyle was in London part of the time.

The gramophones in dispute were produced in Court and put before the witness for inspection. After he had made a close examination, witness said they were in good condition, practically the same as when he returned them to the defendant, except that the reproducer had been removed from one of the machines.

Barnard Davis, brother and partner of the last witness, and one of the plaintiffs, gave corroborative evidence regarding the terms on which the machines were engaged on July 1. The agreement he signed he alleged was blank, with the exception of the printed portion. The reason for this was that Doyle made the excuse that he was busy at the time, and he promised to give them a proper copy later, but he continually put them off. Witness detailed the various conversations they had with Byrne, the delay that took place in the delivery of the machines (one reason being Byrne's dissatisfaction with the payments), and their incompleteness. They had engaged places, he said, where the machines had to be delivered, but they lost the places in consequence of the non-delivery of the machines in time. Doyle had always given them trumpets with the machines, and a dozen records. The arrangement with the people who allowed the use of the machines on their premises was that they should receive a commission on the takings. Their (plaintiffs') profits would be at least £1 a week for each machine. When the machines were returned they were in good order, and plaintiffs received no complaint until after they had told Doyle they intended bringing an action.

Cross-examined: Witness said he had never signed an agreement in blank before.

Sam Been, one of the plaintiffs, gave evidence in support.

For the defence, Mr. Gardiner called

Dennis Doyle, the defendant, who said that when the plaintiffs ordered the machines on July 1, they paid £8. The agreement was signed on 1st October. The agreement was not blank, but was filled in when it was signed, and Byrne was present at the time. He agreed to take back certain gramophones, and credited the plaintiffs with £16. It was agreed that the machines were to be returned in good condition within ten days. When the two machines were returned they were in bad condition. The winding spring of one was defective, and in the other machine one wheel had cut through the other, so that the machine would not work. It was necessary to send to America for the machines, as they were not supplied in England. The machines were cabled for at plaintiffs' request, they agreeing to pay half the

costs, and they were delivered in two months and fourteen days.

Cross-examined: He had previously supplied trumpets with the machines ordered by the plaintiffs. He was not aware that unless the machines were supplied by the 28th October, the plaintiffs would lose the places where it had been arranged to place them. He denied that in regard to the machines in question it was agreed to supply them with trumpets.

John Byrne said he was at present manager for Mr. Doyle in Port Elizabeth, and last year he was manager for him in Cape Town. He was present when the contract was signed, and at that time it was properly filled in. When the machines were delivered, he offered to lend plaintiffs six trumpets for them until trumpets arrived from England. Plaintiffs refused to take the trumpets, as two of them were second-hand. When he supplied trumpets, he charged an extra guinea. Trumpets were not indispensable; the machines could be used with ear tubes. He also described the manner in which the returned machines were damaged.

A machine was produced in Court, and witness explained that it could be used either with a horn or ear tubes. These articles were not supplied with the machines except at an extra charge. They were supplied by different firms to Edison, the manufacturers of the gramaphone.

The Chief Justice: It is no use without a horn or ear tubes?

Witness: It is just the same as buying a scale without weights.

Witness explained the working of the machine.

John William Dyer, bookkeeper to the defendant, gave evidence regarding the signing of the contract. When the machines were returned, he gave a receipt without examining the machines. He had no knowledge of gramophones.

Plaintiffs were re-called to state that when the two gramophones were returned the trumpets accompanied them.

Mr. Rainsford (for plaintiff): It is admitted that these six phonographs were originally ordered on July 1. Mr. Doyle has a printed form for these contracts, and if the contract was signed on the 1st of September, the plaintiff is entitled to the benefit of this contract. The machine would be practically useless without the trumpet. Doyle admits that he often gave trumpets with machines, and the plaintiff would have been entitled to refuse acceptance of these machines unless the trumpets were sent with them. The defendant produces no order-book, and in questions of brokerage the custom is that the man who has introduced the business is at once entitled to his commission. It is not clear whether these machines were returned in July or in October, and there is nothing to show that they were in a damaged condition when they were returned. Doyle's evidence that phonographs should be returned within 15 days if not approved is simply incredible.

[De Villiers, C.J.: The Court is not satisfied that the gramophones were in good condition when delivered.]

Mr. Gardiner (for defendant): They may not be in a proper condition now. The one returned on October 24, would not work when produced in Court. I do not press as to the first point of our claim, but I must press our second point very strongly.

Mr. Rainsford in reply.

De Villiers, C. J.: The claim of the plaintiffs is three-fold. They claim, first of all, £8, a deposit which they made at the time when they ordered the phonograph machines from the defendant; secondly they claim the sum of £16, being the price of two gramophone slot machines, which had originally been purchased from the defendants by the plaintiff; and, thirdly, they claim damages for £100 for the defendant's breach of contract. The first and third of these claims must stand or fall together. The breach of contract alleged in the declaration is substantially this, that the machines were not delivered within the time agreed upon. There is a considerable conflict of evidence as to when this contract was really entered into, but the Court is satisfied after hearing witnesses on both sides, that the document purporting to have been executed on October 1 was executed on that date. By that document it is agreed that these phonographs should be delivered at a certain price, and the first clause in the agreement is to this effect: the hirer agrees to pay the owner on delivery a deposit of £10, and on the 1st of November and on each succeeding week a further sum of 30s., while this agreement remains in force or until the full sum of

£82 has been paid. The first payment, therefore, has only to be made on November 1. If it be true, as the Court finds it to be true, that this contract was only executed on October 1, then whatever prior arrangement there may have been as to delivery, there was a waiver of this agreement, and the plaintiff now undertook to accept the phonographs under this agreement of the 1st October, and seeing that the first payment was only to be made on the 1st November, I take it that any delivery before the 1st November would be a reasonable time, and would be in terms of the contract. In point of fact, delivery was tendered before the 31st October, and therefore the statement that there was no delivery within the time agreed upon falls entirely to the ground, and the plaintiff must fail. But in the course of the trial a further issue has been raised as to whether the condition in which the phonographs were tendered was such as was agreed upon; but that, unfortunately, was not raised by the pleadings at all. If it had been raised, the defendant might have been prepared to give evidence as to what is usual in the sales of phonographs. The alleged defective condition consists in no trumpets nor ear-tubes having been delivered with these machines. Well, he might have been prepared with evidence to show what is usual in the case of these machines, whether a trumpet or ear-tube is an essential part of the machine, but that issue is not raised. The sole issue raised is whether the tender of the defendant was within a reasonable time, and on that point the Court is undoubtedly with the defendant, and the plaintiffs' must, therefore, fail on the first and third counts of the claim. In regard to the second count, however, I am of opinion that the plaintiff is entitled to succeed. It is admitted that the agreement was that the two gramophone slot machines were to be taken back at the price of £16. The defendant accepted these machines, and credited the plaintiff with the price; but after keeping them for several weeks he claimed the right to return them on the ground of their defective condition. The defect complained of could have been discovered on the slightest examination; it was certainly not a latent defect. He knew, moreover, before he bought that the machines were second-hand machines, and that the plaintiffs' sold them because they were not satisfied that they were working properly. Clearly, therefore, the defendant is not entitled to succeed in respect of these machines. But, on the other hand, the defendant by his claim in reconvention claims a sum of £27 for the amount which he would have received as the rent for the hire of these machines, and upon this claim the defendant is entitled to succeed. The phonograph machines were there ready for the defendant. He only now raises the question as to the trumpets, and even then the plaintiffs' were prepared to let him have the loan of trumpets, at all events, to use for these machines, and, seeing that this question of defective condition has not been raised at all, I think the defendant is entitled to claim his rent of £27 in terms of his claim in reconvention. The plaintiff in reconvention, therefore, succeeds to the extent of £27. The plaintiffs, in convention, succeed for £16. There is, therefore, a balance of £11 for the plaintiff in reconvention. Therefore, judgment will be given for the defendant for the sum of £11, and this judgment will have to carry costs.

Kotze, J., concurred in the judgment.

Mr. Gardiner: As to the small amount of £2?

De Villiers, C.J.: As to the £2, I think that commission is payable. The commission, I think, was earned when he brought the customer.

[Plaintiff's Attorneys: W. G. Coulton; Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

MILLMAN V. SOUTH AFRICAN MILLING COMPANY.

Mr. Searle, K.C., as a matter of urgency, applied for the appointment of a commissioner to take evidence on commission in the case of Thomas Francis Millman, of the British ship Crown of Denmark, v. the South African Milling Co. The action was brought by the plaintiff for the detention of his ship, which brought a cargo of wheat from Portland, Oregon. As the plaintiff was about to leave the country, Mr. Searle applied for his evidence to be taken on commission, and for Mr. Alexander to be appointed commissioner. There was a consent signed by defendants.

Application granted, costs to be cost in the cause.

TABLE BAY HARBOUR BOARD V. BLACK. {1903. May 20th. „ 22nd.

This was an action brought by the Table Bay Harbour Board against H. B Black, merchant, Cape Town, to recover £149 19s. 7d. on a bill of exchange, together with interest accrued and costs

The declaration set out that in August, 1901, a certain consignment of 400 bundles of iron standards of the value of £149 19s. 7d. were landed by the said Board from the Flensburg, shipped by one De Jong, that the said De Jong directed a bill of exchange to the Standard Bank for £149 19s. 7d. against the defendant, payable at sight; that the defendant did not honour or pay the said bill; that he wrongfully and unlawfully represented to the servants of the plaintiffs that he was entitled to the said standards, and that he had authority to remove them, that he wrongfully, unlawfully, and fraudulently directed that the said standards be delivered to White, Ryan, and Co.; that he caused the standards to be delivered to the said White, Ryan, and Co., and that as a consequence the plaintiffs wholly lost control and custody thereof; that the Standard Bank instituted proceedings in this Court against the Harbour Board to recover £149 19s. 7d., which defendant had not paid to the said bank, that the plaintiffs thereupon paid the said sum of £149 19s. 7d., with interest and costs to the said bank, and received from the said bank cession of all its right of action against the defendant in respect of such standards, also cession of the said bill of lading and exchange; that plaintiffs were entitled to demand redelivery of the said standards, defendant having neglected to pay the said sums or any part thereof. In the alternative the plaintiffs claimed £163 15s. 5d. by way of damages.

The defendant's plea set forth that the said De Jong was not entitled to draw a bill of exchange upon him as alleged. He said that 400 standards arrived by the Erna, that it was the duty of the plaintiffs to deliver the said standards to the defendant, or such persons as he might direct, and that he gave instructions that they were to be delivered to White, Ryan, and Co.; he also said he gave no instructions for the delivery of standards from the Flensburg, and that he did not receive the standards now in dispute either from the plaintiffs or any other persons; he denied that he gave false or fraudulent or unlawful directions. He asked that the claim be dismissed with costs.

Mr. Buchanan (with him Mr. Alexander) for plaintiffs. The defendant in person.

De Villiers, C.J. (to the defendant): Why do you not have counsel to assist you?

Defendant said this matter had been dragging on for two years. He was recently given to understand that he should hear no more about it, but about a month ago he had a communication from Mr. Robb to make a deposit of £50 to cover certain fees, etc.

De Villiers, C.J.: What is your defence?

The defendant now said his defence was that he did not receive the standards in dispute, that all the standards that he did receive he paid for, and that he never instructed the plaintiffs to deliver the standards in dispute to anybody else. The only instruction he gave to the plaintiffs was with regard to the standards ex. the S.S. Erna.

Mr. Buchanan: I can show that he sold both consignments, and that he got payment for both.

Frank Robb, assistant general manager of the Harbour Board, said they received the cargo of standards to defendant by the Flensburg. They were found there when the Board took over the landing work in October, 1901. The goods had been lying at the Basin since August, 1901. The Flensburg discharged into lighters in the Bay. The standards were delivered to R. M. Ross and Co. by the general direction of the defendant. Defendant did not give any order to witness. They had no written order from the defendant. In November, 1901, the Board got another similar consignment for defendant by the sailing ship Erna; this boat came to the West Quay. The latter consignment was delivered to one of the military transports on the South Arm. The Erna came in on the 2nd November; the goods were not cleared until the 27th November. The consignment was delivered to the order of Joseph Black and Co., really authorised by Divine, Gates and Co., clearing agents to the Standard Bank.

De Villiers, C.J., said there was no need to go into the question of what the Erna delivered.

Witness, proceeding said that the Flensburg consignment was delivered to R. M. Ross and Co. The bank then produced the bill of exchange and lading, and claimed the amount of £149-19s. 7d. from the Harbour Board.

De Villiers, C.J.: I suppose this was done in the early part of the Board's taking over the work? I suppose they would not part with goods under similar circumstances now?

Witness: No. Continuing his evidence, witness spoke to a letter having been addressed to the defendant, pointing out that the claim of the Standard Bank had had to be paid, and that the bank had ceded all rights of action against defendant to the Board. It was not possible that there could have been confusion between the two consignments, because they would be off-loaded on different dates and from different parts of the Docks The tickets produced were those of the consignment delivered to R. M. Ross and Co. between the 6th and 13th November from the Basin. The Board had not been paid for these goods.

Cross-examined by defendant: It was not customary for the Board to deliver goods out of the Docks on a verbal message. He did not know whether defendant was importing large consignments of standards at that time, and that he had about 8,000 standards in the Docks. Defendant said that he had received the standards at his store from the Flensburg, and he sent them back again. He returned the goods to the Docks; he passed no entries.

Mr. Buchanan: We can prove that they were sent back again and accepted by the defendant.

Edwin George White, of the firm of White, Ryan and Co., said that his firm had a transaction with the defendant early in November in regard to 400 bundles of standards. His firm subsequently sold the goods to R. M. Ross and Co. At the time of the purchase defendant told them that they were on the traction engine trailers at the Docks. Defendant was paid for the goods on the 7th December, but they were placed to the defendant's credit on the 15th November. Witness did not remember that the defendant told them which vessel the goods came by. The goods were delivered between the 6th and 15th November. Defendant went down to the Docks and authorised delivery to witness's firm with their shipping clerk. R. M. Ross and Co. were pressing for delivery, and delivery was made thereafter.

Gilbert Richard Maltravers, of the Standard Bank, said that in August, 1901, De Jong had two bills against the defendant; one was received in July, and the other in August. Both bills were of exactly the same amount, and were payable at sight. The bills were presented to the defendant, but he had only paid the one representing the Erna shipment. When the Flensburg bill was presented to the defendant he said he would pay when the goods arrived. It was frequently presented to him afterwards, and he still said he would pay when the goods arrived. The Bank did not give the defendant any authority to remove the goods from the Flensburg.

Robert Thompson, quay superintendent, Victoria Basin, said he remembered standards being landed about August, 1901, from the Flensburg. They were marked either "H.B.," or "H.B.B." Mr. Black came down one afternoon with Mr. Leonard. Witness had nothing to do with the Erna standards at the West Quay. The defendant spoke to witness about the standards lying there, which he said were his. Witness next got an order from Mr. Leonard to deliver the goods to H. B. Black. Mr. Leonard was at that time assistant to the district superintendent. The goods were sent up, but were returned, and then Black asked that the goods should be sent up again, and this was done upon his payment of a fine of £9 for extra cartage. The goods were delivered to Ross and Co. Witness was quite sure that the standards in question had been consigned by the Flensburg.

Guy Leonard, clerk in the Harbour Board's employ at the Docks, said that defendant came and saw him at the pier head, to give him instructions to get some standards delivered to him that were at the Basin. He saw Mr. Thompson, and asked him to load up the standards, which were lying at the Basin. He gave his instructions verbally. Written instructions would be in the hands of the quay superintendent before delivery was allowed. He knew that the goods were sent to H. B. Black at Waterkant-street, that they were returned, and that a fine was paid for extra cartage.

Cross-examined by the defendant: He did not remember which ship the iron standards came by.

De Villiers, C.J., asked if duty was payable on the standards.

Mr. Buchanan: No, free entry.

De Villiers, C.J., said that there should surely be some note kept by the Customs.

Mr. Buchanan said that there was no record in the Customs.

Witness mentioned that supervision at the Docks was somewhat lax at the time.

Michael van Breda Albertyn produced the manifest of the S.S. Offenbach, and said that there were no standards conveyed by that boat for the defendant.

This concluded the evidence for the plaintiffs.

Defendant said that he received one cargo, for which he met the draft.

George Hopkinson, defendant's storeman, said he remembered a lot of standards coming up to the store about two years ago. They were sent back to the Docks. Defendant told the man who was by that the standards did not belong to him.

Defendant then went into the box, and said that he never received the alleged cargo from the Flensburg. He had been told by several people that the standards in question had been delivered to a firm of engineers.

Cross-examined by Mr. Buchanan: He had transactions with De Jong for more than two years. He bought 12,000 standards from De Jong. He only had one invoice, and one bill of lading from De Jong in November, 1901. The Bank only presented one bill of exchange up to November; that was for the Erna. The question of the bill from the Flensburg was not brought under his notice until December.

De Villiers, C.J., asked the defendant if, in the event of the case being postponed, he would be able to show by what vessel the 400 bundles which were sold to White, Ryan and Co., and delivered to Ross and Co., arrived.

The Defendant: Yes; I shall be able to do that.

De Villiers, C.J.: The case will be adjourned until Friday morning, so that you can bring that evidence.

Potsea, May 22.

The defendant went into the box, and stated that he had been unable to trace the bill of lading. He had been absent in England, and his business was discontinued for eighteen months. He had been unable to find any bills of lading which went back beyond July of last year, and the consignment in question was alleged to have been delivered in November, 1901.

De Villiers, C.J. (to defendant): Surely you have something to prove this simple question. There were certain standards sold by you to White, Ryan and Co., and subsequently delivered to R. M. Ross and Co. What the Court wants you to show is what boat did these standards came by.

Defendant: Unfortunately, I am not able to give it. I may say I sold not one or two lots, but several to White Ryan and Co.

De Villiers, C.J., remarked that the defendant's evidence was unsatisfactory, and that the Harbour Board ought to have brought stronger proof than they had adduced. The case was as incomplete on the one side as on the other. Here they had the document as to the delivery of the standards to R. M. Ross and Co., which said that the standards came from the Offenbach and not from the Flensburg.

Mr. Buchanan: Yes, but I explained that.

De Villiers, C.J.: Yes, explained it in a way. The manner in which the Harbour Board did their work is incomprehensible There is no document to show how these things were delivered, nothing to show how they got through the Customs to R. M. Ross and Co.'s, and there surely ought to be some official documents by which the goods delivered to R. M. Ross and Co. may be identified. At present they cannot be identified. I think the case should stand over for further evidence on both sides. The plaintiffs will then have an opportunity of fortifying their case. There ought to be something to enable you to trace the goods from the Flensburg into the stores of R. M. Ross and Co. You must try and get something. At present the matter is too vague.

Mr. Buchanan: The defendant must be bound down to some statement of his case. He has thrown over his plea, and has given three or four versions.

De Villiers, C.J.: It is now reduced to a very simple issue—whether the goods which came from the Flensburg were the goods which were delivered to R. M. Voss

and Co., and it ought to be as easy for the plaintiff as for the defendant to prove this. The matter will therefore stand over.

[Plaintiff's Attorneys: Reid and Nephew. Defendant in person.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice KOTZE.]

ADMISSIONS. { 1903. May 22nd.

Mr. Alexander moved for the admission of George Stephen Louw as an advocate.

Application granted, oath to be taken before the Registrar of the Supreme Court of the Transvaal, Pretoria.

PROVISIONAL ROLL.

BROAD AND OTHERS V. BURNS.

Mr. Buchanan, for the plaintiff, moved for the final adjudication of the defendant's estate, provisional order having been granted on the 9th May.

Order granted.

LIQUIDATORS OF THE SOUTH AFRICAN MINERAL WATER CO. V. LLOYD AND OTHERS.

Mr. Buchanan, for the plaintiffs, asked that this matter be postponed until the 13th July, in prospect of a settlement.

Application granted.

MORVIN V. GILLANDERS.

Mr. Benjamin moved for a decree of final sequestration of the defendant's estate, provisional order having been granted on the 15th May.

Order granted.

PHILLIPS AND CO. V. POOLE.

Mr. Benjamin, for the plaintiffs, asked that this matter should stand over until the last day of the term.

Application granted.

DE BEER V. BELDRING.

Mr. Greer moved for the compulsory sequestration of the defendant's estate, provisional order having been granted on the 16th May.

Order granted.

NEDERLANDSCHE BANK V. WILSON AND ANOTHER.

Mr. Van Zyl moved for provisional sentence on a promissory note for £1,000 in favour of one Caisse.

Mr. Buchanan read the affidavit of one of the defendant (Mallet), which stated that, although the promissory note was for £1,000, defendants had only received benefit to the extent of £400—£250 in cash and £150 in goods. The bank had sequestrated Caisse's estate, and obtained judgment against him for £1,325, amongst which was the note for £1,000. Defendants stated that if the claim was only pressed so far as the benefit received was concerned, namely, £400, they would be solvent. Deponent also stated that the plaintiffs had agreed that payment under the note should not be enforced until Caisse's estate had been finally liquidated and distributed.

Mr. Van Zyl read the plaintiffs' affidavit, which denied that such a promise was made.

Provisional sentence granted, with costs.

HOLM AND ANOTHER V. WINNITZKY AND OTHERS.

Mr. Buchanan moved for provisional sentence under certain articles of sale for £2,900, with interest at the rate of 6 per cent. from the 1st December, 1902, in connection with the purchase of a certain piece of land and buildings situate in Cape Town. The plaintiff tendered transfer to the defendants on the payment of the purchase price. The conditions were signed by all the defendants, one paying the other to be absolved.

Order as prayed.

TRUSTEE IN THE ANTE-NUPTIAL CONTRACT OF SILBERBAUER V. O'DOWD.

Mr. Benjamin (for the plaintiff) moved for provisional sentence for interest at the rate of 6 per cent. on a mortgage bond from the 1st January to the 31st December, 1902.

Order as prayed.

HEATLIE V. VAN DIEMEN.

Mr. Buchanan (for the plaintiff) moved for a decree of civil imprisonment against the defendant, the amount outstanding being £9 17s. 11d., costs of a certain action. The defendant had paid the amount of the judgment, but he had failed to redeem his promise to pay the costs. Defendant was now of Malmesbury, and formerly of Wynberg.

Order as prayed.

ESTATE VAN NOORDEN V. LANG AND HEYNEMANN.

Mr. Gardiner moved for provisional sentence on a promissory note for £150.

Order as prayed.

ILLIQUID ROLL.

SMITH AND CO. V. RABAN. { 1903. May 22nd.

Mr. Buchanan moved for judgment under Rule 329d for £214 4s. 11d. on account of goods sold and delivered.

Order as prayed.

HEATLIE V. BRUYSKES.

Mr. Benjamin moved for judgment under Rule 319 for £62 10s., being the unpaid balance of certain brokerage in connection with a sale of property.

Order as prayed.

ALHEIT'S CASE.
MICHAU'S CASE.
BAILEY'S CASE. { 1903. May 22nd.

Registration of Voters—Qualification—Occupation.

Actual occupation of the requisite premises during the whole of the qualifying period is sufficient to entitle the occupier to be registered as a voter even if he was only a tenant at will. Where the alleged occupier has been absent from the premises during a portion of the qualifying period and it is proved that during such absence he was lawfully excluded from the premises, he cannot be legally regarded as having been in actual occupation during the whole of the qualifying period.

Where, however, there has been no break in the right of occupation, the absence of the occupier during a portion of the qualifying period does not legally constitute a break in his actual occupation, provided that there has been personal occupation for such a portion of the qualifying period as would fairly entitle him to be regarded as one of the inhabitants of the division.

These were arguments on the claims of J. J. Michau, Abram Bailey, and C. W. Alheit, to be registered as Parliamentary voters.

Mr. Schreiner, K.C., for the appellant, J. J. Michau, whose application to be placed on the roll of registered voters for the division of Stellenbosch had been refused, said he understood that in this case no one appeared to oppose. Mr. Michau was an attorney practising in Cape Town, and he resided for the greater part of the year at Rondebosch. He, however, had considerable property at Hottentots' Holland, and he was also the owner of four houses at Somerset West. One of these houses, he claimed, gave him qualification under the occupation clause. Mr. Michau was the Mayor of Somerset West Strand, and he stated that he went down there three times each month. He had been removed, on his own application, from the list for the Cape Division, and he now asked to be enrolled on the Stellenbosch list. Counsel submitted that the claim was a good one, and that Mr. Michau had a sufficient qualification within the meaning of the eighth section of the Constitution Ordinance. Counsel contended

that occupation within the meaning of the Act did not necessarily imply permanent residence, and he urged that, so far as Somerset Strand was concerned, the claimant was the *bona fide* occupier of the house in question.

De Villiers, C.J., intimated that the Court would take time to consider its decision.

Mr. Schreiner, K.C., also appeared for the appellant, Abram Bailey.

Mr. Burton said that he appeared for the other side, but he had no objection that he wished to press.

Mr. Schreiner said that the applicant was the owner of a farm in the district of Colesberg, but the farm was in the care of his manager. The applicant had a bedroom solely reserved for his use, in respect of which he claimed that he was entitled to be placed on the voters' roll. Counsel argued the case at some length, and said that an important point to be remembered was that the house formed no part of the manager's emoluments, and that if he wished to be registered, it would have to be under the salary qualification. Counsel also stated that applicant had occupied the bedroom from forty to fifty days since 1899.

De Villiers, C.J., intimated that in this case also the Court would take time to consider its decision.

In the case of C. W. Alheit, Mr. Burton was for the claimant, and Mr. Benjamin was for the objector.

Mr. Burton said that the appellant resided with 108 other students at an establishment called The Home, at Stellenbosch, which was under the superintendence of Professor De Vos. The first question raised appeared to be as to the power of the superintendent to transfer the occupiers from one room to another at his discretion. The facts found by the Civil Commissioner, as the Registering Officer, was that Alheit had got in this Home the sole use of a room worth £100. The value, then, was within the requirement of the law as to qualification. He paid £100 for board and lodging. He paid £9 a quarter for the use of the room. The first question that presented itself was whether the fact that the superintendent had power to transfer him from one room to another could do away with his right *bona fide* to claim a vote for such room.

De Villiers, C.J., said the important question was whether the fact that the superintendent had the power to exclude the appellant from the rooms for certain months of the year during the long vacation disqualified him?

Mr. Burton said he would deal with that point. During the long vacation, from the middle of December to the end of January, the room had to be locked up. In this matter he had to take his stand upon the same contention that had been raised by his learned friend (Mr. Schreiner) in the two previous cases, viz., that what was required under our law for the purpose of being registered in respect to property was occupation, and that occupation, under our law, did not imply residence. He was bound to admit, upon the authority which he should refer to, if residence were required from the students, if it were necessary that he should prove that these students resided in this place for twelve months, he should have no case. But if it were the case that our law required, in respect to the property qualification, occupation, and that occupation did not imply residence, then he submitted that the fact that he was subject to a rule during certain months of the year that the room should be locked up, and that he must not reside there, he submitted that it did not deprive him of occupation. If the term occupation implied residence, then three-fourths of the merchants of Cape Town would be disqualified from voting in respect of their business premises. Thousands in a large city like Cape Town would be disqualified.

De Villiers, C.J.: Do you mean that a man living in England, and having a place of business here, would be entitled to be registered as a voter here?

Mr. Burton: It may seem very unsatisfactory that it should be so, but I submit that it is the law.

De Villiers, C.J.: You must read all the Acts together, and take the spirit of the Acts, and not quote particular sections merely.

Mr. Burton said that what he did rely upon was the enacting sections of the Constitution Ordinance. He submitted that the distinction to be drawn was as between mere occupation and inhabitance. A constructive occupation might be urged on behalf of a man who owned a house somewhere, but who made no

use of that house. Occupation referred to under our law, he contended, meant the *bona fide* use in some respect or another of premises of the required value. He claimed that Mr. Alheit was in *bona fide* occupation of his room in the quarter, and that the fact that he held that room under a condition that he, in common with everybody else, was only to reside there during a certain period, whatever effect it may have had on his residence had no effect upon his occupation. Counsel contended that the break of residence during the period of twelve months could not affect Mr. Alheit's *bona fide* occupation of the room during that period.

De Villiers, C.J.: It is not necessary to hear Mr. Benjamin on behalf of the objector to Alheit's claim. The occupation which entitles a person to be registered as a voter must be an "actual occupation" in terms of the last proviso to the 8th section of the Constitution Ordinance. Whatever these terms might mean in other statutes, there are many indications in the Ordinance and in the Acts relating to registration that occupation in order to be "actual" requires the personal presence of the occupier. For instance, the notice to be given to claimants under the 14th section of the Ordinance assumes that only persons who are "inhabitants" can claim to have their names inserted in the voters' list. By the Act 9 of 1892, which imposes the education test, but reserves the existing rights of persons then already registered, such reservation is confined, under the 3rd section, to persons who "continue to reside in the division" in which they were so registered. Again, the 7th section of Act 48 of 1899 imposes on the registering officer the duty of inserting in the list framed by him the names of all persons in the existing register, except, among others, the names of those who do not reside or earn salary or wages in the field-cornetcy, and further, to insert the names of all persons not on the existing register who possess the necessary qualifications, and (a) reside within his field-cornetcy (b) earn salary or wages within his field-cornetcy. Reliance, however, has been placed by the claimant on the 3rd section of the Act of 1899, which requires residence in the case of persons claiming the wages or salary qualification, but is silent as to such residence in regard to the occupation qualification. The reason of such silence appears to me that, as the occupation required is an actual occupation, it was deemed unnecessary to refer to the residence of the occupier, and this view is confirmed by the proviso to the section which refers to both classes of voters in the following terms: "Provided that a person who is qualified to be registered as a voter on the day on which any registration of voters shall commence shall not cease to be qualified by reason that such person shall take up his residence in another electoral division after such day." In view of these and other indications of the intention of the Legislature I cannot accede to the view that a person residing elsewhere, say in England, but owning a place of business in this colony, is entitled to be registered as a voter in the division where the business premises are situated by virtue of his constructive occupation of such premises. His personal presence may not be required for every day of the year, but he must have been in personal occupation of the premises for a sufficient time during the requisite period immediately preceding the registration as to satisfy the registering or revising officer as to his actual and *bona fide* occupation. If during the qualifying period there is a break not only in his actual occupation, but also in his right of occupation, the 3rd section of Act 48 of 1899 is not complied with, and registration cannot be allowed. In the case of Alheit there clearly was such a break. During the greater part of the year preceding the registration he occupied jointly with other students a dwelling-house of sufficient value, but during the long vacation, which lasts from the middle of December to the end of January, all the students have to leave (unless special permission to stay is given by the conductors of the establishment) and the place is locked up. This rule appears to me to to be fatal to Alheit's claim to be registered. If he had remained in personal occupation during the preceding vacation he would, notwithstanding the existence of the rule, have been entitled to be registered, for, as has already been decided, a person may be registered even if he has occupied at the will of the owner provided only there had been

actual occupation. So also, if no rule had existed preventing his access during the vacation, his occupation would have been regarded as continuous, and he would have been entitled to registration notwithstanding his voluntary absence during vacation. But where the alleged occupier has been absent during a portion of the qualifiying period, and it is proved that during such absence he was lawfully excluded from the premises it is impossible to hold that there has been a legal occupation during the requisite period. The claim of Alheit must therefore be disallowed.

MICHAU'S CASE.

In regard to Michau, he owns property of the required value at Somerset West, and, during the qualifiying period, has from time to time occupied the premises either by himself or along with his family. The objection to his registration has been withdrawn, and it may therefore be assumed that he has not, during any of his periods of absence, let the premises to anyone else. If he had so let them there would have been a break in his right of occupation, and there would consequently have been such an interruption of his actual occupation as would have disentitled him from being registered. It would be difficult to lay down any general rule as to the number of days during which the personal presence of the occupier is required to establish his actual and bona fide occupation. An occasional presence merely for the purpose of giving colour to the claim for registration would not be enough, but there should be a personal occupation for such a period as would fairly entitle the occupier to be regarded as one of the inhabitants of the electoral division. Mr. Michau may be fairly so regarded, for not only does he for a few months in the year reside together with his family at Somerset West, but he is a Mayor of the place, and frequently visits it in order to attend to his duties as member of the Municipal Council. His claim must, therefore, be allowed.

A. BAILEY'S CASE.

The case of Bailey appears to me to be of a much more doubtful nature, and if the objection to his claim had not been withdrawn I should have found some difficulty in upholding his claim. The property, by virtue of which he claims his qualification, is of sufficient value, but it would appear that from 1899 to 1903 he has only resided on the premises for forty or fifty days. The Revising Officer must have found that the greater part of that period of personal occupation occurred during the year immediately preceding the registration, for otherwise it is difficult to conceive how the claim could have been admitted The finding is upon a question of fact, and the Court will not disturb it, more especially in view of the circumstances that the objector at the Revising Court has practically withdrawn his objections in this Court. The claim will, therefore, be allowed.

J. Maasdorp concurred.

Kotze, J.: I concur in the judgments which have just been delivered, and for the same reasons. The first point to be decided is what is the meaning of the words "actual occupation" occurring in the Acts. There may be such a thing as constructive occupation," and by that I understand a real occupation, where the personal or residential element must come in during the statutory period. Now, in the case of Alheit, it is candidly admitted by Mr. Burton that there is an interruption of actual occupation, there is no free access, the claimant Alheit cannot go there at any time and say, "I insist on occupying this room," the professor who conducts the home has a right to say that during certain periods he will not allow him to occupy the room. The case, therefore, falls within the decision cited from 16, Q.B.D., 231. With reference to the other two cases, we find that, in that of Mr. Michau, he for some three months of the year off and on resides at Somerset West Strand, in the electoral division of Stellenbosch, and, therefore, I think, seeing that a person can only now have one vote, he has substantiated his claim. There does not appear to be anything to show that while he is not at Somerset West with his family somebody else is in actual occupation of the premises. We must assume that he has free control of and access to the premises at all times during the year. I therefore think he has proved his claim. In regard to the claim of Bailey, there the case may not be quite so strong, but still Bailey claims to be registered as a voter, and it is also stated that since 1899 he has resided for 40 days on his farm. I think, in the absence of evidence to the contrary, and the objections not being pressed that were raised

before the Revising Officer, and no one appearing in support of them, we must take it that the Revising Officer satisfied himself that Bailey was properly qualified, i.e., that he has *bona fide* resided on the farm for some portion of the previous twelve months. His name has been placed on the Register, and should, upon the case stated, remain there.

[Attorneys for Albert and Michau: Michau and de Villiers. For Baily, Van Zyl and Buissinne.]

GENERAL MOTIONS.

Ex parte FATTAAR. { 1903. May 22nd.

Mr. Alexander, as a matter of urgency, moved for a writ of attachment against the husband of the petitioner, who, it was declared, had sailed for Bombay in the Burgermeister from Cape Town, on Tuesday last, and who, the petitioner had reason to believe, did not intend to return to this country. The husband of petitioner had left her and the children unprovided for. It was proposed that the writ should be executed against defendant when the boat called at East London, on Saturday, the 23rd inst.

Writ of attachment granted as prayed.

Ex parte HOFMEYR.

Mr. McGregor moved for an order authorising the Master to issue a certain certificate.

It appeared that petitioner was married in community of property, and his wife died in January, 1900, there being three children (still minors) of the marriage. A joint will had been executed, under which, in the event of the testatrix dying first, and testator wishing to contract a second marriage, he would be bound to distribute amongst the children the money which testatrix had inherited—a sum of £1,505, which petitioner had paid into the guardians' fund. Petitioner had asked to be granted a certificate to enable him to enter into a second marriage, but the Master had refused to comply, contending that under the will there was a massing of the estate, and that he could not grant a certificate until petitioner had given security of the payment of five-sixths of the estate, to which the children would eventually be entitled. Petitioner asked for an order authorising the Master to grant a certificate.

In reply to the Court, Mr. McGregor said petitioner was prepared to give security for the material portion of the estate.

Order granted, on condition that security be given by petitioner for 15-48ths of the estate for the benefit of the children of the marriage.

Ex parte VAN DER VYVER.

Mr. C. W. de Villiers moved for a rule nisi under the Derelict Lands Act to be made absolute.

Order granted as prayed.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

VAN ONSELEN V. LANDMAN AND ANOTHER. { 1903. May 22nd.

Order of Court—Contempt.

This was an application upon notice to respondents to show cause why an order for personal attachment should not be granted against each of them for contempt of court by their refusing to comply with the terms of a certain award which had been made a Rule of Court.

Mr. Burton was for applicant, and Sir H. Juta, K.C., for respondents.

Mr. Burton read an affidavit by applicant, which set forth that he and respondents were co-proprietors of the farm Hartebeestefontein, 200 morgen in extent, in the division of Humansdorp. The farm was divided by arbitrators, and conditions made for fencing in the lands, the award being made an Order of Court. There was a dam on the farm, which the award laid down should be considered as belonging to all the proprietors, and be open to them for the watering of cattle. Further, the gardens and cultivated land were to be enclosed by proper fences, especially the gardens adjoining the dam, to prevent fowls, pigs, etc., gaining access to the farm. It was alleged that respondents had neglected to properly fence their lands, and applicant had consequently been put to a lot of unnecessary trouble in watering cattle, as he must always have somebody in charge of them.

Sir H. Juta read affidavits from respondents, in which they stated that they had obeyed the order of the Court, and

that applicant was in no way interfered with in the free and undisturbed use of the dam.

In a replying affidavit applicant maintained that poultry and pigs could get through the fences, which were made of wire and bushes, while in places there was no fence.

Maasdorp, J.: I do not think there is any question between applicant and respondents as to the meaning of the award, because according to the affidavits of the respondents they interpret the award as it is interpreted by applicant, but they say they have really carried out the intentions so expressed. It appears there is a certain watering-place which is reserved for the use of all the proprietors who participated in the award, and the roads to this watering-place must be kept open. Consequently, the proprietors had the right to drive their animals to water by all these roads, but it was necessary to make provision to prevent animals getting into the gardens, and consequently the burden of enclosing the ground was thrown upon the proprietors of the gardens. In order to keep poultry, pigs, and fowls out of the gardens, the proprietor of the farm was ordered to make a proper fence. The only question is not as to the intention expressed in the award, but as to whether a proper fence was made. Respondents say they have made a proper fence, and they give some description of it, but it must be of a very unsatisfactory character. They have a wire fence adjacent to the watering-place, and they have put bushes against the fence. A fence so constructed seems to me to be likely to be ineffectual in keeping pigs and fowls out of the gardens. We have the evidence of witnesses who say that the fence is utterly inadequate for the purpose. If that is so it must be apparent to respondents that they have not carried out the intention of the award as they understood it. Under these circumstances, as the award was made a Rule of Court, as the order contained therein is one they are expected to obey, and as they have up to the present made no attempt to comply with the terms of the award in that respect, the Court must now make an order which will compel them to set about performing the terms of the award. It was contended that there may be some difference of opinion between the parties as to whether the fence is a proper fence or not, but I am rather inclined to think respondents refrained from putting up a proper fence, well knowing that the fence was not a proper one. The Court must therefore give an order against respondents, but I think the purpose of this application will be served if the Court merely now orders that respondents shall pay the costs of this application, and give them further opportunity, as they allege there was some misunderstanding, to comply with this portion of the award. If they neglect in the future to carry out the award, a further application can be made, but there can be no difference of opinion as to the meaning of this award. No order of attachment will, however, be made.

Kotze, J., concurred.

[Applicant's Attorneys: Dempers and Van Ryneveld. Respondent's: Walker and Jacobsohn.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

TREVOR v. CHETTY. { 1903. May 23rd.

Sale and purchase—Broker's note—Mutual mistake of seller and purchaser.

T. purchased from C. certain cottages. C. subsequently alleged that certain two cottages had been included in his broker's note by mistake. T. now sued C. for a pro rata *return of the price already paid in respect of these two cottages.*

Held, *that as the evidence disclosed that defendant's broker had led plaintiff to believe that he was buying the two cottages in question, defendant's mistake could not be set up as a defence against plaintiff's claim.*

Semble: *Had the mistake of plaintiff and defendant been*

mutual the latter would have had a good defence.

This was an action for the transfer of certain property at Salt River, the alternative claim being £1,500 damages, and interest *a tempore morae*.

The defendant was absent on account of sickness, but counsel offering no objection the Court decided to proceed with the case.

The declaration set forth that both parties to the suit were resident in Cape Town. On or about November 20, 1902, the defendant (Sababadae Sockalinga Chetty) sold to the plaintiff, through the former's broker, Ernest Reading, certain land and buildings at Salt River, described in the broker's note as follows: "Certain block of buildings and ground, being properties Nos. 1 to 19 (odd), Alfred-street, Salt River, and certain house adjoining, situated in Maitland-road; also certain two houses in Alfred-street, being Nos. 2 and 4 (even); also shop and eight houses, situated in Maitland-road. All as per diagrams for the sum of £11,000 sterling. Possession and transfer to be given on the 15th December, 1902. £500 being given as deposit, balance to be paid on day of transfer." The defendant duly paid the purchase price to defendant, who, on December 25 caused transfer to be passed to plaintiff of certain land, which he represented to be a transfer of the land and buildings purchased. Thereafter plaintiff discovered that certain land sold (i.e., that upon which the properties Nos. 17 and 15, Alfred-street, Salt River, were built) was not included in the said transfer; and the defendant had failed to effect such transfer. Defendant's plea admitted the sale, but alleged that the terms of the contract of sale were incorrectly stated in the broker's note referred to, and that properties Nos. 17 and 19 were not included in the contract of sale.

Sir H. Juta, K.C. (with him Mr. Buchanan) for plaintiff; Mr. Alexander for defendant.

The plaintiff, Edward Gapper Trevor, stated that he purchased the property from the defendant, according to the broker's note, and he went out to see it in the company of the plaintiff's broker, one Reading. The houses Nos. 1 to 19 (odd), in Alfred-street, were under one roof; houses Nos. 17 and 19 were similar to some of the others. Later, he took out a valuator named Phillips, who made a valuation of all the properties included in the broker's note, and he (plaintiff) subsequently agreed to buy the property, through Reading, for £11,000. The broker's note was drawn up in the defendant's shop, and signed by both plaintiff and defendant. Phillips was also present. After he had closed the bargain, he entered into negotiations with the South African Association for a loan upon the property. Transfer was obtained by the South African Association, as his agents, on December 29, a loan was raised, and a bond was passed. At the time the broker's note was signed, plaintiff agreed with the defendant that they should share the rents for December, he (plaintiff) having to get possession on the 15th of that month. The rents were collected for the month, including those of Nos. 17 and 19. About the end of January he ascertained from the South African Association that the properties Nos. 17 and 19 belonged to one James Short, and that they were not on his (plaintiff's) diagram. Short claimed the rent that had been collected for Nos. 17 and 19. Plaintiff demanded transfer of Nos. 17 and 19 from defendant, but he refused. For houses of the same value as Nos. 17 and 19, plaintiff received £3 5s. per month for each, but he had contemplated raising the rent. Rents were going up everywhere.

By Mr. Alexander: He first went out to see the property on November 20 or 21, accompanied by defendant's broker. The broker was not acting for both parties in the transaction, but he (plaintiff) looked upon him as his own agent for the time. The defendant never pointed out Nos. 17 and 19 as part of the property. Plaintiff was led to believe so by his brother.

By the Court: Defendant was not present when his brother spoke to plaintiff.

Cross-examination (continued): He had met Mr. Reading only once or twice before the transaction; he arranged with Reading to buy the property before he saw defendant. There was a delay with the transfer, because the papers were not ready, the solicitors not having received instructions to get the papers by the 15th.

Mr. Alexander: At the time when the sale was concluded, it was distinctly understood between you that you were

purchasing what Chetty bought from Cosay, and the transfer to be given by Cosay would be given by you?

Sir H. Juta objected to the question, on the ground that it was seeking to vary a contract by oral evidence.

Mr. Alexander contended that it was one of those cases where oral evidence was admissible, because the pleadings raised a mutual mistake.

The Court held that the pleadings did raise a case of mutual mistake, and that if the defendant could prove this, he was entitled to succeed. The evidence would, therefore, be admissible.

Continuing, plaintiff replied to the question with a decided negative. He distinctly understood he was buying the whole block, otherwise he would not have entered into the transaction. Cosay's name might have been mentioned amongst the tenants of the property, but not as the owner of Nos. 17 and 19. Plaintiff admitted there were discrepancies in the broker's note; the "certain two houses" in Alfred-street (Nos. 2 and 4) consisted of one house, with two front doors. If shops were counted as separate properties, there would be twenty-one altogether. He did not obtain a list from Cosay before he bought the property, but he saw a list of what Chetty thought of raising them to. The list handed him (list produced) was not what he saw before the sale. In that list he noticed certain discrepancies; in some cases, the prices were raised. When it was shown him, he did not say at once that Nos. 17 and 19 were not included; he gave it only a very cursory glance. He asked for a statement of rents before the sale was concluded. The owner wanted £1,000 for the two houses; similar houses brought in £3 5s. per month, but the house next to it only £2 17s. 6d. Neither the defendant nor his broker told plaintiff that the property had been bought from Cosay. He might or might not have heard it from the tenants. The broker's note was an exact copy of the rough copy. He knew now that Chetty paid Cosay £9,500 for the property, but he did not know it at the time. Mr. Reading said he thought the figure was £10,000 or £10,500. That was for the property as pointed out on the spot by Mr. Reading—the whole block. His words were: "It is right up to where the new buildings are going up."

Re-examined: Reading pointed out Nos. 17 and 19 to him; they were both under the same roof as the other houses. Witness would not have bought the property unless he was having the whole block. When he went to raise a bond on the property, and when he gave authority to increase rents, he included Nos 17 and 19.

By Maasdorp, J.: Witness had no personal negotiations with defendant until after the broker's note was signed.

By Kotze, J.: When witness told the S.A. Association to collect the rents he did not specially mention Nos. 17 and 19, but gave instructions regarding the property as a whole.

William Henry Phillips, auctioneer, stated that he went out with Trevor to value the property. He included Nos. 17 and 19 in the valuation, and valued the two at £350 each.

Mr. Buchanan read the evidence, taken on commission, of Mr. Reading, who stated that S. M. Chetty, defendant's brother, took him out to see the property in November last. At that time witness was fully under the impression that S. M. Chetty was the owner of the property, as he had received all instructions from him. Chetty's instructions were that he had twenty houses and two shops for sale at Salt River, the houses in Alfred-street were, witness was instructed, the odd numbers from 1 to 19 inclusive. When Chetty showed him the property he (Chetty) walked along the terrace to No. 19, after pointing out No. 1. Witness met Trevor the next day and pointed him out the property in exactly the same way as Chetty had previously pointed it out to him. Witness valued Nos. 17 and 19 at £1,250 the pair. He did not hear the name of Cosay until after the broker's note was signed. Witness sold solely and wholly according to what was pointed out to him, and not according to diagrams.

This closed plaintiff's case.

Mr. Alexander called

Sabba M. Chetty, defendant's brother, who stated that in November last his brother owned certain property at Salt River, which he had bought from Cosay in September previous. Witness went with Reading to Salt River, and showed him the property saying simply, "This block and T block," but he did not indicate each particular house. He never pointed out Nos. 17 and 19. Reading and plaintiff afterwards came to defen-

dant's shop, and witness gave Reading a rent list, which he had obtained from Cosay. That list contained the numbers of all the houses they had to sell, but it did not include Nos. 17 and 19, which never belonged to defendant. Defendant paid Cosay £9,500 for the property.

By Maasdorp, J.: Witness's brother asked him to carry through the business for him with Reading.

Peter Carl Schroder, assistant in defendant's shop, said that he remembered Trevor coming to the shop and having a conversation with defendant regarding the property, in the course of which the diagram was mentioned, and also Cosay's name.

Jacob Cosay deposed that he sold the property in question on behalf of his wife to defendant. Nos. 17 and 19, which were painted in a different manner to the other houses in the terrace, were not included in the transaction.

Mr. Alexander explained that he was unable to call the defendant, he being unwell.

Sir H. Juta said plaintiff was quite prepared to cancel the sale and have his money back.

Mr. Alexander having been heard in argument, on the evidence,

Maasdorp, J.: In this case plaintiff claims the transfer of certain two properties, which he alleges he purchased from defendant, or in the alternative he claims damages in the sum of £1,500 for breach of contract. Plaintiff sets up a claim, and bases it upon a broker's note, which has been put in, and on the face of that note it would appear—if the note is correct—that plaintiff purchased these two properties, and would now be entitled to transfer. If plaintiff succeeds in proving that this property was sold by defendant to him he would be entitled to transfer whatever mistake might have been made by defendant himself in the transaction. But it would be a different matter if it was proved that there was a mutual mistake in the acceptance of the broker's note by these two parties. The question was raised whether the point that a mutual mistake was made was raised on the pleadings, and it seems to me that it is raised there, because there is an allegation on defendant's plea that the properties were not included in the contract of purchase and sale. That I take to mean this, that neither plaintiff nor defendant intended to include in that contract the two properties in question but subsequently, when they came to make a written agreement, they both made a mistake in accepting the broker's note, in which the properties were included. The Court has now to decide whether there was a mutual mistake by virtue of which defendant is entitled to escape from the terms of this contract. We have the very strongest evidence given by the broker in this case, who acted during the greater part of the negotiations as agent for the seller, that he was instructed by the seller's brother—who was appointed by the seller to negotiate for him—to sell these two properties to plaintiff. The broker alleges that the sale was completed by his instrumentality on the instructions of the defendant's brother. If we accept the evidence given by the broker, the case for the plaintiff is proved, because if representation was made by the broker that he was selling Nos. 17 and 19, then no mistake was made by the plaintiff when he accepted the broker's note, including the two properties, as the true contract. I think the evidence is strong that plaintiff was induced to purchase in consequence of representations made by defendant's agent that he was selling these properties, and defendant has failed in proving that there was any mistake made by plaintiff. If it is once decided that plaintiff bought the property on representations made by defendant, then he is entitled to recover, because no mistake made by defendant can be set up as a defence against plaintiff's claim. If plaintiff intended to purchase all the properties, including Nos. 17 and 19, then he paid a price which covered all of them, and he is entitled to recover the price paid for the properties not transferred. He may recover a *pro rata* sum, in the shape of a proportionate reduction of the purchase price paid by him for all the properties, or he may have been entitled to damages in consequence of the failure on the part of defendant to complete his contract, but in this case plaintiff is satisfied with merely recovering the proportionate value of these properties, as proved in the evidence. He claims nothing further, and I think he is certainly entitled to at least that. Having paid £11,000 for the properties, including these two houses, and it appearing that the value of these two houses amounts

to £700, plaintiff is entitled to recover £700. Judgment will therefore be given for plaintiff for £700 with costs.

Kotze, J., concurred.

[Plaintiff's Attorneys: Reid and Nephew. Defendant's: Silberbaner, Wahl and Fuller.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., and the Hon. Mr. Justice KOTZE.]

THE LIQUIDATOR OF CONTAT'S COLLIERIES v. CONTAT. 1903. May 26th July 2nd. ,, 3rd.

Company—Winding up—Liquidator—General bond—Preferent claim.

In the winding up of a mining company the defendant claimed to be ranked as a preferent creditor in respect of a general bond against the company passed in his favour by two life governors, of whom he was one, to secure advances alleged to have been made or to be made by him to the company. Held, *that the liquidator was justified in refusing to admit the preferent claim in competition with other creditors of the company without clear proof of the money claimed having been actually advanced.*

This was an action brought by the liquidator of Contat's Collieries Estate and Railway Co. against J. E. Contat, now of East London, to recover £2,250, balance of the purchase price of certain properties sold by the company to defendant.

The plaintiff's declaration set out that he had been appointed official liquidator of the company, and that the defendant resided at East London; that the plaintiff, as the duly-authorised agent, held on the 22nd April, 1901, a public auction, and he sold two certain properties upon which the company had leases—portion of a certain farm Zevenfontein, in the district of Albert, and another farm Stewart's Post, in the district of Molteno—for £3,000, payable as to half forthwith and the balance within three months of the date of sale, with interest at the rate of 6 per cent per annum from the date of sale; the defendant on the 24th April, 1901, paid £750, and had failed to pay any further sum; plaintiff prayed for judgment in the sum of £2,250, with interest at the rate of 6 per cent. per annum as to £750 from the 22nd April, 1901, and as to £1,500 from the 22nd July, plaintiff, in his capacity of liquidator, tendering the lease and rights in the said property.

Defendant, in his plea, admitted certain of the allegations as to the sale and the amount paid, but said that the company was, prior to the said sale, and still was, subject to a set-off of £3,000 and more, by virtue of a certain mortgage bond, duly passed by the said company in favour of the defendant. He had claimed against the said company in liquidation, and urged that he was entitled to preference. The said claim was the sole preference claim against the company. It was agreed in the conditions of sale that defendant should pay in cash a portion of the purchase price sufficient for the liquidation expenses of the said company, and that the balance of the said purchase price should be set off *pro temp* against the amount of the said claim. The defendant duly paid in cash, and the plaintiff accepted £750, being the estimated amount of the said liquidation expenses. He admitted that the said lease of the farm Stewart's Post had been cancelled, but denied that the said lease had been cancelled through any default of his. Defendant prayed for the dismissal of the claim, with costs. In his claim in reconvention, the defendant, now the plaintiff, craved leave to refer the Court to the foregoing allegations in the declaration. The plaintiff, now defendant, had not within reasonable time given him the use of the said farm Stewart's Post and the transfer of the said lease and rights. The defendant refused to put plaintiff in possession of the said farms.

The defendant had wrongfully and unlawfully failed and refused to pay the prescribed rent under the lease of the farm Stewart's Post, and the said lease had been cancelled by the lessor of the farm. The defendant, now plaintiff, had lost the benefit of the said farm Stewart's Post, and had been deprived for many months of the use of the said farms, and had sustained damages in the sum of £9,500. Plaintiff claimed the rights and leases of the farm Stewart's Post, and a due and proper liquidation account, and failing compliance with the terms of prayer: (a) £9,500 damages; (b) alternative relief; and (c) costs of suit.

In his replication, plaintiff took exception to the suit by the defendant against him in his individual capacity, and prayed that such part of the claim in reconvention should be dismissed, with costs. The defendant was not entitled, plaintiff said, to the transfer of the rights and leases until he had paid the balance of the purchase price. The plaintiff denied that the lease had been cancelled through his default and neglect. He denied that the defendant was entitled to damages in the sum of £9,500, or any other amount. He admitted that he was not prepared to file a liquidation account. He said that he would be prepared to file an account as soon as the issues in this suit were decided.

The defendant's rejoinder was general.

Mr. Benjamin (with him Mr. Buchanan) for plaintiff; Mr. Upington (with him Mr. Alexander) for defendant.

Mr. Benjamin, in opening the case, said that this was an action to recover £2,250, being the purchase price of certain assets of Contat's Collieries Estate and Railway Co., in liquidation, that were sold by the liquidator, plaintiff in the present action, on the 22nd April, 1901. The conditions of sale stipulated that the purchase price should be paid as to half in cash on the day of sale, and the remaining half of the purchase price three months from date, together with interest at the rate of 6 per cent. The defendant contended that there was an agreement prior to the sale, and subsequently repeated, wherein conditions were signed that he should be entitled to set off a bond of the amount which he claimed. The plaintiff denied that there was this agreement, so that the first point would be as to whether or not there was this agreement, and whether or not this agreement was admissible to vary a written contract, the conditions of sale being signed by the defendant and signed by the auctioneer on behalf of the plaintiff. The second point in the case was with regard to the lapse of one of the interests that were sold by the liquidator in the farms Zevenfontein and Stewart's Post. These leases were held under certain rents by Contat's Collieries, and were sold by the plaintiff as liquidator. The rentals were paid up to a certain day subsequent to the sale by the liquidator, but he did not pay the rentals after that date. In consequence of the non-payment of the rentals after that date, which plaintiff contended should be paid by the defendant, inasmuch as he was the purchaser, the lease of Stewart's Post lapsed. The defendant said plaintiff should have continued to pay the rent of Stewart's Post, so as to keep alive the lease, and that, having failed to do so, he was liable for damages. The defendant likewise said that the plaintiff failed to give him possession and transfer of these two interests, and in consequence of that he had been kept out of these properties all this time, and that he (defendant) was entitled to damages in respect thereto. The second point in the case was as to whether there was any duty on the part of the plaintiff to keep alive this lease, and whether he had, as a matter of fact, which he denied, kept defendant out of the beneficial user of these interests. The third point in the case was that the defendant contended the plaintiff was in default, in not having previously filed a liquidation account. The plaintiff said he had not filed such account, because he had been awaiting the balance of the purchase price, which should have been paid to him, of £2,250, and that until that sum was paid, he could not file his liquidation account.

De Villiers, C.J. (to Mr. Benjamin): What is the amount of the mortgage?

Mr. Benjamin: It was a general covering bond for £5,000. The amount claimed under this action is £3,000 odd. Counsel submitted that the *onus probandi* was upon the defendant.

Mr. Upington said that, as far as the pleadings went, there was a great deal in the declaration that the defendant did not admit. As a matter of fact, the plaintiff admitted that he had not tendered

to the defendant transfer of the whole of the property. He submitted that it lay upon the plaintiff to show why he had not.

[De Villiers, C.J.: It is more convenient that the plaintiff should go on with his case.]

The plaintiff, John William Robert Edward Pooley, said he was the official liquidator of Contat's Collieries under appointment of the High Court of 1899. Previously to that time there was a voluntary liquidation, which, however, came to naught, and application was made by Mrs. Field and other creditors for an official liquidator. The defendant applied to be appointed official liquidator, but witness was selected. Witness investigated the affairs of the company as far as he could from the books and papers in Kimberley, and after that he made a personal inspection of the properties *in situ*. He found certain leases of the properties Zevenfontein and Stewart's Post originally granted to Contat himself, and subsequently ceded by him to Contat's Collieries. At the time of his appointment he found that the lease of Stewart's Post had lapsed through failure to pay rent due at the proper date, but witness afterwards succeeded on payment of £150 in reviving the lease in August of the following year. He obtained a lease for 94 years, subject to certain periodical payments, and the right remaining in the lessor to cancel on failure to pay the rent on due dates. Witness had no funds in hand to pay the £150, but he managed to raise the necessary money to revive the lease. The defendant had sent a claim to him as official liquidator, which witness refused to recognise because the claim was incorrect in that he endeavoured to bring within the operation of the bond matters which belonged to J. Contat, father of the defendant in this case, and other matters which he could not as official liquidator recognise as being proper claims under the bond.

[De Villiers, C.J.: Had he no cession from his father of his father's claim?]

Witness: Not that I am aware of. From time to time he demanded that an account should be filed, supported by vouchers. No such account, however, had been filed. Defendant, in one of his letters, referred witness to Mr. Wright, who was secretary to the voluntary liquidators, but witness could get no vouchers from Mr. Wright. The sale of the property was, owing to the siege of Kimberley and other causes, deferred until April 15, 1901, and it was purchased by a Mr. Meyers, who, however, did not carry out the purchase. Witness, in consequence, re-advertised the property for sale on the 22nd April, and in so doing he had the concurrence of the defendant's father, J. Contat. He received a letter from the defendant, authorising him to bid up to £4,000. In a letter defendant said he might bid up to £4,000 against the bond for himself. He asked witness whether, under the circumstances of the country, he intended to give the property away, or he wanted to get a bargain for somebody else. He gave notice to witness that in the event of his not being able to be present at the sale he might bid up to £4,000 against the bond of himself. He added that if he were present at the sale the letter would, of course, become null and void. Witness produced the conditions of sale, which set out that the purchaser should pay one half of the purchase price on the day of sale and the balance in three months, the balance to bear interest at the rate of 6 per cent. per annum. It was stated at the sale that the plant and bridge and other moveables of the liquidated company were not offered, the question of whether these belonged to the defendant having been discussed. The property was knocked down to the defendant for £3,000. On the 24th April he paid £750, and witness gave him a receipt for this amount, "being on account of cash instalments of purchase price, without prejudice to the conditions of sale." Witness demanded the full half of the purchase price, but the defendant went to the bank, and on his return he said he could not obtain more than £750 at present. Witness took this sum in order to have cash in hand. After the sale he did not refuse defendant possession of the property; he had never turned the defendant off. In 1901 the High Court appointed the Master to make an inquiry into the affairs of Contat's Collieries under the provisions of the winding-up clause. Witness understood that a letter had been written on behalf of the defendant to the liquidators of the Cape Collieries, asking them to make arrangements to complete the necessary connection with the siding.

[De Villiers, C.J.: Has the acount of the liquidators been framed?]

Witness: No, my Lord. I have been unable to do so owing to the refusal or want of knowledge on the part of the defendant in not giving me a proper account I sent the claim back; I could not recognise it in the form in which it was presented.

In further examination by Mr. Benjamin, the witness said the company was considerably involved at the time when the bond was passed. Witness worked up the books in connection with the examination before the Master. The witness produced a balance-sheet made up to the 30th November, 1898, in which the loss of the company was shown to be £9,256 12s. 9d.; and also a balance-sheet made up to the 30th September, 1897, before the bond was passed, this showing the company's indebtedness to be £1,942 11s. 4d. It was in a hopeless state both before and after the passing of the bond. The proof of debt filed by witness was in respect to the debt filed by J. E. Contat. The account brought up a general balance, without giving details From time to time defendant was credited with various amounts as life governor. The rent of Zevenfontein was paid up to the 20th June, 1901, and of Steward's Post up to the 3rd August, 1901. Witness contended that after the sale defendant was liable for the subsequently accruing rents.

By Mr. Upington: Witness raised objection to the first proof of debt. Possibly his objection was that as regards the shortage of plant he knew nothing about it. He had not then the full knowledge he obtained later when he got hold of the books. On August 15, 1899, witness got certain directions from creditors. He advised Mr. Contat by letter that it had been resolved that the official liquidator should take counsel's advice or take other steps to contest the bond of J. E. Contat. He did not take steps to contest the bond. He wrote to Joseph Contat, pointing out that the claim was not in order, as a full detailed account was required. This was the only ground of objection stated in the letter. The company's books showed the details of the claim. The claim was not accepted from the company's books, but from the claimant's books. That was the custom of the High Court. Contat wrote, explaining that the vouchers had been handed in to the company for comparison and audit. On the 21st August, 1899, Contat wrote an amended account, withdrawing certain claims respecting the shortage of tools.

Mr. Upington asked the witness whether, in a certain interview before the sale, Mr. Cochran did not ask witness if, in the event of Contat bidding at the sale, the amount of the purchase price would be set off against the amount of his indebtedness under the bond.

Mr. Benjamin objected that this evidence was irrelevant.

After argument, the Court held that this evidence was inconsistent with the subsequent written documents.

In reply to the Court, the witness said he had rejected the claim.

[De Villiers, C.J.: Would it not be possible for an accountant to go into the matter, and ascertain what was really the amount at issue?]

Mr. Upington said he thought this would be the best plan.

Mr. Benjamin said he was prepared to agree to this, providing that the balance still due was paid into Court. He submitted that, apart from this agreement which the parties set up, there was really no set-off in this case.

[De Villiers, C.J.: But at the same time the Court has often in cases where there are cross-claims as against the plaintiff, ordered the claim in convention to stand over until it has decided as to the claim in reconvention. It is not a case for a set-off, it is clear, but it doesn't follow that the Court is bound to give judgment on the claim in convention if it is reasonably clear that there is a counter-claim in excess of or equivalent to the amount of the claim in convention. His Lordship further pointed out that the plaintiff had objected to the defendant's claim. Application was now made to compel him to admit that claim, and the defendant proposed to produce evidence to show that the amount is due. Supposing the Court found a certain amount of the defendant's claim due, did the plaintiff wished to dispute that on the ground of undue preference?]

Mr. Benjamin: Portion of it he would be obliged to contest on that ground.

De Villiers, C.J., pointed out that the point of undue preference was not raised by plaintiff. In his replication the plaintiff said he admitted that the defendant had filed the claim against the company in liquidation, but contended that the said claim had not

been admitted by him (plaintiff) as valid. The point was whether on the issue raised in the pleadings the Court could not go into the question of whether the claim was a valid one, quite apart from whether it was an undue preference. Here were two definite proofs of debt, stating how the claim was arrived at, and the plaintiff said he denied the validity of it. Here was an issue raised, and the plaintiff should surely be prepared to meet it. Upon the pleadings, the Court could not prevent the defendant from leading evidence to show that the claim was valid.

After further argument on the facts, the Chief Justice said the Court was of opinion that defendant would be entitled under the claim in reconvention to prove that his claim was a valid one, and, if necessary, to have the claim amended by referring to proofs, which, however, were referred to by plaintiff in his replication.

[De Villiers, C.J. (to Mr. Benjamin): Is your case that there is nothing whatever owing under the bond?]

There may be something owing under the bond, but there are several items in the account which we intend to challenge if your lordship is not going into the account.

The witness Pooley, in answer to the Chief Justice and counsel, said that if the accounts were gone into, it would be found that the defendant owed the company something, but not quite independently of the question of undue preference. Setting aside the question of undue preference, he should object to the amount of defendant's claim, the said claim being up to about £5,000, he believed. In any case, there was nothing owing by the company to the defendant. The defendant's claim was for £4,000 odd; witness had taken out what he considered the objectionable items. He thought an accountant would, from the information supplied, be able to find out the real position between the parties.

Cross-examined by Mr. Upington: The amounts objected to appeared in the company's books. The books were kept by a bookkeeper practically under Mr. Contat's superintendence. Mr. J. Contat was a life governor and a director, and he did everything from beginning to end. He had never heard of a balance sheets book. There were balance sheets. The books of the company were at present in Court, he believed. The balance sheets book having been produced, witness was asked to look at pages 55, 56, and 57. He saw an amount to Joseph Contat of £1,223 8s. 2d. It was not really a balance sheet, but simply trial balances. On page 58 there was the first balance sheet, dated the 23rd October, 1897. On the profit and loss account there was an item of salaries, life governor, directors, etc., to the amount of £2,199 15s. 6d. There were two other preference claims against the estate besides the defendants, both relating to salaries. He did not say he objected to all the items of the defendant's claim. He objected to the first alleged to be paid in by J. Contat. One class of objections was to items in the cash book, alleged to be paid in by J. Contat, and placed to the credit of J. E. Contat. These were not all the items, however, to which he objected which he said were not incurred. He did not know how many directors there were, but the principal names were J. Contat and J. E. Contat. Witness detailed other items to which he took exception. He submitted that there had been undue preference shown by the defendant.

By the Court: The company owed nothing at the time the bond was passed. The governor's fees amounted to about £2,000 or £3,000. The company started with only £200 subscribed capital.

By Mr. Benjamin: Joseph Contat seemed to act as though he held a power of attorney from the company to do everything. J. E. Contat was a young man, and had been a printer in Natal, and a typewriter and shorthand writer in East London. In December, 1897, the immovable assets of the company were sold by J. Contat as life governor to J. E. Contat, £1,375 being the purchase price. This seemed, as did most other transactions, to have been done by J and J. E. Contat without reference to the company. The witness read the record in the minutes relating to the resolution sanctioning the passing of the bond first to J. E. Contat and afterwards to J. J. Moore. The latter guaranteed to the bank, and witness understood that the original bond would be ceded to him.

Counsel for the plaintiff read the evidence, taken on commission, of Mrs.

Field, wife of the late Charles Field, who traded as J. J. Moore. She deposed to having seen a guarantee given by her husband to the African Banking Corporation, in respect of advances to be made to Contat's Collieries. After the death of witness's husband, witness was asked to take over the guarantee, the bond being offered as security. Witness had paid up over £2,000 on the guarantee.

Henry Francis Ford, Registrar and Master of the High Court, said he was appointed to hold an inquiry into the affairs of the company. Witness presented a report to the Court. He held an inquiry on the 18th January, 1902. Witness handed in the report.

Mr. Benjamin put in the record of defendant's evidence before the Master, and closed his case.

Mr. Upington called

Joseph Contat, who said he resided on the farm Zevenfontein. He was the father of the defendant, who was chief clerk to the Town Council at East London. Witness had acted as attorney for his son since 1893, the latter being then a compositor, working for himself. Everything done in connection with this business was carried on by witness on defendant's behalf. In 1892 witness acquired the leases of the two farms for his son. In 1893 witness was forced to surrender his own estate. The lease of Stewart's Post lapsed, but witness reacquired it for his son in 1894. Witness had no capital, but disposed of certain shares, and did certain work on the property, sinking shafts, and otherwise developing the property until it was floated in 1896. Witness and his son obtained 80,000 shares, 20,000 were held in reserve, and 10,000 were left for public subscription, only about 150 or 200, however, being taken. The company was in a sound position then. In order to keep the property going, witness had to sell some of his son's vendor's shares, and he advanced the money accruing from the sale to the company. In 1897 a balance-sheet was drawn up. This was audited and passed at a meeting of the shareholders. The company gradually lost ground, owing to want of capital and want of transport facilities, in consequence of rinderpest. Witness and his son were by articles of association appointed life governors, and became entitled to certain fees. They did not take these fees out; they credited themselves with it. The overdraft at the bank increased, and at about the end of 1896 the bank called upon the company to give security, and some of the directors—Forsyth, Campbell, witness and Moore—stood as guarantors. In May, 1897, Moore died, and in August his executors gave notice to the bank that the overdraft would have to stop. Witness continued to advance to the company money, which he raised by selling shares belonging to his son. In December, 1897, the company were indebted to defendant to the extent of about £1,300. Witness did not feel himself justified in making further advances. Matters were discussed between witness, the directors, and the superintendent, and it was arranged to sell the plant to the defendant, and debit him with the amount. He was accordingly debited with the £1,325 which Mr. Pooley had objected to. After August, 1897, when the overdraft was stopped, an account was opened at the bank in the name of J. E. Contat, ordinary account. This was done with the knowledge of the directors. J. E. Contat had a special account also. To finance the company, witness drew cheques from the special account, and transferred it to the company's account. This was done until May, 1898, when the cheques which he had lodged as security were actually paid into the company's account to pay debts. They amounted to £900 odd. In February, 1898, the bond in question was passed. It was not passed for the purpose of being ceded as security to J. J. Moore. The bond was not ceded to Moore, but witness did propose to cede it after it was passed. He had offered to cede it to Mrs. Moore. He had endeavoured on behalf of the company to raise money on the bond. Witness had sold about 18,000 or 19,000 shares—not at par—and had paid the money into the account of the company. Witness had ceded his life governor's fees to the defendant. J. E. Contat's account had been credited with this. Witness was not a bookkeeper, and in a matter such as this, he would be guided by the bookkeeper. Witness submitted a claim upon the estate in May, 1899, and a supplementary claim later on. In both these claims there appeared an item, balance of account rendered,

£2,442. This was taken from the company's ledger up to May, 1898, and the particulars were shown in the ledger. The vouchers were sent when the company's books were being audited. There was no truth in the suggestion that the entries in the various books were made collusively by witness and Martin (the bookkeeper). No question of his bond being an undue preference was ever brought before him. The items shown on the accounts proved were correct. The leases were a valuable property, and were paying before the cession to the company. Witness had used every endeavour to get the plaintiff to file an account.

Cross-examined by Mr. Benjamin: He had received payments by cheques and cash. He paid the money into the company to the man in charge of the books—first Campbell, then Posnean, and Adams and Martin. He had not subpœned any of these men. The books were in bad order when Mr. Martin came in 1897, and Mr. Martin wrote them up under witness's instructions as managing director. Witness was sorry to say he was not only managing director, but also financier of the company. He transferred the moneys due to him from time to time to his son. It was all for his son. He was supporting himself out of a share belonging to his son. His own estate had been sequestrated. It was not a fact that the money was his own; he made a present of it to his son. They floated the company in £130,000. They held 100,000 vendors' shares. There were 10,000 shares left to be subscribed by the public; only £150 was subscribed by the public, as a matter of fact. In February, 1897, he supposed that the indebtedness of the company was as stated in the books. Then the bond was passed, and the indebtedness of the company was six months afterwards over £9,000. He and his son formed the quorum at the directors' meeting. He or his son proposed the resolutions; the resolutions were seconded in due form. Witness was chairman.

Mr. Benjamin: This is a solemn farce you went through on each occasion at the offices of the company's solicitor?

Witness: I was forced to do that.

Mr. Benjamin: You and your son went through the form of selling the assets of the company to your son?

Witness: No, it was done with Mr. Stanley; it was to save the company. Further cross-examined: He did not ask Mrs. Field to advance £1,700. He tried to pay everybody off to whom the company owed money.

Mr. Benjamin: Yes, including your son, and you took good care to help your son as much as possible.

Witness said he was left alone with all the troubles of the company on his shoulders. Replying to further questions, witness said that his son saved an asset to the company of the value of £20,000. They acquired a right-of-way from the Cape Collieries. For this he was to receive £100 a year. They also claimed his fees as life governor, amounting to £200 a year. His son was also paid for additional work. The lease of Stewart's Post had already lapsed when he received a letter giving him notice about it. The liquidator threw every obstacle in his way that he could. His son was born in 1876, so that in 1894, when they acquired the concessions, he was a minor, but he was working on his own account. Witness had a power of attorney from him.

Joseph Ernest Contat, the defendant, said he had been a compositor in Natal. In 1893 his father obtained general power of attorney from him. His father obtained certain cessions and leases on his behalf. He had no funds under his individual control. He was now Chief Clerk in the Town Council Offices of East London.

Cross-examined by Mr. Benjamin: He was not acquainted with the books. He was present at some of the transactions. He negotiated the asset from the Cape Collieries. As a matter of fact, his father did everything in connection with the estate. He held a meeting with his father, and passed a resolution to strengthen the position of the company as regarded the asset.

[De Villiers, C.J.: Is that all the service you rendered?]

I consider it a very important service, as we could not get the Kimberley directors together. Replying to Mr. Benjamin, he said he paid £40 of his own moneys to his father.

This concluded the evidence.

Postea (July 2nd): Counsel were heard in argument.

Mr. Benjamin (for plaintiffs): This action is instituted for the recovery of £2,250, being the purchase price of assets in Contats' Collieries, which were sold by the liquidator and purchased by the defendant. The purchase price was £3,000. The defendant paid on account £750, leaving a balance owing of £2,250, for which this action has been instituted. The defence pleads first of all that there was an express agreement at the time of sale with regard to the payment of the purchase price, that the defendant should be allowed to pay a certain amount to meet liquidation expenses in the estate, and that, with regard to the balance of the purchase price, that should be an amount set off against the claim which he alleged he had against the company. The pleadings go on to say that, quite apart from the agreement, the defendant was entitled to set off his claim under his bond against the purchase price. In reconvention, he claims a sum of damages by reason of the fact that he was not given possession, and cession of the property on due day. In addition to that, he also claims damages by reason of the fact that the lease of one of the properties, Stewart's Farm—the rents of which, he says, should have been paid by the plaintiff, but were not paid by him—was forfeited and so lost to him. In the third place, he claims in reconvention that the plaintiff, now the defendant, should be compelled to file a liquidation account, in which liquidation account he should be compelled to bring up as preferent this claim under the mortgage bond. The point is whether the defendant is or is not entitled to set off his claim under the bond.

[De Villiers, C.J.: As far as I remember, the really important question to decide is: Is there any money owing at all?]

Yes. With regard to that, the onus of proof is really upon the defendant. He gives no evidence showing that any money was owing to him.

[De Villiers, C.J.: The son was a minor, and while he was a minor certain moneys were laid out by his father.]

Mr. Upington (for the defendants) said he agreed that the essential point in this case was whether or not there was a sum of money owing by the company to the defendant. He left out of question altogether the validity or otherwise of the bond, in regard to which the Court had had certain evidence. so that the question really was whether any sum of money was owing under the bond. With regard to the claim which had been put in by the defendant in the liquidation account, there were certain points that he should like to deal with before coming to the special items to which the liquidator in his evidence took objection. The liquidator admitted that these amounts appeared in the company's books, but he took exception to them on various grounds. The defendant sent in an account showing his claim against the company as early as May 31, 1899.

[De Villiers, C.J.: Before you go into that, the first point that strikes me is this: there were two life governors, father and son, who transacted all the business for the company. These two life governors come together and say, "We must pass a bond in favour of the son," and the bond is passed in favour of the son. Then subsequently the father transferred his debts to the son. The real intention of this was to secure Moore, who financed this company. This company was perfectly insolvent all the time, but we can not enter into that question now. I want to put it to you, Mr. Upington, whether these facts do not make it incumbent on you to prove that this amount was owing under the bond?]

In the first place, there has been voluminous correspondence between May, 1889, and May, 1902, between the defendant's father and the liquidator, and during the whole of that period the question which cropped up in the course of the case now, *i.e.*, that this bond was passed for the purpose of securing the estate of J. J. Moore, was never raised. Again, Mrs. Moore would not accept the security. The son explained that his money was under the control of his father, who held his power of attorney.

[De Villiers, C.J.: The father simply was acting, and the son was the dummy?)

If that were so, if your lordship is going to say that J. E. Contat had no money, that all that was brought under the bond was J. E. Contat——

[De Villiers, C.J.: I don't wish to say anything of the kind. I only ask, does the evidence show it?]

But I say, if your lordships do say that, then of course it knocks a very big hole into my client's case; but I submit that the evidence does not show that.

[De Villiers, C. J.: There is the very last passage of J. E. Contat's evidence before the Commissioner: "I was not in a position to make advances to the company if I had been applied to."]

J. E. Contat explained that statement to the Court by saying that he had no money under his own private control at that time. That was perfectly clear, but the evidence went to show that in February, 1898, there was a large amount standing to his credit in the bank. He thought, apart from directors' and life governors' fees, there were advances made to the company of two other kinds. In the first place, J. E. Contat said he sold shares of his, and paid the amounts received therefor into the company from the beginning. In addition to that, J. E. Contat's special account, which was J. E. Contat's private account, financed the account of the company, which was the ordinary account, to the extent of over £1,000.

[De Villiers, C.J.: The two life governors, who had the whole control, were buying the assets of the company in favour of one of them. Can such a transaction be upheld?]

I will show that the amount of J. E. Contat's indebtedness was brought before the directors as late as September, 1898.

[De Villiers, C.J.; Was not the whole thing left to Contat, senior? Was it not Contat, senior, alone who managed the whole concern?]

I will refer your lordships to the minute books on that point. At a meeting of the directors on the 17th January, 1898, a resolution was passed: "That the Board consent to the passing of a bond up to £5,000 in favour of J. E. Contat, and afterwards in favour of the estate of J. J. Moore." The meeting was attended, not only by Contat, but also by other directors—Fischer and Forsyth. There was another directors' meeting in May, at which it was agreed that the three directors present (J. Contat, W. Forsyth, and W. Lawrence) should sign a guarantee to the bank for the overdraft, which would relieve the estate of Moore from its liability. Mr. Contat, it was stated further, undertook to transfer the bond of £5,000 which he held over the company's assets as collateral security to the bank, and indemnify Forsyth and Lawrence.

[De Villiers, C.J.: The original does not show that. You had better look at the minute book yourself to see if there is anything to suggest the interpolation?]

At any rate, the book shows that the two life governors did not come together and pass the bond privately. The directors knew that a bond was going to be passed before it was actually passed, and they knew on the 4th of May that it had been passed.

[De Villiers, C.J.: Yes, because they knew that the debt was owing to Moore. But why should they have this bond passed afterwards in favour of Moore if that debt was really owing to Contat? Do you say there was anything owing to J. E. Contat when this bond was passed?]

It is very difficult to tell from the books whether there is or not. My contention is that they may have considered that there may have been something owing to Contat, but when the bond was passed, it was to cover, not alone past indebtedness, but future indebtedness. On the 15th August the liquidator looked upon Contat as a bond-holder, and he called upon him for the production of certain vouchers, and also to make an affidavit.

[De Villiers, C.J.: In 1897 it was discovered that Contat owed his son £1,300, and he then, in his capacity as life governor, transferred all the plant to his son, and that plant was still there, and then the son had this security of the bond of 1898.]

In regard to the plant, there was this to be said, that on the 29th October, 1898, there was a resolution passed that ownership should be resumed by the company at the cost price of £1,325. The money has never been paid to Contat. In his account he did not credit himself with £1,325, although, strangely enough, at the end of the company's ledger, there was an entry, a most extraordinary entry, crediting Contat with £1,325.

[Kotzé, J.: Yes, but that is said to be a mistake.]

Yes, that is a mistake, but it looks extraordinary when read in conjunction with this minute, because the liquidator was going to take over

this plant at cost price, and then this entry appears in the books, crediting Contat with £1,325. Of course, that does not appear in his claim.

[De Villiers, C.J.: Yes, but in point of fact did the liquidator take over the plant?]

He did not, as a matter of fact; Contat still has it.

[De Villiers, C.J.: There is no evidence how that £1,325 became due to the son.]

I will come to that afterwards. My point at present is that the liquidator recognised that sale on the 19th October, 1898. The absence of any vouchers for these amounts, all of which appeared in the company's books, is not a reasonable ground for refusing to recognise the whole claim when the vouchers have been furnished to a proper official of the company for the purpose of the accounts of the company being audited.

[De Villiers, C.J.: What were the assets for distribution in the company's estate?]

Practically these rights.

[De Villiers, C.J.: And Moore has not been paid?]

No.

[De Villiers, C.J.: So that the result of giving the defendant preference would be to give him practically the whole of the money to the exclusion of Moore's estate?]

That is so. Moore's not being a preferent claim. There is, I think, another preferent claim for rent, amounting to about £250.

[De Villiers, C.J.: Do you seriously contend that a life governor's fees should enter into competition with a creditor like Moore—a bona fide creditor who has advanced money to keep the thing afloat for a time?]

There is a bond to cover all indebtedness.

[De Villiers, C.J.: Can a director pass a bond in his own favour?]

The company could.

[De Villiers, C.J.: I think there is no power; it is entirely *ultra vires*.]

Then they ought to have raised that point; but, so far from doing so, they admit that the bond was passed by the company. Life governors' fees and directors' fees comprised rather more than half the claim, but, in addition to these items, there were actual advances to the amount of over £1,000, which were vouched for by the cheques. Counsel argued at some length to show that the £2,000, with which the special account was opened on behalf of the company by J. E. Contat, was distinct from the £2,500 paid by Moore to cover the overdraft. The defendant had heard nothing of these wholesale objections until the liquidator came into the box. On the contrary, the liquidator had written in May that he would admit Contat's claim provided the amounts due to J. E. Contat were separated from those due to J. Contat. Further, there were instances in which the liquidator had accepted the credit items, but had refused to take the corresponding debit entries.

I am able to inform your lordships, from information which has come to me, that the debts of the company amounted to £994 at least, so that it was placing a false position before the Court to ask that the credits should be struck out, without at the same time striking out the whole of the debits, which were in a corresponding position. This is only another instance of the careless and cursory way in which the liquidator has gone into the books, and has objected to items without the slightest foundation for objecting to them. Those items amount to a considerable sum, and the position of the defendant is that those credits should not be taken into consideration, unless the debits, which are in precisely the same position, were also taken into consideration. I am informed that a pencil mark has been made in the book opposite the debit items. Another item is the £700 which the liquidator stated had been underpaid by J. E. Contat on the value of buildings possessed by the company. The liquidator informed the Court that J. E. Contat took these buildings over for £270, and that these very buildings stood in the books at about £1,100. An examination of the books reveals the fact that no one but the most careless person could possibly have fallen into such an error as that of the liquidator. The great majority of items in the property account were, doubtless, for buildings, and to the plant account the sum of £811 was credited. The liquidator did not point out in the box where the buildings set down at £1,100 were. The item of £1,325 was brought up in the balance-sheet when the company went

into liquidation; the liquidators' attention was drawn to that very item, and they said that Mr. Contat had taken over the buildings and plant of the company at cost price, and that the company again took them over upon the same terms. During the course of the voluminous correspondence, no objection was raised, and now the liquidator went through the items in the box in a most reckless manner.

[De Villiers, C.J.: The liquidator was simply doing his duty.]

I know that, my lord.

[De Villiers, C.J.: There was no recklessness at all.]

Mr. Upington said that he submitted that the most cursory examination must have revealed the fact that there were large debits on the other side in the same position. He would merely draw attention to the main items, and endeavour to show that the claims were well founded. He would submit that, with regard to the item of £1,325, beyond vague allegations that the buildings stood in the books at £1,100, there was no proof to that effect. The item of £585 was, according to Mr. Contat's explanation, the cost price of the mining material, buildings, etc., and all these items were brought up in the balance-sheet. Then there was the item due from the company to Posneau, and taken over by Contat. Contat might, instead of discharging Posneau's liability, have paid the money into the company for the purpose of Posneau's liability being discharged, and the company might then have issued a cheque to Posneau. Could there have been any objeciton to that coming under the bond?

[De Villiers, C.J.: Certainly. The bond is passed for the purpose of enabling Contat to keep this company going; it is not passed for the purpose of enabling Contat to pay the debts of the company, and thus securing a prefence for himself.]

My point is that, instead of transferring this amount from Posneau's credit to his own credit, Contat might have paid his own cheque into the company, that would have been an advance, the company would then have paid out Posneau's liability, and the result would have been that Contat was a creditor. There could be no ..fference at all, except from the point of view, perhaps, of vouching the payment. But the effect was exactly the same if, instead of passing cheques, the amounts were transferred from one name to the other.

[De Villiers, C.J.: The question of undue preference is not raised here, unfortunately. If it had been raised the case, possibly, would have taken quite a different turn. At the same time, if you wish to reply on preference by the bond you must show that the money was advanced under the bond, but if you show that Posneau's account appears as part of your claim, then you must show that Posneau also was entitled to that preference which you now give under the bond.]

The amount was due from the company to Posneau as wages.

[De Villiers, C.J.: I suppose you would also say that Contat would be entitled to preference on life governor's fees.]

I don't know that, but he has had a salary as managing director. I would submit that, in the first place, Posneau's claim was a claim for wages, and, therefore, it would not have been an undue preference. I submit that there could have been no difference in the two courses of action, and in that case the defendant would have been entitled to bring the amount under his bond. Counsel proceeded to deal with the liquidator's objection to an item of £1,738. This item, he observed, appeared to have been transferred by the bookkeeper Martin, under the instructions of J. Contat, to the account of J. E. Contat. J. Contat received £200 a year as life governor under the articles of association, and £600 a year as managing director. He contended, taking first the £600 a year, that that was a salary, whether Contat were a director or a manager of the company, and there was no question that Contat did a lot of work in and about the affairs of the company. As the liquidator himself said, "He was the beginning and the end of the company." It was not disputed that his salary was owing, or that the life governor's fees were owing. Contat in order not to embarrass the company, appeared to have left his salary and life governor's fees in the assets of the company, instead of drawing them out from time to time, and it is said that he had no right to transfer

those sums so due as salary and fees to the credit of his son. I will admit at once that, if that were done collusively in order that Contat might get the benefit of a preference under his son's bond, whilst retaining the right to his salary and the fees, then there might be a great deal to be said for striking out that item as far as the bond is concerned. The entry shows that £1.738 was transferred from the account of Jos. Contat to the account of J. E. Contat. As to managing director's salary, surely J. Contat was entitled to payment for his services just as any other servant of the company would be, and the payment of such sal ary would not be an undue preference. Surely, if he was entitled to a salary he could say, "Don't pay the salary over to me; pay it over to my son."

[De Villiers, C.J.: How can you place his salary on a different footing to the fees? The thing is exactly the same, though it is called by another name.]

Oh no, it is work that would otherwise have to be done by a paid manager.

[De Villiers, C.J.: There are still fees; I don't see how his salary can be placed on a different footing to fees. No remuneration in any shape or orm can be given to a director, except what is authorised by the constitution of the company. The Companies Act provides for directors' fees to be paid only out of profits. A director cannot legally claim a sum as servant of a company. A company is a partnership, and for a director to enter into competition with the creditors, and set up a preference claim against them, such a thing is unheard of.]

The creditors had notice of the arti les of association and of the bond.

[Kotzé, J., asked where the money of the private account came from?]

I have no evidence, but I am informed that Contat sold on behalf of J. Contat certain other mining rights. Mr. Contat speculated considerably, and that was not the only property he was concerned about. At the present time he is working the remainder of the Zevenfontein Mine. The balance sheet up to September, 1898, shows that J. E. Contat is secured by bond to the amount of £3,145 17s. 6d., and I submit that settles all question of a possible collusion. With regard to the claim against the defendant. I submit, they were not put into proper occupation, as according to the advertisement the company tendered not only their mining leases, but all the rights the company might possess.

Mr. Benjamin in reply,

De Villiers, C. J.: The plaintiff, as liquidator of the Contats' claims from the defendant certain rights over and certain leases of certain property sold by him as liquidator. The amount claimed is £2,250. The defendant, by his claim in reconvention, sets up a bond which was passed in his favour on the 21st February, 1898, and he alleges there was an agreement between the liquidator and himself that the amount claimed under this bond should be set off as against the purchase price of the property. But quite independently of any agreement to set off the defendant claims that he has the right to prove as a preferent creditor in competition with the other creditors of the company for any amounts which may be found owing to him. The agreement to set off has not, in my opinion, been proved, and as the purchase by the defendant has been admitted, the only question to be decided is whether he has established his right to claim as a preferent creditor under the bond. Let me briefly state the circumstances under which the claim in reconvention is made. We find that when this company was first started the defendant was made by his father, Joseph Contat, one of the life governors of this company. At that time the defendant seems to have been a boy of about seventeen years of age. He was a compositor, I think, at Durban, and he was made a life governor with his father of a company carrying on mining operations in Molteno, and in respect of that life governorship he was to be entitled to £200 a year as life governor, while the father, under the trust deed, was also to have £200 a year, and in addition to that he was to have £600 a year as a special remuneration as managing director. It is quite clear from the evidence that the company really never was a success, and that it was entirely a losing concern. Then some time at the end of 1897 it appeared there was alleged to be a certain sum of £1,300 owing to the son, on whose behalf the father was acting, and then as security for this amount alleged to have been due there seems to have

been given a bill of sale to the son. Then shortly afterwards it is alleged that there was a still further sum owing, and a bond was passed by the company in favour of the defendant as security for this amount. When we refer to the books of the company we find that they are kept in, to say the least of it, a very slovenly manner. It is quite clear from the evidence that the soul of the whole undertaking was the father; that the whole company was entirely under his control and management, and that the bookkeepers and all the other officials of the company were entirely under his control. As to what functions the other directors performed it is very difficult to ascertain. They seem also to have been in the hands of Joseph Contat. We find also that before this bond was passed, there was a meeting of directors to authorise the bond. There were present on the 17th January, 1898, Joseph Contat, Fischer, and Forsyth, and it was resolved "that the board consent to the passing of a bond up to £5,000 in favour of J. E. Contat, and afterwards in favour of the estate of J. J. Moore. Joseph Contat is positive in his evidence that the words "and afterwards in favour of the estate of J. J. Moore" were not in the original. I am satisfied that he is wrong. The whole appearance of the minute shows that there was a continuous entry made at the time, and in the same ink, and there is no evidence whatever of any interpollation being made. On the contrary, we are satisfied that there was no interpollation, and that these words were there originally. What was really meant by that it is very difficult to know. It may be that a fresh bond was to be passed in favour of J. J. Moore, or it may be that this bond itself was to be ceded to J. J. Moore, but whatever the true meaning is, the circumstances under which the bond was passed justify the Court, and indeed compel the Court, to scrutinise most carefully this account, which is now presented to the liquidator as an account showing what is due to this defendant under the bond. It is a case of competition between the life governors and the bona fide creditors of the company. The creditor, J. J. Moore, does not appear yet to have been satisfied, and it is quite clear that if the Court were now to allow these amounts which the defendant claims under the bond as preferent claims, it will sweep away all the assets of the estate, and leave nothing for the bona fide creditors of the estate, who have had nothing to do with the management of this company, and who certainly on every principle ought to have preference as against the members of the company, and as against the directors. A considerable portion of the claim, coming under the bond, consists of fees owing to the defendant and his father as life governors. And even if there is to be a competition, that competition should not be a preferent one. such as the one in the present case. It is not necessary to go into all the items, but of this I am satisfied, that where a life governor or a director claims a preference of this kind under a bond passed under circumstances under which this bond was passed, he must clearly establish his claim. He must produce his vouchers. He must satisfy the Court that the amount is owing. He must produce vouchers showing in what manner these claims arose. The father, who really managed the whole business on behalf of the son, was pressed about these vouchers. All he could say was that he delivered them to the secretary, and that they ought to be with the papers, but the liquidator did not find them amongst the papers, and the presumption would be that the vouchers, if given to the secretary, would have been delivered by him to the liquidator. No such vouchers have been produced, and I am of opinion that the liquidator was quite justified in refusing to admit that claim. It lay upon the defendant to produce these vouchers, and if he could not have got the originals, at all events he could have applied to the different persons he had dealt with for duplicates. He could have furnished the next best evidence of payments made by the son on behalf of the company. But nothing of of the sort is produced, and, in my opinion, the liquidator is quite justified in saying, "You must, under the circumstances, bring clear proof of the account, and you have failed to do so"; and what the liquidator is justified in saying, the Court is also entitled to say: that the defendant should leave no doubt whatever on the minds of the Court as to the existence of the debt,

At present, I must say I am not satisfied that there is anything—possibly there may be something—owe-ing. It is the defendant's own fault if he does not satisfy the Court. He should have produced the requisite evi-dence, and he has not done so. At the same time I do not think the defendant should be debarred hereafter from pro-ducing such evidence as he may have, and proving his case, and in that case it will be competent to raise the question as to undue preference. There will be opportunity then of raising this question, which I am surprised was not raised in this case. As the case stands now, there should be judgment for the plaintiff for the amount claimed, but upon the claim in reconvention, there must be absolu-tion from the instance, leaving the de-fendant to proceed with a fresh claim.

Kotze, J., said he was of the same opinion. He thought the circum-stances were such that the Court ought to require the very strongest proof in regard to the claim in reconvention.

[Plaintiff's Attorneys: Van Zyl and Buissinne. Defendant's Attorneys: Walker and Jacobsohn.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

SCHRODER v. BENTLEY. { 1903. May 26th.

Sir Henry Juta, K.C., applied on be-half of the plaintiff for judgment in terms of consent declaring the plaintiff a necessary witness in a recent libel action against the defendant.

Order granted as prayed.

WILSON v. WILSON.

This was an action brought by the plaintiff, John Edmund Wilson, against the defendant, his wife, Harriet Ann Wilson, for restoration of conjugal rights, failing which, a decree of divorce.

The declaration set forth that the par-ties reside at Kenilworth, and were mar-ried in community of property at Clare-mont on the 9th November last. On the 27th February the defendant deserted the plaintiff, and had not since re-turned to him. The defendant person-ally filed a plea, in which she denied that she unlawfully deserted him, or that she ill-treated him. On the 23rd December two men called about a house, and because she had spoken to them for some time, the plaintiff sharpened his knife that night, and on December 26th the parties agreed to apply for a separation order. On the 26th February the plaintiff threatened to bash her face in, and next day she was compelled to leave him, as she was in danger of her life.

Mr. Close for plaintiff; defendant in person.

Mr. Close called the plaintiff. He stated he was married at Claremont in November last. At present he was living with his son. He had ample means to provide for the defendant. For some time he lived on most affectionate terms with his wife, in fact, he thought it would never come to this. The trouble commenced on Christmas Eve. They came to Cape Town to see the "Cave," and when he called to see the defendant's brother, he was treated very coolly. When he returned home he told his mother-in-law that he wished he had never called to see his brother-in-law. Witness gave his brother-in-law a Christmas pre-sent, which he returned. The present was left on the stoep, and accompanied with insulting remarks. The defendant then left with her brother, and went to Muizenberg. For three days she slept with her mother. Later on, she said she didn't feel comfortable. When he told defendant, she said that she would like a deed of separation. Questioned by the plaintiff as to her indifferent man-ner, she told him that he had very funny ways with him. Witness was 50 years of age, and the defendant was well aware of his age before the marriage. On the night of the 26th February they were as happy as could be, and when plaintiff touched the kitten on the morning of the 27th, the defendant came out with shocking language, and said, "You old brute, I'll chuck you out." That night she was very reticent, and she left the room and told her mother that the plaintiff was going to murder her. After consultation with a law agent, he came to the conclusion that he would have a better time if his mother-in-law was out of the house. The mother-in-law was given notice to leave, and his brother-in-law was also

given notice to leave a house of plaintiff's, which he was occupying at reduced rent. Another sister came in on the 26th February, and said to his mother-in-law: "Mother, don't leave the house until Hettie leaves. I'll knock his old false teeth down his throat." The defendant and her mother left the house, and plaintiff had made several unsuccessful attempts to induce her to return. The defendant had obtained an order for £50 through the Court to proceed with an action for judicial separation, but the case was withdrawn. He never on any occasion threatened her with a revolver, nor did he use abusive language. The defendant had a free hand with the rents, and she got plenty of money. The mother-in-law made up the match, and got the plaintiff to make a will in the defendant's favour. Witness had been 22 years in Wynberg, and no one there ever saw him in a public-house. The defendant at times took some liquor, and got very crafty.

Cross-examined by the defendant: He did not catch her by the throat on the night of the 26th February, but the defendant caught hold of him and tore his singlet. He never used abusive language. The occasion of the revolver was when he heard someone outside endeavouring to break into the house, and he jumped up to defend his wife.

For the defence, the defendant called her mother, Harriet Maria Rogers. She had heard the plaintiff use bad language on several occasions. She had seen the marks on the defendant's neck. She remembered the quarrelling on the night of the 26th February, but she was so deaf that she could not remember the language. She left the house on account of the notice sent by the plaintiff.

David Roland, called, stated that he could scarcely find a name for the way in which the parties lived. Witness brought the defendant down from Port Elizabeth, but the plaintiff wanted the banns published before her arrival. The plaintiff wanted the wedding carried through secretly and witness proceeded to the church at Claremont in the course of a few days. The plaintiff virtually dragged them up the front of the church, and witness said, "I have a good mind to go home." Plaintiff declared his age at 48, and inside of four months he gave his age as 50. Witness then proceeded to give corroborative evidence of the abusive language to the defendant. Witness remembered seeing the marks on the defendant's throat.

Maasdorp, J: In this case the paintiff alleges in his declaration that the defendant maliciously deserted him, and he claims restitution of conjugal rights. It is necessary for the plaintiff to prove malicious desertion, and if it appears from the evidence that in consequence of the plaintiff's conduct the defendant was justified in leaving the house, then her leaving would not constitute a malicious desertion. The defendant has stated in the plea that, in consequence of the violent nature of the conduct of the plaintiff, it is unsafe for her to return to live with him, and that she left the house in consequence of that conduct. Now it certainly appeared from the manner in which the plaintiff gave his evidence in court that he was of a very eccentric and peculiar disposition, and it was said by the Rev. Mr. Vine-Hall that he was very talkative, and it appeared that when once he began to talk it was very difficult for him to control himself. It is not very difficult to believe under the circumstances, that when he got irritated, he would use language over which he would have little control. Defendant has called witnesses to prove that on various ocasions he used to her abusive and insulting language, and that on one occasion he went so far when a dispute took place that he committed an assault upon her. I am satisfied that on the 26th February the disputes they had had some days before culminated in violence on his part against her, and she showed signs of the assault on his part upon her. There may be some evidence that the defendant herself irritated him at times, but that would not justify the personal violence which it has been proved he committed on the night in question. It seems to me from the evidence that life under the circumstance, if the plaintiff continues to behave in the same way as he carried on during the first few months of their marriage, life would be unbearable. Under these circumstances, the Court cannot possibly grant an order for the restitution of conjugal rights, and compel her to return and live with the plaintiff. Judg-

ment must be for the defendant, with costs. There is some suggestion of redress for the defendant, but there is no claim in the reconvention for separation, and if she wishes at any time to institute an action, she will have to do so in proper form.

GOUS AND ANOTHER V. VAN DER HOFF. { 1903. May 26th.

Transfer of land—Option of purchase—Withdrawal of option—Damages for breach of contract—Consideration.

H. had given to G. an option of purchase of certain land to be exercised by a given date. Before that date arrived, G., not having availed himself of this option, H. withdrew it. G. now sued H. for transfer, or, in the alternative, for damages.

Held, *that had G. exercised the option before it was withdrawn, a contract of sale and purchase binding on both parties would have been concluded, but that no consideration having been given by G. for the option, H. was at any time previous to its acceptance by G. at liberty to withdraw it.*

This was an action brought by the plaintiffs for an order on defendant to give transfer of certain plots of ground at Somerset Strand, failing which, £1,000 damages for breach of contract.

The declaration set forth that on the 8th January, at Somerset Strand, the defendant, purporting to act on behalf of himself, gave option in writing to the plaintiffs to purchase forty-eight plots of ground at Somerset Strand, the time expiring on the 12th January. On the same day another option was given on a further certain sixty-four plots of ground situated at the same place. Plaintiff gave notice on the 10th January of his intention to exercise his options, and subsequently the defendant informed Gous that the options were no longer binding. On the 7th February plaintiff issued summons against the defendant, and an interdict was granted restraining the defendant from disposing of the land. Lochner, who was the owner with the defendant, made an affidavit, in which he stated that Van der Hoff had no right to transfer the land.

Mr. Searle, K.C. (with him Mr. J. E. de Villiers), for plaintiff. Sir H. Juta, K.C. (with him Mr. Gardiner), for defendant.

Mr. Searle called the first plaintiff, Peter Cornelius Gous, who stated that he resided at Somerset West Strand. He obtained the options from Van der Hoff on the 8th January last, at Somerset Strand. Mr. Van der Hoff called at witness's house, and witness informed him that a certain Mr. Myburg, from the Paarl, had called during the defendant's absence about the land Witness saw the plan of the ground, and pointed out forty-eight plots, which Van der Hoff said he would put down at £25 a plot, if witness could see a chance of selling them. Witness again had an interview that evening with Van der Hoff, who suggested disposing of more of his ground at that price. The defendant drew up a contract, but before he did so witness asked him what terms he would give. Within forty days witness was to mention his purchaser, who would put down £100 or £200 in cash, paying the remainder within fifteen months with interest at the rate of 6 per cent. Two documents were written out, as witness wanted a little more time on the second lot. The defendant agreed to give witness two plots of ground when he disposed of the lot. On the stoep the defendant suggested that as he had been away in all probability Mr. Cillie had sold some of the property. Next morning witness saw Mr. Cillie and learned that certain ground of Lochner and Van der Hoff's, on the hard road, was still open for sale. When witness told Cillie that he had bought the ground, on refusal, from Van der Hoff, he turned a bit white. Cillie then said that Lochner might do the same thing in town, and hoped that witness was not buying the ground for Michau. Witness subsequently met Cillie, who asked for an appointment about Nulty's ground. In Mr. Michau's office Cillie handed witness a document, withdrawing, on the part of Lochner and Van der Hoff, the option on the plots. Michau said that was nonsense, as they had the option on the

ground, and Mr. Cillie replied that he hoped the plaintiffs would not blame him, as he was merely acting on instructions. Michau then showed Cillie a copy of the letter that had been posted, stating that the plaintiffs intended exercising their rights. Witness personally delivered a letter at Van der Hoff's house. In reply to correspondence from the defendant's attorneys, Messrs. Michau and De Villiers, wrote on behalf of the plaintiffs, enclosing £200, being the first instalment on the plots. The cheque for £200 was returned on the 31st January by the defendant's attorneys, who absolutely denied, on behalf of his clients, any agreement being in existence. On the 7th February summons was issued and later on the rule *nisi* was granted and subsequently made absolute pending the action.

Cross-examined by Sir Henry Juta: When Mr. Cillie came into the office witness had the letter in his pocket. When Mr. Michau said that the letter was posted witness took it to be as good as posted. He did not think it necessary to make any mention in the affidavits of the remark he passed to Mr. Cillie that Mr. Michau and he had decided to have the ground.

Johan Johan Michau, member of the firm of Michau and De Villiers, attorneys, Cape Town, said that when Gous called at his office on the morning of the 10th January, he agreed to go halves in the deal over the option. Mr. Cillie called at the office about 11 o'clock. Gous told Cillie that witness and he had decided to buy the ground, and that witness had written a letter to that effect. Cillie then handed Gous the notice of withdrawal, and witness remarked that it was absurd, as they had already accepted the ground. The plots would be worth very nearly £50 each at the present time. Witness had since had an offer of the ground in question, along with some other ground, consisting in all of 450 plots at £12,500.

Cross-examined by Sir Henry Juta: It was quite correct that Gous had received the letter to deliver personally to Van der Hoff, and there could be no question of its having been posted. He believed that Cillie was the agent of Van der Hoff, but as the letter was addressed to the principals, he probably thought the letter might as well go there.

After counsel had been heard in argument on the facts,

Maasdorp, J.: The plaintiffs sue the defendant for the transfer of one hundred and twelve plots of ground, tendering to pay the purchase price amounting to £2,800, or, in the alternative, for £1,000, being damages for breach of contract. The action is based upon a contract contained in two documents, upon the precise terms of which the case must be determined. It seems that some confusion has been introduced into the case by some negotiations which preceded the agreement, when the intention of the parties was different from that which was ultimately expressed in the documents. There was at that time a wish on the part of the defendants that the plaintiff should sell the property for them, and should, in consideration of his services, receive two erven. This would have been a contract of agency, and the consequences would have been different from those arising in the present case. That intention was not carried out in the written agreement which was afterwards executed. It appears from the documents that the defendant gave to Gous an option of purchasing the property, which was to be exercised by noon on Monday, and if it were exercised a contract upon the terms contained in the documents would have been concluded. The defendant pleads that the option was withdrawn before it was exercised by Gous. The question arises whether the agreement was binding upon the defendant for the stipulated time, or whether he could withdraw from it within the time. There is no consideration for the option mentioned in the documents, and no consideration has been proved in evidence. I think it is quite clear that a person suing upon a contract such as this must prove that he has given valuable consideration, otherwise there would be no mutuality, seeing that the contract would be binding upon the defendant for the stipulated time, whilst the plaintiff, who has given no consideration, could withdraw at any time. In my opinion, in the absence of proof of consideration passing from the plaintiff to the defendant, the promise made by the defendant has no binding force in law. It was argued that, under the clause in the documents, requiring Gous to disclose his principal within a certain time, he might have disposed of the property to some third person, and so bound himself to his own detriment

and that would constitute a consideration. That is a mistake, because, until the option was exercised, no contract binding upon any of the parties could be concluded. Having disposed of the option as a contract binding upon the parties until Monday, it still continues in the form of an offer by the defendant to sell the property to Gous, and if that offer had been accepted by Gous before it was withdrawn a binding contract of sale between the parties would have resulted. The main question therefore arises whether the offer was accepted by Gous before it was withdrawn by the defendant. The circumstances under which it is contended that the option was exercised, or the offer was accepted, are those which took place at Mr. Michau's office. It is necessary to decide whether the person with whom Mr. Michau and Mr. Jones then dealt was the agent of the defendant for the purpose. It is clear that during the early part of the negotiations Cilliers was the agent of Van der Hoff, because Van der Hoff had placed the selling of these lots in his hands. The question still remains whether he was agent at the time when the alleged acceptance was communicated to him. It is of importance to refer to the document, which has been put in to ascertain the position of Cilliers when he arrived at Michau's office. He came there with a letter, which amounted in substance to a communication to Gous that Van der Hoff had withdrawn the option. It would follow that Cilliers had already been instructed by Van der Hoff not to sell the property to Gous, consequently his authority to deal with Gous for the sale of the property had come to an end. When he arrived at Michau's office he had no right as the defendant's agent to accept the communication of the decision on the part of Gous to purchase the property. I therefore come to the conclusion that the offer made by Van der Hoff to sell the property to Gous was withdrawn before it was accepted by the latter. Upon the whole, I come to the conclusion that, in the absence of consideration, the promise of an option to remain open until Monday was not binding on the defendant, and that, in so far as it amounted to an offer to sell the property, the offer was withdrawn before it was accepted by the plaintiffs, and consequently no sale of the property was ever concluded between the parties. Under these circumstances, there must be judgment for the defendant, with costs.

[Plaintiff's attorneys, Michau and De Villiers; defendant's attorneys, Walker and Jacobsohn.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

ESTATE VAN DER LITH V. CONRADIE AND ESTATE KOORTZ. } 1903. May 27th.

Executor—Specific bequest—Sale of land bequeathed—Minor—Sureties.

An executor is not justified in selling any property specifically bequeathed unless the sale is necessary for the payment of the debts of the estate.

A sale is not necessary where there are sufficient assets not specifically bequeathed or where the legatee is ready and willing to pay the executor a sufficient sum for the payment of the debts and costs of administration.

Where it has become necessary to sell property specifically bequeathed the legatee is entitled to the surplus of the proceeds after payment of the debts.

Where a debtor obtains restitution on the ground of a real defect in the obligation itself, such as fraud or mistake, the rescission of the obligation discharges the sureties, but if the rescission is founded upon reasons personal to the principal debtor, as for instance his minority, the obligation of the sureties remains in force.

Where, however, an executor held a sale by auction of land specifically bequeathed to a minor who bought the land after protesting against the sale and offering to pay all the debts of the estate,

Held, *that as there were no creditors interested in enforcing the conditions of sale as against the sureties for the minor, the executor, who failed in his action for enforcing conditions of sale against the minor, as principal debtor, was not entitled to enforce them against the sureties for the minor.*

Held further, *that if the executor had been guilty of any* mala fides *he would not have been entitled to any fees, but that as he had acted in good faith he should receive such fees as he would have been entitled to if he had acted on the offer of the minor.*

This was an action to recover the purchase price of certain immovable property.

The declaration set out that the plaintiff was the executor dative in the estate of the late Maria Elizabeth Margaretha van der Lith, and her predeceased husband, Andries van der Lith, and that he sued in that capacity. The defendants were George Conradie, a minor, Johannes Marthinus Conradie, sued in his capacity as father and natural guardian of the said minor, Pieter Jacobus Nel, Marthinus Johannes Koortz, and Cornelius Wouter Cloete, the two last named in their capacity as executors testamentary of the estate of the late Marthinus Johannes Koortz, senior. On or about the 25th February the plaintiff sold in his said capacity, and the second defendant for and on behalf of the said minor purchased by public auction a certain portion of the farm Riet Vlei, in the Klein Swarteborg, district of Prince Albert, known as Dwaars River, for the sum of £1,530. The second defendant, in his said capacity, and by his duly authorised agents, Messrs. Greeff and Walters, signed the conditions of sale as purchaser, and the defendant, Pieter Jacobus Nel, and the said Marthinus Johannes Koortz, senior, now deceased bound themselves as co-principal and securities *in solidum* for the due payment of the said purchase price, and signed the conditions of sale as such. The plaintiff had tendered and hereby again tendered transfer of the property, but the defendants neglected and refused to pay the purchase price. On or about the 18th December, 1902, the plaintiff sued the defendants, save and except the first named defendant, in the Supreme Court for provisional sentence on the said conditions of sale for the sum of £1,530, interest thereon at 6 per cent from the 25th February, 1902, and costs of suit, but this Court ordered the plaintiff to go into the principal case. The plaintiff claimed judgment against the defendants, the one paying the others to be absolved, for: (a) payment of £1,530; (b) interest thereon at 6 per cent. from the 25th February, 1902; (c) costs of suit, including the costs of the claim for provisional sentence.

Defendants in their plea said that the land referred to in the declaration was specially bequeathed to the first defendant, who was also made sole heir of the joint estate. The debts of the joint estate amounted to £500, the said debts being secured by mortgage on the said landed property, and, besides the heir and the mortgages, there were no persons interested in the said estate save in so far as plaintiff was interested in respect of any amounts which might be claimable by him as fees for acting as executor or as the auctioneer who held the sale referred to in the declaration. Defendants alleged that plaintiff gave little notification of the sale, and said that the two first-named defendants did not become aware thereof till the 20th February, 1902. The second defendant gave notice on the 20th February, on behalf of the first defendant through Messrs Greeff and Walters, that he protested against the sale taking place, but the plaintiff refused to withdraw, whereupon the said agents tendered a cheque for £500 for payment of all the debts of the estate. This the plaintiff refused to accept, and on his proceeding with the said sale the agents made protest against the sale as illegal, invalid, and unnecessary. Thereafter the said agents did, under protest, bid provisionally for the

land, which was knocked down to them for £1,530, on behalf of the first defendant. The conditions of sale and the security bonds were provisionally signed by the defendants. The defendants said that the sale was null and void in that the sale effected provisionally under protest was to the first-named defendant of his own property. The defendants prayed that the plaintiff's claim should be dismissed with costs, such costs to be paid by him *de bonis propriis*. In reconvention, the defendants, now plaintiffs, alleged that the defendant had been guilty of misconduct and breach of duty in his capacity as executor as aforesaid, both in respect of the manner of advertising the sale and in respect of his wrongfully, *mala fide*, and maliciously going on with the sale under the circumstances aforesaid. They stated that in consequence they had incurred loss or damages in the sum of £75, especially in respect of travelling expenses, agents' fees, and otherwise. They claimed: (a) an order declaring the said sale null and void; (b) an order declaring that defendant had forfeited rights to any fee or commission as executor or auctioneer aforesaid; (c) judgment for £75 damages, as aforesaid; (d) alternative relief; (e) costs *de bonis propriis*, including attorney and client costs. As a further claim, the plaintiffs claimed £100 as damages for decrease in the value of the estate, caused by the difference of payment in transfer dues and other estate dues which the estate owed the Government.

In his replication and plea in reconvention, the plaintiff denied that the debts were £500, and said they amounted to £800, as also that there were no assets other than the landed property sufficient to satisfy the debts. He denied that the agents bid provisionally or under protest, and he also denied that the first two defendants had sustained any damage for which he was liable.

In their rejoinder, the defendants joined issue, and prayed that plaintiff's claim might be dismissed, with costs.

Mr. Gardiner (with him Mr. Alexander) was for the plaintiff, and Mr. Close (with him Mr. Bisset) was for the defendants.

Frederick Wm. Baynes Wilmot, law agent, said he was appointed executor dative in the estate of Van der Lith. Debts were proved amounting to £800 against the estate. Other expenses were incurred for printing, advertisements, and six months' interest due on a bond to Fairbridge, Arderne and Lawton. He valued the assets in the estate at £880, being the value of fixed and movable property. He decided to sell the landed property, and had the sale advertised in the "Government Gazette" and by handbills. The sale was, as a consequence, well known throughout the district. He saw the minor Conradie in January, 1902, about the position of the estate. He told Conradie if he wanted the farm he should get someone to help him, either to pay the debts or buy the farm. There were two preferent creditors besides the ordinary creditors. He held a sale. He received no notification from the defendants until immediately before the sale, when Mr. Walters read a protest embodied in a letter of the 20th February on behalf of the minor Conradie. The letter said that they would be prepared to pay such amount as might appear to witness to be due, and insinuated that the sale was being held for but one reason, viz., his own benefit. He told Mr. Walters in reply that he had had ample time before wherein to object, and witness could not consent to stop the sale at the eleventh hour. They did not make any offer to him. He denied that a cheque for £500 was tendered to him in payment of the debts. The conditions were read after the protest. The document was signed by Mr. Walters and also signed by Koortz and Nel as sureties. He sued for provisional sentence on the conditions, and the Court ordered that the principal case should be gone into. No appearance was entered on behalf of the defendant.

[De Villiers, C. J.: Is the defendant the sole heir?]

Mr. Gardiner: Yes, my lord.

[De Villiers, C. J.: Is he still prepared to pay all the debts?]

Yes, he is.

[De Villiers, C. J.: It is a pity, under the circumstances, that they could not fix up their differences.]

The case turns upon what took place at the sale. The proceedings were under protest, and there was a clear proof that the tender was definitely refused by Mr. Wilmot.

We are still prepared to settle the matter if the defendant would pay all the debts.

[De Villiers, C. J.: So far as I can judge, the only question will be one of costs.]

There are certain debts which have been incurred since the sale that might be objected to.

[De Villiers, C J.:· You had better proceed with your case.]

Witness (cross-examined by Mr. Close): Witness told the minor. Conradie, before the sale what the position of the estate was. The reason why he did not advertise in any of the newspapers was on account of martial law. The general newspapers were not allowed to circulate through the post. So far as he was aware, the "Cape Times" was only allowed to come by train. At every shop in the village the sale was advertised. The handbills were sent to Ladismith, Kalitzdorp, Oudtshoorn, and elsewhere. Mr. Walters accepted the situation. He denied that Mr. Walters produced a cheque-book, and said that he would pay the debts of the estate if they amounted to £1,000. Mr. Walters did not produce a cheque for £500, and say that it was counter-signed by the manager of the Standard Bank. He did not hear Mr. Walters say that they were going to keep the estate if it cost £5,000. The bidding went up to £1,530. He did not go on raising the bids against Mr. Walters after £1,000 had been reached. They adjourned to a dining-room in an outside house to sign the conditions. Basson was present, as well as the sureties, and Mr. Walters and himself. Not one word was said about the protest at that time. Mr. Walters did not say he was signing subject to his protest. As to the lapse of time between the sale and demand for the purchase price, he saw Mr. Walters, who said that he had the money, but he was afraid that he would not be able to get his costs from Conradie, senior. Conradie was that character of a man that he was sorry he had had anything to do with him. He had not the slightest recollection of receiving a letter from Mr. Walters under date the 15th July. He did not go over to Mr. Walters, and propose to him that he should let him have a formal cheque for £1,530, just to satisfy the Master of the Supreme Court. The movable property realised about £50 or £60. He thought the principal buyer at the sale of movables was the minor, Conradie. Three of the notices of the sale of Van der Lith's estate were sent to Bartenafontein, which was a post office, and the minor Conradie resided there.

Re-examined by Mr. Alexander: All the bids over £1,000 were quite genuine, and if the property had been sold to someone else, the heir would have had the benefit.

By De Villiers, C.J.: The reason why he did not make any arrangement was that the whole thing was sprung upon him, and as a matter of fact the minor's agent had been there all day.

Pieter Nicolas Basson, farmer, Laingsburg, said that the plaintiff gave him handbills to distribute for the sale. There were other sales mentioned on the bills, besides Van der Lith's. He saw the minor on his way out. In conversation they spoke about the sale of the farm. The minor said there would be a lot for him to pay if he had to buy in the property, as there were a lot of debts. Witness was present at the sale. He saw no cheque produced. He did not see Walters produce a cheque-book. He was close to the auctioneer all the time. When Mr. Wilmot refused to accept the protest, Mr. Walters did not say anything further. He saw the conditions signed. He did not hear Mr. Walters raise any further protest.

Cross-examined by Mr. Close: He was not particularly anxious to buy the property. He would have been quite willing to pay more than £1,000. He did not see Mr. Walters offer anything to Mr. Wilmot. He held the vendu roll for Mr. Wilmot. He was present when the conditions were signed.

By Mr. Gardiner: Witness bid up to £1,529.

Johannes Krantz, farmer, said he was at the sale. The sale was well advertised by handbills. Walters came to the sale at about nine o'clock in the morning. When the sale of Van der Lith's land was put up, Walters took a paper from his pocket, and read it to the auctioneer. This was in the form of a protest. Witness did not see a cheque. Walters said that the heir was able to pay. After the property was knocked down to Walters, witness heard no protest. Witness had a conversation with George Conradie before the sale. He did not see Walters pro-

duce a cheque-book. He was close to the auctioneer.

George L. H. de Beer, farmer, deposed to being present at the sale. He corroborated the statements of the last witness as to what occurred there.

Mr. Gardiner closed his case.

Mr. Close called

Johannes Martinus Conradie, the second defendant in the suit, who said his son was the heir to the Van der Lith estate. The Van der Lith's had adopted his son, who was about 19 at the time of the sale. Witness heard of the sale about ten days before the sale from Mr. Walters. Witness and his son had seen Mr. Wilmot previously, and asked him what the debt of the estate was, and he replied he had no time then to go into particulars. Witness told Wilmot he wanted to ascertain in order to pay off the debt. This was before witness heard of the sale. When Walters told him of the sale, witness said they must find some plan to stop it. Witness took a letter to Wilmot's office, but the latter was not in. Witness then agreed to go with his son and Walters to the sale. When the estate property came up, Walters took a letter from his pocket—the one witness instructed him to write—and read it. Walters told the people he protested against the sale as illegal. Walters took a cheque from his pocket, and told Wilmot it was a cheque for £500, endorsed by the bank manager. He asked Wilmot to let him know if the debt was more, and he would pay. Wilmot would not take the cheque. Walters said he would bid for the property under protest. He bid up to £1,529. Witness believed the then value was about £1,000. The Municipal valuation was £750, and the sworn appraisement £800. Witness saw no one bidding at the sale afterwards. Wilmot never came to witness in regard to the debts, nor did he write. In November last witness received a demand. He put the matter in the hands of Mr. Walters. At about Christmas time witness received a summons. He gave instructions for Walters to defend the case. As far as witness knew, there was no hurry to pay Koortz's bond at the time of the sale; no notice had been given.

By Mr. Gardiner: Witness did not see any handbills in connection with the sale. The highest bid, other than that of witness's son, was £1,000.

George R. Conradie, one of the defendants in the case, said he would be 21 years of age next month. He was adopted when a baby by the Van der Liths, and lived with them as their son. He had for the last few years managed the farm, and knew its capabilities. Wilmot never came to witness and told him what the debts on the estate were. Witness did not tell Krantz it was impossible for him (witness) to pay the debts. Witness first heard of the intended sale about four days before it took place. Witness corroborated his father's evidence as to going to Wilmot's office before the sale, and as to what occurred at the sale.

By Mr. Gardiner: Wilmot never said a word to witness about what the debts were. Basson did not tell witness about the sale. Witness did not talk to Krantz about the sale. Witness knew the bond amounted to £550.

Petrus Jacobus Nel, another of the defendants, gave similar evidence concerning the action of Walters at the sale. Walters said he had a cheque for £500, and that any amounts above that he would pay. Basson was not present when the conditions of sale were signed. When the signing took place Walters asked witness to sign as security under protest. Witness did so, as also did Koortz.

John Orlando Walters, agent-at-law, gave evidence in confirmation of that of the previous witnesses. Before the sale witness took the letter of protest to Wilmot's office together with the cheque, but Wilmot had already gone to the sale. He also took the cheque-book containing the cheque for £500. After the cheque was refused witness destroyed it. He now produced the book of counterfoils of the cheque-book showing a record of this cheque. Witness wrote to Wilmot after the sale, and the latter came to witness's office in consequence. Witness told Wilmot he would not pay the amount of the purchase money, as he had at all times been willing to pay the amounts of the debts, as they existed at the time of the sale, and had tendered to do so. The value of the farm at the time of the sale was from £800 to £1,000. Witness sent a letter to Wilmot in July, and afterwards had an interview with Wilmot, at which the latter suggested that witness should give him a formal cheque for £1,530. The next thing he heard about the matter was with regard

to the application for provisional sentence. He had no time to instruct counsel. He went to plaintiff's attorneys, and explained the position of affairs to Mr. Pearson, telling him that they were still prepared to settle the case by paying all the debts due against the estate.

Cross-examined by Mr. Gardiner: He saw the notice in the "Gazette." He was press censor at the time of the sale being advertised. He did not see the advertisement of the sale in the "Gazette" until February 20, although it appeared in the "Gazette" of the 4th February. He did not apply for an interdict against the sale because he thought that if he tendered money to pay all the debts, Mr. Wilmot would be willing to abandon the sale. He tendered the cheque to Wilmot, and he afterwards destroyed it. He only had the counterfoil. He heard no other bids against him after £1.000 had been reached, except by Mr. Wilmot. He did not see Mr. Basson bidding. He did not know when Mr. Basson signed the conditions of sale as witness. He did not suggest that the protest should be entered upon the conditions, but he said to Mr. Wilmot that he was signing under protest. He was certain he had an interview with Mr. Wilmot in July. Mr. Wilmot wanted the formal cheque to show to the Master, so that he could get his commission. He did not know what the amount of the debts was. All he knew was that the mortgages were £500. He asked Mr. Pearson if he would accept a cheque for the amount of the debts, but Mr. Pearson said that the matter had already gone too far, and must come before the Court. He did not tell Mr. Wilmot that he was afraid he should not get his costs from Conradie, senior.

By De Villiers, C.J.: He had a cheque counter-signed by the manager of the Standard Bank for £500. He did not ask for more than that sum. He could have found money to the amount of £800 if necessary.

Herbert Pope said in February, 1902, he was manager of the Standard Bank at Laingsburg. The firm of Greeff and Walters was a client of the bank. On the 22nd February, Mr. Walters came to him with his cheque-book, and asked him to initial a cheque for £500. Witness produced transcript of entry in the ledger of the bank. The cheque was good for payment in 14 days, and was for £500. It was made payable to the executor of the Estate Van der Lith. At that time Greeff and Walters were perfectly good to meet their engagements. He would have been prepared to meet a cheque of theirs up to £1,000.

Cross-examined by Mr. Gardiner: As to whether it would have been necessary to give an overdraft, witness thought that was a matter between banker and client, and unless the Court directed he did not think he should disclose the account.

Pieter Nicolas Koortz said he had a bond on the Van der Lith's estate for £200. He had a conversation with Mr. Wilmot after the meeting of those interested in the estate in November, 1901, and he agreed that the bond should remain on the estate. He saw Mr. Walters offer Mr. Wilmot a cheque for £500 at the sale. He was two paces away from Mr. Walters.

Cross-examined by Mr. Gardiner: He was quite sure that he saw Mr. Walters tender the cheque.

Johannes P. Nel, storekeeper, in the Laingsburg district, corroborated the last witness as to what took place at the sale.

This concluded the evidence.

Counsel having been heard in argument,

De Villiers, C.J.: It has been correctly stated from the bar that it is the duty of an executor to realise and liquidate the estate administered by him, and that if the estate owes any debts, it is his duty to pay those debts out of the moneys realised by him. But it is no part of an executor's duty to sell any property specifically bequeathed if there are other assets to meet the debts of the estate. Even if there are no other assets to meet such debts, the executor is not justified in selling any property specifically bequeathed, whether it be moveable or immoveable, if the legatee is prepared to pay him the amount of the debts himself. The defendant Conradie is the sole legatee of the farm now in question. On the day of the sale he was present, and his agent Walters read a public protest against the sale, and offered to pay the debts of the estate on behalf of Conradie. Notwithstanding such protest and offer, the plaintiff, as executor, proceeded with the sale, and the defendant's father—the defendant being a minor—purchased the farm on behalf of the defendant Conradie. Conditions of sale were drawn up, and they

were signed by the defendant Conradie's father as natural guardian, and by the two other defendants as sureties. The present action is brought to enforce those conditions of sale. Subsequently to the sale repeated offers were made by the defendants to pay the amount of the debts in lieu of carrying out the conditions of sale, but the offers were refused by the plaintiff. In my opinion he committed a grave error of judgment in refusing the offers. He was quite justified in protecting the interests of the creditors, but he exceeded his duty in insisting upon a wholly unnecessary sale. The only person entitled to the proceeds of the sale after payment of the debts was the defendant Conradie, and if he was prepared to pay the debts himself there could be no object in effecting a sale to him of property, which under the will was bequeathed to him. I am of opinion, therefore, that the plaintiff should fail in his action against Conradie. The next question is, should the plaintiff succeed in his action against the sureties? The general principle is that when the principal debtor obtains a restitution on the ground of a real defect in the obligation, such as fraud or mistake, the rescission of the principal obligation discharges the sureties. If, however, the restitution is founded upon reasons personal to the principal debtor, as, for instance, his minority, the obligation of the sureties remains in force. If, therefore, there had been a rescission of the sale to Conradie on the ground of his minority, and there had been no special circumstances to relieve the sureties from liability the Court would have been bound to give judgment against them. But it is clear that even if it had become necessary to sell the farm the only person entitled to the proceeds of the sale after payment of the debts of the estate would have been Conradie himself. The creditors had no interest in the farm realising more than the amount owing to them by the estate, and this amount Conradie was ready and willing to pay to the plaintiff, as executor, acting on their behalf. The question, therefore, whether the conditions of sale should be enforced as against the sureties is really a question between them and Conradie as principal debtor. He is willing to pay the debts of the estate, and, as there is no creditor entitled to take advantage of the suretyship, the plaintiff, as executor, has no right to enforce the claim against the sureties. The defendants by their claim in reconvention have made serious charges of misconduct, malice, and *mala fides* against the plaintiff, and they claim that he should not be allowed to draw any fees for anything done by him in connection with the administration of the estate. I am bound, however, to say that although there has been a grave error of judgment on the part of the plaintiff there is no ground for the serious charges brought against him. He honestly believed that it was his duty to proceed with the sale, notwithstanding the defendants' protest and offer, and he did everything in his power to obtain a good price for the property. He should not, however, receive more fees than he would have received if he had transferred the farm to Conradie upon payment to him of the amount of the debts. The debts amounted to £800, and the fees would have been 1½ per cent. on that amount. The moveables realised £62, and on that amount he is entitled to 5 per cent., but he will not be allowed any commission as auctioneer in the sale of the property. In regard to the costs of the action, if I had thought that there was any want of *bona fides* on the plaintiff's part I should certainly have ordered him to pay the costs *de bonis propriis* but under all the circumstances, the costs will be paid out of the estate.

[Plaintiffs' Attorneys: Silberbauer, Wahl and Fuller. Defendants' Attorneys: Tredgold, McIntyre and Bissett.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZE.]

PROVISIONAL ROLL.

WEIS V. DAVY. { 1903, May 28th.

Mr. De Waal moved for provisional sentence on a mortgage bond for £125, and also for the property specially hypothecated to be declared executable.

Order granted as prayed.

BOLD V. BOUTELLIER.

Mr. Russell moved for provisional sentence on certain promissory notes for £167 5s. 1d., with interest accrued.

Order granted as prayed.

LITHMAN AND CO. V. GOODMAN.

This case, in which Mr. Close appeared for the plaintiff, and Mr. Searle, K.C., for the defendant, was allowed to stand over until Saturday, counsel for the plaintiff stating that the matter had just been placed in his hands, and he had had no opportunity of examining the affidavits.

ILLIQUID ROLL.

REID V. EFROIKEN.

Mr. Close said that this matter had been set down for judgment by default, but as a matter of some urgency defendant was anxious to have the case heard this term. Plaintiff was willing to consent to the case being heard, and defendant being allowed to plead, and, if possible, for the case to be heard this term if their lordships would fix a date.

[De Villiers, C.J.: I am afraid there is no possible chance of its being heard this term.]

Mr. Gardiner (for the defendant) said that they had received a letter from the other side consenting to the filing of the plea, and the removal of the bar for that purpose, defendant to go to trial this term and to pay wasted costs. Plaintiff claimed the purchase price of certain oathay, and the defence was that only a portion had been delivered, and a claim was set up in reconvention for damages for breach of contract in not delivering the said oathay.

The Court granted leave to plead, wasted costs to be paid by the defendant, the case to come on for hearing on the 26th June.

WOODHEAD, PLANT AND CO. V. HAYWARD.

Mr. Pyemont moved for judgment under rule 329d for £64 10s., on account of goods sold and delivered, interest *a tempore morae*, and costs of suit.

Judgment as prayed.

PETERSON V. BLAKE.

Mr. Burton moved for judgment for the amount of plaintiff's claim for professional services rendered, nursing, and maintenance of a patient at the expense of the defendant.

Mr. Close (for the defendant) said that the papers had only just been placed in his hands, and he asked that the case should be allowed to stand over until later in the day. Affidavits were read to the effect that defendant had a valid defence to the claim.

Mr. Burton read a letter from defendant's attorneys on the 19th May, tendering £24, with costs to date, for the maintenance, and asking for indulgence in the matter of doctor's fees.

De Villiers, C. J.: What the Court will do is to grant judgment as if by default, and to leave it to defendant to take further steps. The case will be treated as if there were no appearance for the defendant now.

MARAIS V. BASSON.

Mr. Van Zyl moved for judgment, under Rule 329d, for £162 19s., for goods sold and delivered, with interest thereon, from the 7th May, 1903, and costs.

Judgment as prayed.

GENERAL MOTIONS.

OOSTHUYSEN V. OOSTHUYSEN. { 1903. May 28th.

Mr. Russell applied for an order declaring the defendant, Marthinus Jacobus Oosthuysen, of unsound mind, and appointing a curator to his person and property.

Mr. Gardiner watched the proceedings on behalf of the *curator ad litem*.

Mr. Russell read the affidavits of the defendant's wife and eldest son, and two medical practitioners sworn before Mr. C. J. Roux, R.M. of Riversdale, the effect of their statements being that defendant had for some time been very strange in his manner, that he had not clothed himself properly, that he refused food, that he was of unsound mind, and mentally unfit to manage his own affairs.

The report of the *curator ad litem* stated that the defendant was of unsound mind, and suggested that his eldest son, Gerhardus Johannes Oosthuysen, would

be a fit and proper person to be appointed his curator.

Mr. Gardiner pointed out that the affidavit of the eldest son said that he did not feel himself competent to manage his father's affairs.

The Court granted an order declaring the defendant of unsound mind, and appointing Gerhardus Johannes Oosthuysen curator of his person, and Dirk Versfeld curator of his property, costs to come out of the estate.

ATKINS V. DELPONTE.

Mr. Russell, on behalf of the applicant, moved as a matter of urgency for the appointment of a commission to examine the defendant's witness, Rene Modrie, who was compelled to leave for Bulawayo that day to take up a situation.

Application granted, Mr. Van Zyl to act as commissioner.

Mr. Gardiner, at a later stage, mentioned this matter, stating that there had been no appearance for the plaintiff to the suit, owing to the fact that notice was only served upon them at half-past ten that morning. Plaintiff was at present in Johannesburg, and no opportunity would be afforded of cross-examining the witness if the commission took evidence that day. The case, counsel added, referred to rent that the plaintiff was suing for.

The Court directed that the order already given should stand, reserving to the plaintiff the right to apply for a commissioner to cross-examine the witness.

TRIAL CAUSES.

ADAMS V. CLARKE. { 1903. May 28th

Collision—Negligence—Motor car.

A cart and horse belonging to the defendant were standing in a public road on the proper side when the plaintiff's motor car came from behind and frightened the horse, which began to swerve from side to side. The coachman was a skilful driver and did everything he could to pacify the horse, but the motor continued on its course and endeavoured to pass just as the horse was nearly across the road. In so doing the motor struck the shoulder of the horse, causing damage to the motor as well as to the horse.

Held, *that the plaintiff was guilty of negligence, that the defendant was not guilty of negligence or contributory negligence, and that the plaintiff was not entitled to recover damages for injury to the motor, but that the defendant was entitled to damages for injury to the horse.*

Held further, *that if the driver of a motor car sees or ought to see that an animal is frightened by the motion or noise of the motor, and that a collision is likely to result unless he slackens speed or stops altogether, he is guilty of negligence if he does not regulate his speed accordingly.*

This was an action brought by Sidney Harry Adams, of Cape Town, against Dr. Clarke, of Simon's Town, to recover £40 damages caused to his motor-car in a collision with the defendant's horse and cart, owing to the alleged negligence of the defendant or his servant.

The declaration set out that the plaintiff resided at Kenilworth, and that the defendant was a medical practitioner, residing at Simon's Town. On or about the 7th March, 1903, plaintiff was proceeding to Simon's Town in his motor-car when, in passing the lower North Battery, he met a horse and cart, belonging to the defendant, and then in charge of the defendant or his servant. The plaintiff alleged that the said horse, owing to the neglect and want of proper care of the defendant or his servant, jumped on to the plaintiff's said car, causing the car and cart to collide, and thereby causing certain injuries to plaintiff's car. Plaintiff claimed £40 damages.

Defendant, in his plea, denied the neglect alleged by the plaintiff, and said that while the horse and cart were lawfully standing on the side of the main road at

Simon's Town, the motor-car approached the said horse and cart behind at an excessive speed, and the said motor-car was driven up against the said horse and cart, and cut and seriously injured the said horse and damaged the said cart. Defendant counter-claimed, by reason of the neglect alleged in the plea, for damages to the horse and cart in the sum of £30.

Mr. Burton for plaintiff; Mr. Upington for defendant.

Mr. Burton said that the whole matter came down to this: It was clear that the horse and cart and the motor-car collided. The defendant said it was the fault of the plaintiff, and the plaintiff said it was the fault of the defendant. That was the issued to be decided.

Evidence was then called.

The plaintiff, Sidney Harry Adams, said he was general manager in South Africa of Rudge-Whitworth Coy. (Ltd.). On the 7th March last he drove out from Cape Town in a motor-car. They started from the City Club. He was accompanied by Mr. Hitchin, architect, Mr. Johnson (of Pauling's), and his mechanician. The car was capable of carrying five. At Muizenberg Mr. Johnson got out and witness's wife joined the car. They left Muizenberg for Simon's Town about four o'clock. Witness was driving and had charge of the steering-gear on the right. His mechanician was on his left. It was a very wet day. The weather affected their travelling, and they had to go very slowly. The road was muddy beyond Fishhoek. He estimated the rate of speed at from six to eight miles an hour. The gear provided for three rates of speed, and one reverse. The lowest rate was five miles, the second sixteen, and the third twenty-eight. He fixed the speed by the speed lever. Witness explained how the different gears were put into operation. He said he had the motor-car on the second rate of speed between Fishhoek and Simon's Town, but he modified that by the adjustment of the governors and air valves. In driving along, he approached the North Battery in Simon's Town. Near the point marked "C" on the plans there were soldiers playing football, some on the road, and some on the camp ground. He had to reduce the speed almost to dead slow. Then they had to turn a corner. He came round the corner marked "C," and sounded his hooter. He saw a cart and horse standing ahead near the main gate of the battery, the horse facing towards Simon's Town. He did not alter his speed in driving between the point "C" and the main gate; he just let the car go along slowly. There was ample room to pass the cart. He again sounded his horn. He did not notice any signs of restiveness on the part of the horse, or he should have stopped. There was a man in the cart. When he had heard their signal, the man pulled himself up and caught hold of the reins. When they were passing, the horse reared up and jumped on to the front of the car. The horse swerved right on to them.

[De Villiers, C.J. (to witness): Do you think the driver did something to make the horse jump?]

Witness: I did not see it, but I cannot imagine how the horse could have got there without. As a general rule, we find that if a horse is frightened it will either bolt forward or back, but not jump into danger.

[De Villiers, C.J.: That is the suggestion. You don't blame the horse; you blame the man?]

Witness: I blame the man. In further evidence witness said the horse came with its off-foreleg on the front of the car, and witness was pinned in his stomach against the pillow. The wheel of the car was locked. The horse was slightly injured. The car ran right on to the battery railings. If they had been travelling at a high speed the car would have been completely wrecked, and his mechanician and himself would have been killed. The horse bolted after it had got free from the car. The fact that the engine was not smashed, or the frame broken, or the wheels buckled, showed that they were not travelling at a high rate of speed. He denied entirely that he drove into the horse. The woodwork at the front of the car was damaged, the two front lamps were smashed, one of the side-lamps was ripped up, and the tyres were damaged through quick braking, the total damage done to the car being £40. He had frequently driven cars, especially in England.

Cross-examined by Mr. Upington: The Lanchester was a new car. He should say he had driven this particular car about eight times. The Lanchester was different from other cars. The

steering was such as he was accustomed to. He saw men playing on the green but he did not see men at the point marked "C." The speed at which he turned the corner did not exceed six to eight miles an hour. He denied that the horse was jumping about the road when he turned the corner. The hood of the cart was open. He did not suggest that the boy was asleep; he was lying back in the cart. It was a skeleton hood that was on the cart. It was impossible for people on the road to estimate the speed at which a car travelled. Only the driver could tell the speed by his gear. He did not see the slightest reason to pull up. He could pull up his car within ten yards on a wet road. After the accident, he sent a letter to the defendant, in which he stated that when he saw the horse jumping on to the car, he had to turn the car aside owing to the horse and cart being interlocked with the car. He took every measure to avoid a bad accident and had he not succeeded in pulling up, a very serious fatality might have occurred. There was no panic on the car when the accident occurred, although they all received a shock.

John Sander, mechanical engineer, in the employ of the Rudge-Whitworth Co., said he had had experience of motor-cars since 1900. He agreed with the last witness generally as to what took place between Muizenberg and the battery. He should estimate the rate at which they were travelling at from six to eight miles an hour. After they passed the corner, he saw no signs of restiveness on the part of the horse. The boy in the cart seemed to be either reclining or sitting back. They had got the front wheels of the car level with the wheels of the cart, and without any warning the horse swerved, and half-reared, and came down on the front of the car. The car weighed above a ton when loaded, and if they had been going at a high speed, they would probably have gone right through, or half-way through, the battery railings.

Cross-examined by Mr. Upington: As far as he could see, the horse was not restive when they had turned the corner. He considered that there was no necessity to pull up. They did not strike the horse by trying to cut past it; as a matter of fact, the horse struck the car.

Thomas Henry Hitchin, architect, Cape Town, one of the passengers in the car, said they had slowed down to pass the soldiers on the road. He estimated their speed at the time at about six miles an hour. They did not increase the speed when they passed the corner. When they were a little distance from the horse, about twenty yards, the animal moved its head up and down, as if aware of the approach of the car, but there was no jumping about. There was no reason whatever to indicate that they could not safely pass the horse and cart. He denied that the car ran into the horse, and declared that the horse ran into the car.

Cross-examined by Mr. Upington: He was accustomed to motors. He denied that they were travelling at a high speed after they passed the corner. The horse was not already across the road when they tried to pass it. If the horse had been across the road they would have pulled up.

Jas. Kingston, a gunner in the Royal Garrison Artillery, stationed at the North Battery, said he was inside the main gate when the collision occurred. The horse was under the charge of a coloured "boy." The animal was of restive habits. He had seen it shy before. The car seemed to be travelling a little faster than an ordinary horse. It was nonsense to say that it was travelling as fast as a railway train. The horse was shaking its head as the car drew towards it. Witness corroborated the previous witnesses as to the horse swerving and jumping on to the car.

This was all the evidence for the plaintiff.

The defendant, Dr. Clarke, district surgeon of Simon's Town, said he had driven to the Lower North Battery at Simon's Town on the afternoon in question. He left the cart in charge of a native named David, who was a good, reliable driver. He was about 10 to 15 yards from the cart when he heard a hooter being sounded. He was talking to Major Bushe inside the railings. He noticed that the horse was frightened before he heard the hooter. Then the horse gave a jump forward. He saw his man, who was seated in the cart, take hold of the reins. He ran to the gate, and then when he got there he saw the car flash past the battery. Then he saw the motor dash into the horse. The horse after-

wards bolted. The horse was badly cut about the off shoulder. Witness did not remember seeing the last witness there. He did not see the actual collision. The horse was exchanged with one that cost £50, The animal was now blemished, and could not safely be driven. It was still dangerous to drive, and was now being used by Mr. Albertyn.

Cross-examined by Mr. Burton: The horse was perfectly quiet before the collision, and inclined to be lazy. It might be that the horse had been seen to shy before. As a matter of fact, it had shied before. He had no opportunity of signalling to the motor car to stop; he could not see the car. The car was travelling very fast. He only saw it pass the gate. He would not be able to estimate the rate of speed. The car was going past the gate twice as fast as a horse that trotted past there.

Re-examined by Mr. Upington: He produced a brass pin of the shaft of his cart, taken off shortly after the accident. The pin showed where the horse was struck. He considered that this was the only thing that locked his cart to the car. He had examined his cart, and this was the only mark.

Major Francis Bushe, R.A., said they were encamped at Simon's Town on the date named. He heard the hooter. He saw that the horse immediately became frightened, and it jumped about in the road. The boy was handling the horse skilfully, and in a minute more he would, in witness's opinion, have got it quiet again. He estimated the speed at which the car passed the gate as ten to twelve miles an hour. He was certain that the horse did not rear up and jump on to the motor car. He saw the collision. By the impact of the car with the railings, the rails of the fort were considerably bent. The whole thing lasted a very short time; he supposed not more than ten seconds would elapse between the last sound of the hooter and the collision. He heard plaintiff say that he had to turn into the rails or he should have had to kill the horse. He did not remember the exact words, but that was the effect. The horse was wounded in two or three places.

Cross-examined by Mr. Burton: He was talking with Dr. Clarke about twenty yards from the gate. Witness remained there, and Dr. Clarke went away. He did not notice the gunner Kingston there at the time. He saw the horse jumping about the road before the car reached it. The animal was swaying about as if it were trying to bolt, and the groom was doing his utmost to hold it in. He thought if there was any mistake in his calculation of the speed of the car, it would be that he had underestimated it.

By De Villiers, C.J.: The horse seemed to be startled by the hooter, and it was kept up perhaps by the rattle of the car. He thought if the driver had had another quarter of a minute he would have got the horse quiet again.

J. Leach, gunner in the 56th Co. Royal Garrison Artillery, said he was sentry at the Lower North Battery on the date named. Before the accident, he saw the car coming at not less than 12 miles an hour. The horse was restive, and was trying to bolt. The motor-man did not slacken speed, but came on at a good rate, and tried to cut past the horse. The car struck the horse, and dashed into the rails.

Cross-examined by Mr. Burton: There was scarcely room for the car to pass between the horse and ditch. The car actually ran into the ditch. The horse was across the road.

Thomas James Wilson, corporal in the 56th Co. Royal Garrison Artillery, said the horse was moving about when the car came round the corner, and it became more restive as the car approached, and when the car was opposite the wicket-gate the horse was almost diagonally across the road. The motor-man tried to pass the horse on the front, but struck it, and then ran into the ditch. Witness was a cyclist, and he certainly should not have tried to pass the horse in the position in which it was.

David Slemah, a native coachman, in the employ of Dr. Clarke, said that on the afternoon of the accident he was waiting at the gate of the Lower North Battery. A little before the accident he noticed that the horse was frightened, and that it was jumping about. He tried to quieten it. The horse was struck by the motor. The horse did not jump on to the car. The horse and cart were drawn by the car to the battery railings.

Cross-examined by Mr. Burton: He had driven the horse since the accident. The animal shied more now than it did before. He only heard the hooter once, and then it was just before the collision. He had not been asleep in the cart.

Casper Pieter Albertyn, of Simon's Town, said that Dr. Clarke exchanged a gelding valued at between £45 and £50 for the pony that he let defendant have. He frequently drove the horse before the accident. It was then quiet and good mannered. The horse was now very dangerous to drive. It seemed to be very nervous. He should not like to give more than £25 for the pony now.

Mr. Upington read the affidavit of Patrick Burke, of the 56th Company Royal Garrison Artillery, who said that the motor travelled at a very fast rate towards the defendant's horse and cart. He saw the horse plunging to and fro in the road when the car was 70 yards away. The speed of the car did not slacken until it struck the horse. The car passed like lightning, and faster than a train anyway. The boy on the cart held the reins when the car gave the alarm. The horse was high spirited. The car struck the horse, and not the horse the car.

Counsel for the plaintiff having been heard in argument on the facts,

De Villiers, C.J.: I quite agree with the learned counsel for the plaintiff that a motor-car has as much right to be upon a public road as any other vehicle, but this general statement must be taken with some qualification. It should not be forgotten that motoring is an entirely novel mode of locomotion, and that there are many horses which have the greatest repugnance to passing a motor-car, or being passed by a motor-car. It is, therefore, the duty of the person who is in charge of the motor-car, when he observes that he is about to pass an animal which shows signs of restiveness or fright, to do everything in his power to prevent an accident. If he sees, or has an opportunity of seeing, that a collision is likely to result unless he slackens speed or stops altogether, he is clearly guilty of negligence if he does not regulate his speed accordingly. The time may come when all animals on the roads will become used to seeing and hearing motor-cars pass, but until the practice of motoring becomes much more universal than it is at present, the owner of an animal cannot be regarded as guilty of negligence if the animal in swerving through fright causes a collision. In the present case the plaintiff's own witnesses are not agreed as to the conduct of the horse when the plaintiff's cart was approaching the cart. According to the plaintiff himself he saw no signs of restiveness on the part of the horse, Sander also says he saw no signs of restiveness, and yet the gentleman who accompanied them, Mr. Hitchin, who was sitting behind with another member of the party in the car, did observe signs of restiveness. Now, if he did observe signs of restiveness they must have been very clearly marked, and, therefore, it is clear that the man who was driving the motor-car must have been somewhat unobservant in not seeing that this horse was restive, a point which was observable to a man who was sitting behind him in the car. Then there are other witnesses who stood much nearer. There is Major Bushe, who saw clearly that the horse was restive. There were intervening between him and the cart some railings, and therefore he would not perhaps be able to see most distinctly everything that passed, but he saw the horse moving from side to side, and he is perfectly satisfied that the driver of the cart was careful and cautious, and that he did everything that a careful driver could do to prevent the horse from bolting, or from doing anything in the nature of an injury. But then there were other witnesses who were in an even better position to observe what passed, viz., Wilson and Burke. With regard to Burke's evidence, some ridicule has been bestowed on his statements because his language is somewhat exaggerated, and I have no doubt that he does somewhat exaggerate the facts of the case, as witnesses of that class are apt to do. They repeat what has happened, and they school themselves for giving evidence, and ultimately when they do give their evidence, it is in a somewhat exaggerated form. But it does not follow that everything they say is to be taken as untrue. He speaks, for instance, of this car as passing at lightning speed. Well, it was not going at lightning speed. Then he speaks of the car as passing as fast as a train. Perhaps he meant the trains as they usually passed at that particular point. But whatever the speed was, it is clear that the car must have been going at a somewhat fast speed when the collision occurred. Major Bushe, whose ordinary avocations enable him to measure speed—he knows the speed at

which the artillery have to pass at reviews—he is perfectly satisfied that the speed was fully between ten and twelve miles an hour, and he says further, in cross-examination, if he is mistaken at all he is mistaken in putting the speed at too low a rate rather than too high a rate. The mistake which the plaintiff made, in my opinion, was that when it was observable that there was a horse, a restive horse, standing on the right side of the road, swerving from side to side, he did not stop or even materially slacken his speed, but endeavoured to pass between the horse and the right side of the road. The consequence was that the car caught the horse on the side, and caused the injury to the horse, I cannot believe that the accident could have happened in the way stated by the plaintiff without much more serious consequences to the horse. The plaintiff's case is that he was coming very quietly, that the horse suddenly swerved and jumped on the motor-car. That seems to be such an extremely improbable thing that if there are other credible witnesses who oppose this view altogether, I feel bound to adopt the view of the other witnesses. If it had happened as the plaintiff alleges, I should think that there would have been injuries not only to the shoulders of the horse, but also to the lower part of its leg. We only find that the injury was on the shoulder. In my opinion, therefore, so far from there being any negligence on the part of the defendant, there was negligence on the part of the plaintiff. The accident, I think, would not have occurred if the plaintiff had, when he observed the restiveness of the horse, stopped for a moment and given the man a chance to pacify the horse. According to the evidence, this man was a skilful driver. There is no evidence, as there is so often in these cases, to show that the man has ever had an accident before. It is suggested that he was asleep. It is a mere suggestion, and counsel for the plaintiff said that the chief evidence in his favour was that of the driver of the horse himself. Certainly, if that is his chief evidence, the rest of the evidence must be very weak indeed. So far as the plaintiff's evidence went, there was no evidence whatever of neglect on the part of the defendant's driver. Unfortunately he failed in pacifying the horse, and the question is, who must bear the loss that has resulted? In my opinion the plaintiff alone is responsible, and must bear the loss. The defendant has claimed in reconvention, and the counsel has candidly stated that the question of damages must be left to the Court. The only independent witness who has given evidence upon this question of damages is Mr. Albertyn. According to him, the horse was worth £45 to £50 at the time it was exchanged to the defendant. After the accident, he says, he would not pay £25 for it. That would show at all events £20 damages. The judgment of the Court must, therefore, be for the defendant on the claim in convention, and upon the claim in reconvention the defendant must have judgment for £20 damages, and the plaintiff must pay the costs of the action.

Kotze, J. concurred.

[Plaintiff's attorneys, Syfret, Godlonton and Low; defendant's attorneys, P. A. M. Cloete.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and a Jury.]

S. A. FISHERIES v. KAMP. { 1903. May 28th, „ 29th.

This was an action for the recovery of the sum of £2,970 4s. 4d., as damages alleged to have been caused to plaintiffs by the negligence or default of the defendant.

The plaintiffs' declaration was as follows:

1. Plaintiffs are a duly incorporated company, carrying on business at Cape Town, and defendant was, at the time of the occurrences herein referred to, the owner of certain cold storage premises situated at Woodstock.

2. Defendant is indebted to plaintiffs in the sum of £125 2s. 7d., in respect of fish supplied at various times between the months of August, 1900, and May, 1902, both months inclusive, as will appear from the accounts rendered to defendant.

3. Plaintiffs are likewise entitled to claim from defendant the sum of £10, being the value of packing cases, the property of plaintiffs, which were wrong-

fully and unlawfully removed by defendant, and which have not been restored.

4. During the years 1900, 1901, and 1902, plaintiffs occupied certain space or accommodation in defendant's cold storage premises.

5. Owing to the defectiveness of machinery and other causes, defendant failed to uniformly maintain the said space at the proper temperature, and the said space was from time to time inundated with water partly escaping from the machinery employed, and partly running in, owing to the carelessness and negligence of defendant's servants.

6. From time to time plaintiffs were compelled to destroy large quantities of fish stored in the said space, which had turned bad owing to the rises of temperature and inundations of water referred to in the preceding paragraph.

7. The value of the fish so destroyed amounted in all to the sum of £2,970 4s. 4d., as will appear from the account hereunto annexed, which sum plaintiffs are entitled to claim from defendant.

Wherefore plaintiffs pray:

(a) Judgment for the sums of £125 2s. 7d., £10, and £2,970 4s. 4d.

(b) Interest *a tempore morœ*.

(c) Alternative relief.

(d) Costs of suit.

ANNEXURE.

August 8,1902.

Mr. H. Kamp, Dr. to the South African Fisheries and Cold Storage Co., Ltd.

1900.			
Oct. 25: 125 bags bad fish destroyed, each 100 lb. —12,500 lb.; and			
Oct. 30: 80 bags bad fish destroyed, each 100 lb. —8,000 lb.; total, 20,500 lb. (3d.)	£256	5	0
Nov. 24: 256 bags bad fish destroyed, each 100 lb., on November 21, 22, 23—25,600 lb. (3d.) ...	320	0	0
1901.			
Jan. 14: 9,466 lb. bad fish destroyed (3d.)	118	7	0
Jan. 15: 4,879 lb. bad fish destroyed (3d.)	60	19	9
Jan. 15: 3,911 pairs bad soles destroyed (1s. 9d.)	342	4	3
Jan. 16: 1,890 lb. bad fish destroyed (3d.)	23	12	6
Jan. 16: 800 pairs bad soles destroyed (1s. 9d.) ...	70	0	0
Jan. 16: 425 lb. smoked fish destroyed (6d.)	10	12	6
Jan. 17: 2,360 pairs bad soles destroyed (1s. 9d.)	206	10	0
Mar. 15: 2,125 pairs bad soles destroyed (1s. 9d.)	185	18	9
March 15: 12,843 lb. bad fish destroyed (3d.) ...	160	10	9
Mar. 23: 3,280 pairs bad soles destroyed (1s. 9d.)	287	0	0
May 7: 13,415 lb. bad fish destroyed (3d.)	167	13	9
May 7: Cost of burning at Gasworks	2	6	6
May 31: 1,779 lb. bad fish destroyed (3d.)	22	4	9
Dec. 28: 7,736 lb. bad fish destroyed (4d.)—Nov. 20-Dec. 28	128	18	8
Dec. 31: 3,150 pairs bad soles destroyed (1s. 9d.)	275	12	6
1902.			
Jan. 27: 2,715 lb. bad fish destroyed (4d.)	45	5	0
Jan. 27: 547 pairs bad soles destroyed (1s. 9d.)	47	17	3
Mar. 4: 13,929 lb. bad fish destroyed (4d.)	232	3	0
Mar. 4: Coolie hire, burying fish	3	16	0
Mar. 4: Carting away bad fish	0	11	0
Mar. 4: 5 bags lime	1	15	5
	£2970	4	4

To this declaration the defendant pleaded as follows:

1. Paragraph 1 of the declaration is admitted.

2. Defendant admits that he is indebted to the plaintiffs in the sum of £108 6s. 9d. for fish supplied, but says that the plaintiffs are indebted to him in a larger sum. Save as excepted defendant denies paragraph 2.

3. Defendant denies paragraph 3, and says that the plaintiffs left certain packing cases of no value on his premises without his consent, that plaintiffs wrongfully and unlawfully refused to remove them, although called upon by the defendant so to do, and the defendant thereupon removed the same as he was entitled to do. The defendant has not got the same, nor has he made use of them.

4. Defendant says that during the years 1900, 1901, and 1902 the plaintiffs were his tenants of certain space or room in his cold storage premises, and that the plaintiffs had the sole control and key thereof,

it was the duty of the plaintiffs while such tenants to keep such room properly closed and clean, and to store and pack the fish placed therein by them in a proper and cleanly manner.

5 The defendant denies all the allegations in paragraph 5, and says that the plaintiffs neglecting their duty in that behalf did not keep the door of the room properly closed, but frequently and negligently left the same open, thereby interfering with the temperature, did not lay out their fish in a proper and cleanly manner, but negligently threw the fish down in heaps, thereby preventing the percolation of air, and the plaintiffs negligently allowed old bags to be about and rot in the said room, thereby causing a certain amount of heat to be generated.

6. The defendant had no knowledge of the allegations in paragraph 6 of the declaration, while the plaintiffs were his tenants, and denies that the fish turned bad through any fault or default of his or of his servants, and say that on or about the 23rd of June, 1901, he gave the plaintiffs legal notice to quit, and give up possession of the said room by the end of July, 1901, but the plaintiffs, notwithstanding, continued to remain in occupation of the same. If the plaintiffs were compelled to destroy fish stored in the said room, it was owing to their own negligent conduct as aforesaid; no claim therefore was made by the plaintiffs or any notice thereof given until August, 1902.

7. The defendant denies the allegations in paragraph 7.

8. The defendant further says that it was a condition of the occupation by the plaintiffs of the said space or room, and the storage of fish by them therein that the defendant was not to be held responsible either for damage or loss by fire or otherwise to goods stored therein.

Wherefore he prays that the plaintiffs's claim may be dismissed with costs.

For a claim in reconvention the defendant says:

1 He begs to refer this Honourable Court to paragraphs 4, 5, and 6 of his plea in convention.

2. The said room was lined with successive layers of wood packed with material termed insulation.

3. It was the duty of the plaintiffs to give up possession of the said room in the same good order and condition that they received same, but the plaintiffs in breach of their duty and by reason of their negligent conduct aforesaid so used the said room that when they gave up possession the said woodwork and insulation were rendered useless, and the defendant in order to use the said room was compelled to restore the said woodwork and insulation. The cost thereof was £100, and while it was being restored the defendant was unable to use the said room or let it, and thereby further suffered damage to the extent of £500 for both of which sums the plaintiffs are indebted to the defendant.

Wherefore the defendant claims:

(a) The sums of £100 and £500 as aforesaid; (b) alternate relief; (c) costs of suit.

For a replication the plaintiff says that save in so far as the plea admits the allegations in the declaration he joins issue thereon, and again prays for judgment, with costs.

And for a plea in reconvention he says:

1. He craves leave to refer to the allegations in the decalaration and replication in convention.

2. He admits the allegations in paragraph 2 of the claim in reconvention.

3. He denies each and every the allegations in paragraph 3 of the claim in reconvention, and specially says that if the woodwork and insulation were rendered useless (which he does not admit), it was not due to any fault or neglect on his part, and he is not liable therefor.

Wherefore he prays that the claim may be dismissed with costs.

Sir H. Juta, K.C., for plaintiff. Mr. Benjamin for defendant.

C. C. K. Ericksen, managing director of the plaintiff company, was called, and gave evidence in support of the allegations contained in the declaration. He stated that the water came into the chamber from the room above, and lay in liquid state in the chamber used by the company. There were thermometers in the storage, and witness had noticed the temperature at 25 degrees (the lowest), and the highest at 75, which represented three degrees of heat. The temperature was not there to freeze the water lying about. It was almost impossible to get the proper temperature when liquid water was there, as water was a heat conductor. It was practicable to do so by using heavy machinery, but if this were done, it would not pay. Witness had frequently seen the machinery standing still; during portions of the time he was in

occupation. This happened once through want of coal. This occurred on several occasions during a certain week. Another cause of stoppage was the breaking down of the feeding pump. This was some time during Easter, 1901. The company claimed £2,970 4s. 4d. Witness was examined in regard to the correspondence. The first letter was dated the 21st June 1900, and was written by witness's partner, Mr. E. Wadner. This was before the concern was floated into a limited liability company. In this letter, defendant was asked the terms upon which he could supply accommodation for cold storage of fish. Defendant replied on the 11th July giving the following terms: For 1,000, £12 10s. a month; 2,000, £20. 3,000, £25. The letter stated: "Should you require fish frozen, then I am prepared to let you have the whole of one room, if empty, until the fish can be packed together, without making any extra charge." Witness understood the letter referred to his wanting to put fresh fish frozen in the room. Witness saw Mr. Kamp personally before he went into occupation. The agreement was to put in frozen fish. The question of rent had been settled by arbitration. It was never agreed that it was to be a condition of occupation and storage of fish that defendant was not to be held liable either for damage or loss by fire, or otherwise, to goods stored there. Defendant wrote in November, 1900, to say that the present system of storage of fish and the manner in which fish was stored was unsatisfactory. He (defendant) considered that fish in the first instance should be put in proper state, or frozen in small quantities before stacked. The letter concluded: "You must not be surprised if in the course of a few days some tons of fish may have to be thrown away." Continuing, witness said that the fish were frozen before being stored; they only required to be kept frozen. In January, 1901, witness wrote to defendant, drawing attention to the state of the chamber, and stating that the temperature had repeatedly been considerably above freezing point, and that large quantities of water were covering the floor. In February witness wrote a similar complaint. On the 8th March Kamp wrote, stating that he could not understand why the temperature of the room should be lower than it originally was. During the time witness was in possession, he occupied one chamber. Witness had used another chamber in order to remove the fish to have the water baled out and the chamber generally cleaned. The fish were in the second chamber for only a couple of days. The fish were all right there.

By Sir Henry Juta: Witness could have gone out at month's notice. Notwithstanding that in November things were unsatisfactory, witness remained for two years. On the 3rd September, 1900, Kamp wrote to say that under the then circumstances of storing his (defendant's) room would be spoiled; while his (plaintiff's) fish could not possibly keep under the circumstances. After this a quantity of fish, of the value of over £500, was spoiled. Until August, 1902, witness did not say anything about claiming for damages. On the 26th June, 1901, Kamp wrote to witness asking for immediate payment of the account due to him for storage, and stating that he must ask them to leave on the following Monday if the account was not paid on Saturday. At that time, according to the present claim, witness had sustained damage to the extent of about £2,300. Witness left in March, 1902. In August the arbitrators met, and ordered witness to pay rent and costs. Witness did not put unfrozen fish in the chamber. Fish were taken from the chamber, and hawked round in a cart for sale, and the portion unsold was returned to the chamber at night and taken out again next morning. At first Kamp burned the bad fish in the furnace for witness, but afterwards the bad fish increased too greatly to allow of this being done. Through an oversight on one occasion, bags, which had contained fish, were allowed to remain in the chamber. Fish, with water running off them, had not been placed in the chamber. Witness did not know that in April, 1901, a third feeding pump was installed. Witness did not keep the air-lock closed. The air-lock chamber was used by Kamp.

By Mr. Benjamin: The question submitted to arbitration was that of the rent of a chamber for cold storage. Witness had frequently complained by letter of the condition of the chamber. When Kamp wrote saying that he could repair the leakage through which the water came, if he had control of the chamber, witness replied that Kamp had free ac-

cess to the room daily, and that he could therefore have control of the room so as to do away with this nuisance. The air-lock had all along been used by Kamp as an ice-room. The unsold fish, when returned, was put in a position of its own, and specially dealt with. As soon as it was found that that particular fish was not quite sound it was destroyed.

Francis H. Tallent, chief engineer in charge of the Imperial Cold Storage at Woodstock, said he had previously been third engineer of the Bullard liner Johannesburg, and had had charge of the cold storage chambers. Witness had been to Kamp's. Mr. Kamp called him in to see the machinery in 1901, in about June. He was informed that there were slight difficulties. Witness saw the machinery, which had stopped. The driver told witness the pump would not work. Witness found the pump was completely out of order, and would not supply the boiler. Witness did not see other pumps. Witness put the pump in order as far as he was able, and saw the machinery started. About a hour and a half later the machinery was again stopped, the pump being smashed. Witness did not think it was looked after as it ought to have been. Witness recommended that a new pump be purchased. If water got to the insulation, the damage could not be repaired without taking up the insulation. The air-lock was a convenience for the temporary placing of goods. Witness did not see how bags in a room could affect the temperature. In witness's opinion fish could not be kept in too low a temperature. At any rate, the temperature should not exceed 20. Rotting bags or fish could not affect the insulation. If a wet bag were left in the chamber at 20 degrees, it ought to freeze.

Edward Erickson, a former foreman in the plaintiffs' employ, said the plaintiffs' fish were hard frozen when taken to the chamber at Kamp's. There used to be much water in the chamber, and the men had had to use buckets to bale it out. Witness had seen Mr. Kamp looking at the place frequently, and had heard him say he would have the defect attended to. Witness had seen the thermometer at 32, 33 and 34.

By Sir Hy. Juta: In the first fortnight Kamp complained about the packing of the fish. It was not until November that plaintiff had reason to complain.

John Garcia, formerly employed by Mr. Kamp as engine-driver, stated that the engine had stopped many times while he was there in 1901. He had seen ice kept in the air-lock by Mr. Kamp.

G. Berghstead gave similar evidence. The inner door was always kept closed; the door of the air-lock was usually open.

Oscar Alyhr, sale agent for the plaintiff, was also called, and gave evidence to the same effect.

Frederick E. Greenstreet, engineer, said that in October, 1900, Mr. Ericksen asked him to inspect the chamber he had rented from Mr. Kamp. Witness saw the room. The temperature was very high. Witness believed the door was open for him to go in. Witness believed the temperature was above freezing point. There was water in the room. In case of fish storage, the temperature should never be allowed to go over 20 degrees.

By Sir Henry Juta: Fish which was rotting would not affect the insulator, but would affect the boards.

James Henry Robinson, secretary to the plaintiff company, produced the company's books, showing a record of the fish destroyed.

Philip Essler, assistant to Erickson, the foreman was also called for the plaintiffs. In cross-examination, he said that frozen fish was sometimes taken out in the morning for sale, and was returned bad.

This concluded the evidence for the plaintiff.

Elias Mahl, in the employ of the Imperial Cold Storage Works, said that he occupied the room in question for some time, and found the room in good order. The machinery was quite capable of doing the work, and since then Mr. Kamp had added four more rooms. When the Pieter Faure made a haul the fish was always placed on the rack. The principle was that the air must circulate round each fish. Fish arriving in bags should be taken out at once. Tainted fish in a cold chamber would affect the good fish. Fish which the customers refused in the summer months would do a great deal of harm if returned to the cold storage room. As long as the temperature was

below freezing point it would be good enough for the fish. Receiving gangs dealt with the fish, and the men only remained half an hour in the cold storage room. It would require eight or ten men to deal with 250 bags of fish at Kamp's.

Cross-examined by Mr. Benjamin: He could not say hether the wagons drove up to the door of Kamp. The machinery was generally worked during the night, and the average temperature at his place was between 20 and 22 degrees. If anything went wrong with the machinery the temperature might be maintained for a day if the doors were immediately closed, and the fact of water lying about would prove that the temperature was not at a proper stage.

Albert Frederick Cooper said that in October, 1901, he started as a fitter at Ericksen's works at Kamp's place. It was part of his duty to carry fish into the chamber. Up till February, 1902, only two men had carried in the fish. The fish sometimes arrived hard and sometimes soft. He had known the fish to arrive in such a condition that he wouldn't eat it, but he would not say it was bad, as some people might have a different taste from him. When the fish arrived it was not placed on the racks, but was dumped down on the floor. The fish would lie in a heap all night, and it would take them from one to three days to sort it out. While he was carrying in the bags all the doors were open, and he could not possibly keep opening and closing the doors with a bag on his back. Witness himself had dealt with a consignment of fresh fish. When the bad fish was returned by the carts he placed it in the same chamber as the frozen fish. Ericksen tried to get the sanitary people to remove the fish, but did not succeed. The engine stopped towards the end of 1901, and witness had to complain of the temperature. He left the place because he was asked to bury bad fish.

Cross-examined by Mr. Benjamin: He was not dismissed by Mr. Ericksen for drunkenness. All the bad fish was allowed to remain in the chamber, and went on accumulating, and when witness left there would have been five or six tons of bad fish.

Thomas Henry Jones said that in November, 1901, he was in Mr. Ericksen's service at Kamp's Cold Storage. He had fishery experience in Alaska and British Columbia. Witness and Cooper carried in the fish, and at times the number of carriers would be increased. Sometimes the fish would be very hard, but at others very soft, and the bags would be very wet. The bags would be dumped down overnight, and it would take them one to three days to sort it on the racks. When Kamp's stopped the burning, the fish was put in the cold chamber, and Ericksen knew of this. The bags were charred from the generation of heat inside.

Cross-examined by Mr. Benjamin: He would swear that he did not go to Mr. Robinson and offer himself as a witness.

John Wm. Fraser, a carpenter, stated that he had about six years' experience of cold storage insulation. He was engaged for some time in Kamp's Cold Storage, and gave a description of the insulating material in the Ericksen chamber. The boards of the chamber were very much decayed through bad fish.

Levinson Jenkinson said that he was in the employment of the Corporate Fisheries. When he was in Kamps, he saw fish brought in in a soft condition, and on one occasion it was very soft. Ice was stored in the air-lock room, winter and summer. He found the temperature 27, 28, and 30 degrees. He had had one complaint about the temperature of the chamber, and he told them that he would look into the matter. Fish was improperly stocked in the chamber. It would be incorrect to say that the doors of the chamber were constantly left open. Mr. Kamp gave instructions regarding the door being kept shut.

Antonio Latto, a fitter, said he was engaged to repair Kamp's refrigerating machinery. The breakdown mentioned by the plaintiff would not affect the temperature.

Cross-examined by Mr. Benjamin: He was a certified fitter, and had several testimonials, but it was true that a Mr. Taunton had been called in to fix the pump.

George Groatwold, an engine-driver, said that he had control of the engine at Kamp's, when there were only four rooms. At present there were nine rooms, and the same plant was being used as on the former occasion. He had noticed bad fish there which re-

mained for several days. Witness had to stop the burning of the fish, as it affected the boilers.

Cross-examined by Mr. Benjamin: He complained to both Mr. Ericksen and Mr. Kamp that the air-lock was open. He never remembered seeing the temperature at 32 degrees.

The witness Fraser, recalled, stated that the joints of the air-lock were properly soldered.

Henry Kamp, proprietor of the Cold Storage at Woodstock, said that he was the first to start in Port Elizabeth and Johannesburg, and was the first to start cold storage successfully in Cape Town. He had an ice-making machine working summer and winter. Water would spoil fish in either summer or winter, but witness never allowed any water to enter the chamber from the air-lock. The soldering had never been touched since the plaintiff left. The machinery was absolutely newly imported from England. It was to his interest to keep the door of the ice chamber locked. With the exception of a few ice cream vendors from Woodstock, the ice was generally sent out to the suburbs in large quantities. He had drawn Mr. Ericksen's attention to the bags of fish lying about for days. When the men brought the fish in both doors were usually left open, and in the summer months, during a south-easter, the snow would immediately commence thawing on the pipes. He pointed out to Mr. Ericksen that the insulation was becoming spoilt through the moisture from the bags. He had seen bad fish brought back and placed in the store. That would naturally affect the good fish. Some of the fish was buried in his garden, and it was in a frightful condition.

Cross-examined by Mr. Benjamin: About May last year he stored meat at Mr. Ericksen's place at Prestwich-street, and it went bad in the cold storage. It was true that he had a considerable number of customers, but they mostly came in the morning.

By Maasdorp, J.: He didn't object to the fish being a trifle soft on arriving from the Docks, as the machinery would be able to put it right.

This closed the evidence for the defence, and after counsel had addressed the jury,

Maasdorp, J., in summing up, said that there was really no point of law in the case. Counsel had pretty well agreed as to the liabilities of the parties under the contract, and, consequently, there was no abstruse point of law which he was called upon to elucidate. If they found that the defendant had caused the loss, the plaintiff could only claim up to the time he discovered that the place was in an unfit condition, and after that he himself must be responsible for the loss. Regarding the delay in proceeding with the case, his lordship said the jury would have to consider whether under the circumstances each party did not think he was himself somewhat to blame in the matter. The defendant had admitted a claim for £108, and the jury must in any case find for that amount.

The jury retired at ten minutes to five, and returned at a quarter past five with a verdict for the plaintiffs on the claim for £108 7s. 9d., with costs up to date of plea, and for the defendants in reconvention. No further order was made as to costs in the case.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant's Attorneys: Scanlen and Syfret.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZE.]

GREENING v. MOSS. { 1903. May 29th.

Mr. Rowson, on behalf of the plaintiff, asked that this case should be postponed, inasmuch as he had not been sufficiently instructed.

Mr. Alexander said he was engaged for the defendant, along with Sir Henry Juta, and he opposed any postponement.

[De Villiers, C. J., pointed out that it would be extremely difficult to put the case on a later date, and said that the case would be called later in the morning, and if the plaintiff were not present, then the Court would grant absolution from the instance.]

When the case was called later in the day the plaintiff appeared, and said he was sorry to have to ask for an adjournment, for the reasons set forth in his affidavit. The plaintiff read his affidavit, which was to the effect that he was an attorney of this court, and that he instructed the attorney whose name appeared on the record to take this action to trial. About three weeks ago he instructed his attorney to give the necessary notices to inspect documents and to confer with witnesses, etc. Since then his attorney had suffered from indisposition, which had prevented him giving attention to the matter, and he had referred deponent to his clerk, who had also been unwell. A few days ago he discovered that nothing had been done. He himself had made every effort to serve subpœnas, but it had been of no avail. It would take deponent a few days to put matters right, and he asked the Court to allow the case to stand over until later in the list.

William Gordon Coulton, the attorney referred to, then stepped forward, and said that he denied *in toto* the statements made by the plaintiff in his affidavit.

[De Villiers, C. J., said that plaintiff had made some serious charges against another attorney, and that attorney now came forward and said that he denied the charges which had been made. He did not see how the Court could accept the affidavit without some notice having been given to the other attorney as to these statements.]

Plaintiff: I have let him know verbally from time to time.

Mr. Alexander, for the defendant, said that he objected most strongly to a postponement. He would like to point out to the Court that the plaintiff was at present insolvent. He had surrendered his estate, and a second meeting of creditors had been held. The only result of a postponement would be that his client would be mulcted in a large amount of costs, because it would be hopeless to get any costs out of the applicant.

[De Villiers, C. J., (to the plaintiff): The Court cannot postpone the case now, and will proceed to hear it.]

Plaintiff: I am sorry to say I cannot proceed.

[De Villiers, C. J.: Then there must be absolution. Cannot you give evidence yourself? Why are your witnesses not here?]

Plaintiff: Because they have not been subpœnaed. My chief witness will not come without subpœna.

Mr. Alexander: He alleges slander, but it is not slander at all. He has been put on the black list, because he has not paid his fees.

Mr. Coulton was called, and, in answer to the affidavit of the plaintiff, he said the arrangement between them was that he should have so much money in order to bring the case into Court. The plaintiff had not supplied him with money.

De Villiers, C. J., after hearing further statements, said: The case is set down for to-day, and the plaintiff is not prepared to go on with it. He produces no evidence in support of his case, and therefore there must be absolution from the instance with costs.

GRUNBERG V. GARDINER AND EASTON.

This was an application on notice of motion, calling on the liquidator in the defendants' estate to show cause why an interdict should not be granted restraining him from parting with any assets of the firm of Gardiner and Easton, or of the joint venture with one Calgo, pending an action to be brought in this Court. The case, it appeared, arose out of the lease of a certain farm on Mowbray Flats, entered into between the plaintiff and the firm of Gardiner and Easton. Mr. Gardiner appeared for the applicant, and the respondent was represented by Mr. Close.

Affidavits having been read on both sides,

Mr. Gardiner said that there was no denial that the lease was entered into by Gardiner and Easton for twelve months, a large portion of which period was still to run.

Mr. Close contended that the applicant had no right to take this special class of remedy, an interdict.

[De Villiers, C. J.: Is Mr. Syfret willing to give an undertaking that he will retain the proceeds of any of the cattle that he sells pending a further order of Court?]

Mr. Close: I suppose he would be, but I am not specially instructed. He says in his affidavit that he places himself entirely in the hands of the Court.

[De Villiers, C.J.: Such a course ought to satisfy the applicant.]

Mr. Gardiner said that there was still to accrue under the contract an amount of £400 for rent. The rent of the farm was at the rate of £60 a month.

De Villiers, C. J.: There will be no order, on condition that Mr. Syfret gives his undertaking that he will retain a sufficient amount of the proceeds to meet the claim of the plaintiff, the question of costs to be reserved for argument.

WATSON V. VON DURING.

Mr. Rowson, as a matter of urgency, applied to the Court to fix a day for the hearing of this trial, as the plaintiff wished to proceed to Europe as early as possible.

Mr. Gardiner, for the defendant, said he thought it was only fair that he should explain that the case was previously postponed on account of his temporary absence when the Court was sitting in two divisions.

It was directed that the case should be set down for the 10th June.

THOMAS V. THOMAS.

This was an action for divorce and division of the property of the marriage, brought upon edictal citation. Mr. Upington appeared for the plaintiff. defendant was in default.

The plaintiff, Thomas Rowland Thomas, said he was living at East London. He was married to defendant, Mabel Jane Thomas (born Price) at Bloemfontein in August, 1898, in community of property. For three or four months they lived fairly happily together, and then one day his wife asked to go to Queen's Town, where she had some relatives. She went away that day He next heard from her from Springfontein, whence she wrote a letter saying that she had no intention of returning He had written to her very frequently, asking her to return to him. Just before the war broke out he came to Cape Town and took a position. He went to Wales in 1901, and remained there until December last year. He then returned to South Africa and proceeded to Queen's Town to make inquiries as to his wife. He afterwards proceeded to East London and inspected the passenger list of the steamship Scot. In consequence of that and other information he received he instituted proceedings for divorce. After his wife had left him for some time he sent notes to the amount of £10 to £15 per month to her, care of Price Brothers. Queen's Town. He also sent to her through J. G. Fraser, £750, her half share of the sale of a house, which was bought with her money, for £800, and which he sold for £1,500. He had applied for an interdict against the Standard Bank to restrain them from parting with moneys standing in his wife's name.

Mr. Upington said that an affidavit had been filed by Mr. Price, denying that petitioner had sent any money through him to the respondent.

By De Villiers, C.J.: Witness had not seen his wife since October or November, 1898. He identified the photos produced.

Mr. Upington said that a letter had been received from respondent admitting that she had received the intendit and the citation, and that she had travelled as Mrs. Ballaster and in another name.

Evidence taken on commission was also read, showing that respondent had voyaged home in the Scot in January of this year with a man named Ballaster, and that she had represented herself as Mrs. Ballaster.

The Court granted a decree of divorce, with costs, and an order for a division of the property in community, Mr. Syfret being appointed receiver.

ROSENSTEIN V. ROSENSTEIN.

Mr. J. E. R. de Villiers, for the plaintiff, said that this was a proceeding for divorce by edictal citation. The Court had ordered that the papers be served in Brazil, but the papers had not yet been returned, and counsel asked that the case should stand over *sine die*.

The Court acquiesced.

KOENIG V. LANDESHUT.

This was an action in regard to a partnership account, Mr. Searle, K.C., being for the plaintiff, and Mr. Upington for the defendant.

Mr. Searle applied for a postponement on account of the illness of Koenig, who was certified by his medical attendant, Dr. Griffiths, to be totally unfit to attend Court.

[De Villiers, C.J.: Is not this a case of an account simply?]

Mr. Searle said that there had been an award of arbitrators, which had been made, a rule of the Court, and the only question now was what was a reasonable amount for the defendant to pay to the plaintiff in respect of the plays.

Mr. Upington mentioned that he had in attendance a witness from Natal Mr. Harry Hall, whose connection with a theatrical enterprise necessitated his return as early as possible, and the defendant, Mrs. Landeman, was also anxious to proceed to the Transvaal.

De Villiers, C.J., stated that the case would be postponed, and the question of costs reserved. He added, in reply to counsel, that he did not see how the case could possibly come on this term.

KINNEAR v. HUXHAM. { 1903. May 29th.

Sale—Breach of contract—Damages—*Quanti minoris.*

The plaintiff, who lived at K. in the Transvaal, ordered from the defendant, a manufacturer in the Cape Colony, three wagons of different qualities at different prices and paid the full price. The defendant sent the wagons by railway to K. and on their arrival the plaintiff accepted two of them, but although he took charge of the third he refused to accept it on the ground that it did not answer to the description ordered.

Held, *that although under ordinary circumstances the plaintiff would be entitled to claim a wagon such as that ordered, or on refusal might retain the wagon and claim back the purchase price as well as damages, yet that, under the special circumstances, as the defendant refused to deliver a wagon such as that ordered, as the plaintiff did not by his declaration tender the wagon delivered, and as the expense of returning the wagon to the Colony would be very great, the proper course was to let the plaintiff retain the wagon and recover damages—the measure of damages being the difference in the market values at K. between a wagon of the description contracted for and a wagon of the description actually delivered.*

This was an action brought by the plaintiff, who resides at Krugersdorp, Transvaal, against the defendant, who resides at Claremont, Cape Division, for delivery of a certain wagon, according to agreement.

The declaration set out that while plaintiff was residing at Claremont the defendant agreed to make and deliver to him certain delivery wagons. One of the wagons delivered was not in accordance with the specification agreed upon. Plaintiff had paid £40 upon it. The same wagon, with two others, was forwarded to Krugersdorp, Transvaal, and after it had been unloaded he discovered that the said wagon was of 1⅞ in. axle instead of 2¼ in. and of 10 ft. length instead of 10 ft. 6 in. The defendant wrongfully refused to supply a wagon of the specified dimensions. Plaintiff prayed for delivery of the wagon, according to the said agreement, or, in the alternative, return of the sum of £40, with £6 1s. 9d., one-third of the sum paid by the plaintiff for railway carriage, £3 15s. paid by the plaintiff for import duty, and unloading the said wagon, and costs of suit.

The defendant, in his plea, said that in November last he agreed to make and deliver to the plaintiff six delivery wagons, according to instructions. About the 4th December plaintiff requested defendant to accept the purchase price partly in cash and partly in promissory notes. Plaintiff selected three wagons from some standing in the defendant's premises. Defendant denied all knowledge of the allegations as to the sums said to have been expended by the plaintiff on the wagon. He admitted receiving a demand from the plaintiff for another wagon, but said he did not understand its tenor.

The replication of plaintiff said that the demand was made in accordance with the

agreement of the 1st November, 1902, and that the agreement was subsequently cancelled in regard to three of the wagons, but that it continued as to the other three.

[Mr. J. E. R. de Villiers for plaintiff; Mr. Gardiner (with him Mr. Bisset) for defendant.]

The plaintiff, George Alexander Kinnear, said he was now a carriage builder, at Krugersdorp, Transvaal, and that he formerly lived in the Cape Peninsula, between November, 1900, and December, 1902. While at Claremont, in November, 1902, he placed an order with the defendant for six trolley wagons, four of which were to have 2¼ in. axles and 10 ft. 6 in. bodies, and the other two 2 in. axles and 9 ft. 6 in. bodies. He signed the order in the defendant's order-book. On the 3rd November he confirmed the order by letter, agreeing to pay £40 for each of the four larger wagons and £36 10s. for each of the two smaller ones, the wagons to be delivered by the 20th November. It was arranged that he should pay £133 in cash and a bill at 30 days for the balance of £100. This arrangement was entered into prior to his giving the order. By the 20th November the wagons had not been completed, but he did not mind, as there was a scarcity of trucks at the time. He saw the wagons in the latter part of November. On the 3rd December last year he met the defendant, who told him that three of the wagons had been trucked for him that morning. Defendant was to send two 2¼ in. and one 2 in. wagon. Witness went in to pay the defendant, but the latter was busy with a lady and gentleman. He subsequently paid defendant £133 in cash and a promissory note dated December 3, payable at thirty days for £100. He demanded a receipt for the payment for six trolleys, which, however, was refused. After a long argument, the defendant still refused, and witness demanded back the money and note, which were returned to him. Witness destroyed the note. On the next day —December 4—the defendant spoke about the money, and witness then paid the man's brother £130. The brother usually received the money from the defendant, but he paid in the defendant's presence. Witness was given a receipt for £130 "on account, being part payment for six trolleys." A day or two later he paid defendant £3 and a promissory note for £100. Witness saw the second batch of wagons still standing. Defendant demanded a surety on the back of the bill. This witness refused to give this in principle. They had a further interview on or about the 13th of December, when they came to terms. The defendant, it was arranged, should make a refund from the £133 upon the three wagons actually sent—two at £40 and one at £36 10s. Witness cancelled the order for the three other wagons, and defendant returned to him £16 10s. by cheque and his promissory note. Witness went to Krugersdorp on the 16th November. When witness unloaded the wagon, the railway clerk and eight or ten boys were with him. Witness found two of the wagons to agree with his specifications. He measured the wagon in the presence of witnesses. One of the wagons, marked "H," had a 1¾-inch axle. Witness paid £3 duty on that wagon. He paid £18 5s. 5d. railage on the three wagons. Witness put the matter in the hands of his attorney, who sent a letter of demand (produced). In this letter it was pointed out that the wagon was of wrong size and dimensions, was painted brown, instead of green, and was marked "H" insted of "K," which was the letter appearing on the other two. Witness paid the boys 24s. or 26s. for unloading the wagon. There was a difference of about 3,000 pounds between the carrying capacity of a 1¾-inch axle and a 2¼ inch. Witness would not have bought a wagon with a 1¾-inch axle; it would have been absolutely unsaleable. If he had wanted such a wagon, he would not have paid more than £32 for it.

By Mr. Gardiner: The wagon was consigned to a certain Kruntling, witness's friend, to whom he directed defendant to send them. The wagons had not been sold to Kruntling. Witness did not pick out these particular wagons in the yard. He did not superintend the loading up of the wagons on the trucks. He saw the wagons after they had been trucked. Witness saw a brown wagon at defendant's weeks before witness's carts were finished. When the first lot were sent away, witness saw four green wagons left. He saw a boy taking one of these away, and witness, believing it was his, stopped the boy. He was, however, told not to interfere.

A. B. Burchman, carriage builder, said the difference in the carying capacity of a 1¾-inch axle wagon and 2¼-inch axle wagon was about 3,000 pounds.

John Wilson, railway checker at Claremont, produced consignment notes of wagons sent to Heidelberg and Krugersdorp on the 3rd December, 1902.

Mr. De Villiers said this would, perhaps, explain why plaintiff got the cart marked "H," which should have been consigned to the parties at Heidelberg. "K," he suggested, stood for Krugersdorp.

Kotze, J.: Do you say the railway people made a mistake?

Mr. De Villiers: No, we do not say there was any mistake by the railway.

Witness said the marks "K" and "H" were placed on the carts by the consignors.

Mr. De Villiers read certain evidence taken on commission in support of the plaintiff's claim, and closed his case.

Mr. Gardiner called

Charles Huxham, the defendant, who said he used to see Kinnear often when the latter was living at Claremont. Witness remembered the order being given, and confirmed by letter. Nothing was said about a promissory note. Witness expected cash. Afterwards Kinnear asked witness to take a promissory note for three. Witness said he would take the note if Kinnear could get a guarantor He came to witness later, saying he could not get a guarantor, and witness told him it was all right, as he had customers for the wagons. Kinnear then said he would take three wagons, and witness told him to select them. This was on the day the wagons were trucked. Kinnear saw all the wagons in the yard, and picked three. He asked witness to assist in the trucking, and witness agreed. Kinnear went to the station with the wagons and saw to the trucking of them. Witness got the consignment note made out. Kinnear picked out two green wagons and a brown one. These were the three which were sent off. The two large wagons were sold at £40 each, and the other at £36 10s. Witness told Kinnear the prices of all the wagons in the yard. Witness considered that a 1¾ inch axle could be replaced by a 2¼ at a cost of about £4 or £5.

By Mr. De Villiers: The sale was cancelled about six or eight days before the cheque was given.

[De Villiers, C.J.: Did the cancellation take place before or after he selected the three wagons?]

Witness: He cancelled the order for the six wagons, and then he selected three.

By Mr. De Villiers: The originally stipulated contract price for a 2 inch axle wagon was £36 10s. Defendant picked out a wagon of this axle measurement, and agreed to give him £40. Witness took no measurements himself.

By Mr. Gardiner: Although plaintiff cancelled the original order, he left a balance with witness, intending to try further to get security for the promissory note.

The witness John Wilson (recalled) said he could not remember whether plaintiff came to the station with the wagons. They were brought by Huxham's men.

James Penfold, blacksmith at defendant's wagon works, said he saw plaintiff with defendant in the yard, picking out wagons. Witness could not say which he picked. He looked over all the wagons, not the green ones only. Two green wagons and one brown wagon were sent to the station. Kinnear went to the railway station.

Cross-examined: Witness did not hear Kinnear speaking when he was looking at the wagons.

William Grill, one of the defendant's employees, deposed that Kinnear was at the station when the wagons were sent off. Witness did not know the date.

Edward Beamister, wagon builder, said it would cost about £3 or £4 to replace a 1¾ inch axle with a 2¼ inch axle.

Cross-examined: In order to strengthen the carrying capacity, the springs would have to be altered.

Mr. De Villiers said that he would be able to call witnesses to prove that plaintiff the 3rd December, and therefore could not have been at the station when the wagons were sent for.

Mr. De Villiers called

Louis Henri de Beers, articled clerk in the employ of Van der Byl and Van der Horst, who said he saw plaintiff in the office on the 3rd December last. Mr. Kinnear was in the regular employ of the firm as a bookkeeper at the time. He fixed the date by a dispute they had in regard to a penholder.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: In cases where there is a conflict of evidence, it is always a safe principle for the Court to be mainly guided by documentary evidence which is admittedly authentic. The order book and the plaintiff's letter book show that he ordered wagons with 2¼ and 2 inch axles, and not with 1¾ axles. One of the three wagons forwarded to Krugersdorp had 1¾ axles, and the plaintiff was not bound to accept an article which he had never ordered. He has claimed from the defendant delivery of a wagon of the description purchased by him, or, in the alternative, the return of the purchase price, and damages for non delivery; and the defendant has refused to comply with either demand. It would no doubt be competent for the Court to make an order of specific performance, but the more usual course is to award damages for breach of contract, and the question to be determined in the present case is what should be the measure of damages. The plaintiff did not inspect the wagons before they were forwarded from Claremont to Krugersdorp, and it was the defendant's own act to despatch the wagons by train to their destination. The damages to be awarded should therefore be such damages as were sustained by reason of the delivery of a defective article at Krugersdorp. If this were treated as an action *quanti minoris*, the plaintiff would have been entitled to recover so much of the price as represented the difference between the value of a wagon as bought, and the value of a wagon as actually delivered (*ut restituatur ex pretio quanti minoris valet res*). It was not intended in the case of *Irvine* v. *Berg* (Buch. 1879, p. 198), to confine this action to cases where the purchaser has resold at a loss. In that case the plaintiff had bought a cargo of mealies, which he resold at a considerable profit, and he claimed damages on the ground that some of the mealies were found to be unsound. The judges found, as a matter of fact, that the mealies were sound when delivered, but proceeded to discuss the question whether the plaintiff would have been entitled to damages if the mealies had been unsound. The *obiter dicta* on this point were not very accurately reported. There had been an acceptance by the plaintiffs of the mealies, with a knowledge of whatever defects they had, and the *actio quanti minoris* was clearly not applicable. I made some further remarks as to goods bought in bulk, but they were not intended to extend the doctrine laid down by Voet in his Commentaries (21. 1, 5). In the present case. the wagons were not sold in bulk at a lump sum for the lot, but at a fixed price for each wagon. The fact therefore that the plaintiff accepted and may have dealt at a profit with the two wagons would not debar him from the right of claiming a return of part of the purchase money of the third wagon. But, in strictness, the action *quanti minoris* is only applicable in the case of a latent defect in the article purchased and delivered. Most of the sales referred to in the Dutch books are sales of specific goods. which the purchaser has inspected, or had an opportunity of inspecting, and which after delivery are found to contain a defect which was latent at the time of sale. Considering that the Dutch were a commercial people, it seems strange that there should be such a dearth of authority in regard to sales other than those of specific chattels. The purchaser of such a specific chattel was entitled to claim delivery, and, failing delivery, to claim damages for non-delivery, but very little is said as to the rights of a purchaser who has bought, not specific articles, but goods answering to a certain description. The practice of this Court, in such a case, has been to award damages to the purchaser, on failure by the seller to deliver goods answering to the description and the measure of damages has been the difference between the price and the market value of such goods. Where, however, the goods were, to the knowledge of the seller, required by the purchaser for a special purpose, special damages have been awarded. In the present case there is no question as to special damages, but the plaintiff claims a return of the purchase price and of the charges paid by him for the conveyance of the wagon to Krugersdorp. Under ordinary circumstances the plaintiff would have been entitled to succeed in his claim, in addition to obtaining damages, but only on delivery by him of the wagon in his possession, and the declaration does not tender such delivery. The expense, moreover, of returning the wagon by railway would be great, and, under these special

circumstances, a fair measure of damages would be the market price of a wagon of the description contracted for, and the market price of a wagon such as that actually delivered. There is clear evidence that the market value of the former at the date of delivery was £65, and that the latter could have been resold for £50. Judgment will therefore be given for the plaintiff for £15, with costs, he retaining the wagon.

[Plaintiff's Attorneys: Michau and De Villiers; Defendant's Attorneys: Syfret, Godlonton and Low.]

FEHRSEN V. FEHRSEN.

Mr. Close drew the attention of the Court to this matter, which was standing over, and said that his client, the defendant, who had come down from Somerset East, had been in Cape Town since Saturday last. He was a doctor, and was urgently required up-country, and counsel asked the Court if an early day could be appointed for the trial.

Mr. Buchanan said that the plaintiff also was wishful that the trial should be taken as early as possible. The action was one for judicial separation, brought by Mrs. Fehrsen against her husband, Dr. Fehrsen. The plaintiff said that she had to leave the defendant on account of his conduct, and the defendant said that his wife had deserted him.

Mr. Close said that the parties had been living apart for a couple of years.

The case was directed to be set down for trial on June 2nd.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J H. DE VILLIERS, P.C, K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZE.]

PROVISIONAL ROLL.

PHILLIPS V. POOLE. { 1903. May 30th.

Mr. Benjamin moved for provisional sentence on a promissory note for £100 17s., dated 17th February, and payable to the African Banking Corporation.

Order granted.

GARLICK AND OTHERS V. HILLIER.

Mr. J. E. R. de Villiers said this was an application to make final a provisional order of sequestration, but he was instructed that the parties had now come to a compromise, and he therefore asked that the provisional order be discharged.

Order granted as prayed.

WESSELS AND CO. V. RICCI.

Mr. J. E. R. de Villiers moved for the provisional order of sequestration granted in this case to be made final.

Order granted as prayed.

ROSE V. WOJCEICHOWZKI.

Mr. Upington moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court, by which defendant had been condemned to pay costs of a certain application which he had made. Judgment was put in, return of *nulla bona*, and taxed bills of costs. The amount of the costs was £15 17s. 9d.

Defendant said he would be prepared to pay the money in six months, and in the meantime he made an offer of 10s. a month. He admitted having sold a promissory note in his posession in order to pay merchants.

Mr. Upington said the Court would remember that the case arose out of a building contract, in which the defendant accused the respondent of fraud.

Decree granted as prayed, to be suspended pending payment of £1 a month, the first payment to be made on the 2nd June, right being reserved to the plaintiff to apply again on proof that the defendant had means.

ROSENBLATT AND OTHERS V. JACKSON.

Mr. Russell moved for provisional sentence on a mortgage bond for £2,700 dated 24th February, 1902, with interest at 6 per cent. from the 1st January, 1903, and costs, and also asked that the property specially hypothecated be declared executable.

Mr. Searle, K.C., for the defendant, read his client's affidavit, which was to the effect that he had purchased from the plaintiffs a certain piece of ground, with the buildings thereon, for £17,000 sterling. The arrangement was that he

should pay plaintiffs a deposit of £1,000, and instalments of £500 per month for three months, until the sum of £2,500 had been paid, and then they would find a mortgage bond for £14,500. This the plaintiffs failed to do, and they raised the money in four bonds instead of one. The defendant was now in negotiation for the sale of the property, and he expected to complete the sale shortly, when he would be in a position to pay the £2,000. He was willing to deposit £50 in order to obtain an extension of time until the end of June.

Mr. Russell said he was authorised to accept stay of execution, provided plaintiffs were given judgment, and the £50 were immediately paid.

Provisional sentence was granted, execution to be stayed until the 30th June, provided that the defendant forthwith deposit with the plaintiffs the sum of £50.

THERON AND CO. V. LE SUEUR.

Mr. C. W. de Villiers moved for a decree of civil imprisonment on an unsatisfied judgment, and stated that the defendant had tendered to plaintiffs £5 a month, and plaintiffs were willing to consent to stay of execution provided that the £5 a month were paid, the first payment to be made on the 15th June.

Order granted in terms of application.

ILLIQUID ROLL.

S.A. BREWERIES, LTD. V. BLOMSON. { 1903. May 30th.

Mr. J. E. R. de Villiers said that this was an application, under Rule 329d, for a certain sum of money, for goods sold and delivered, but he was now instructed that the sum had been paid, and he merely asked for costs.

Order granted in terms of application.

BRODIE V. BRODIE.

Mr. Upington moved for judgment, under Rule 329d, for the amount of certain promissory notes, which plaintiff had signed as surety for the defendant, and which he was compelled to pay up, the amount being £310 9s. 11d.

Order granted as prayed.

LIBERMAN AND ANOTHER V. HOOLE AND CO.

Mr. Benjamin moved for judgment for costs in this matter, under Rule 329d, for the sum of £22 10s., in respect of which an action had been instituted for goods sold and delivered. Counsel now applied for judgment for costs.

Order granted in terms of application.

GEISSLER V. MORRIS.

Mr. Gardiner moved for judgment, under Rule 319, in default of plea. The matter arose out of the sale of certain land at Wynberg for £1,300, the conditions of sale being that £100 should be paid on the 1st April, £100 by promissory note, and the balance on or before the 31st June. The first instalment had not been paid, and counsel asked for judgment for £100, with interest *a tempore morae* and costs of suit.

Order granted as prayed.

PFEIFFER V. CARRE.

Mr. Upington, for the defendant, applied for removal of bar, and for leave to file his plea.

Mr. M. de Villiers, for the plaintiff, said he applied for judgment, under Rule 319, and he must strongly oppose the present application. Ample time had been given to the defendant to file his plea. The declaration was filed on the 14th May, the plea was due on the 21st, and notice calling upon him to file his plea was not given till the 26th. No notice was taken, however, and on the 28th defendant was barred. Defendant, in his affidavit, blamed his attorney for telling him that the case would not be tried until August, and thus leading him to believe that there was no urgency as to filing the plea. He also said that the transactions entered into by the plaintiff on his behalf were of a speculative and gambling nature. They were only so in the sense that all transactions in shares were of a speculative nature. The plaintiff simply acted as broker on the defendant's behalf, and on this account there appeared to be due £1,400 3s. 4d., which the defendant neglected to pay.

Mr. Upington read the defendant's affidavit, which stated that the plaintiff induced him to go into certain share transactions of a speculative and gambling nature. The plaintiff purchased stock in

his (defendant's) name, and sold it in most instances at his own discretion, and without any reference to deponent. Deponent further said that the delay in filing his plea had been caused by an attack of influenza, and his attorneys also told him that the case would not be tried until August.

De Villiers, C.J., said he thought the attorney should make an affidavit in support of these statements, but

Mr. Upington informed their lordships that the attorney who had charge of the case was out of town at present.

De Villiers, C.J.: Very well, the case may be mentioned on June 2nd. In the meantime, the letters will be verified by affidavit.

GENERAL MOTIONS.

ALBRECHT v. ALBRECHT. { 1903. May 30th.

Mr. Gardiner stated that this was the return day of an order granted in this Court, calling upon the respondent to restore to plaintiff conjugal rights, and, failing compliance, to show cause why the bonds of marriage should not be dissolved, with forfeiture of benefits of community and custody of the child of the marriage. The affidavit of plaintiff stated that the defendant had not obeyed the order to restore conjugal rights.

The Court granted a decree of divorce in terms of the prayer.

NAIERMAN v. NEWMAN.

Mr. Buchanan moved for the rule *nisi* restraining the respondent from removing certain bricks and other articles from a farm in the district of Somerset West to be made absolute. Mr. Gardiner appeared for the respondent.

The affidavit of Louis Lyons stated that he was the agent of the plaintiff, who was at present out of the Colony, and that he held his general power of attorny. Plaintiff was the registered owner of a piece of land at Eerste River, on which there were a large quantity of bricks, certain household furniture, and farm implements. Israel Newman (plaintiff's brother-in-law) was at present living on the farm, and he had removed certain goods and intended to sell the other goods, asserting that the said Naierman was indebted to him in a certain sum of money. There were certain other people who had claims against Naierman.

The affidavit of the defendant, Israel Newman, admitted having removed certain goods and intending to remove others, but said that on the 6th April he bought for £200 all the movable property on the said farm. He annexed a receipt given to him by the plaintiff. On the 10th April he informed Lyons of this.

The replying affidavit of Lyons denied that Newman had informed him of the said purchase. Lyons further asked to be joined in the present application with the plaintiff. He said that he purchased 25,000 bricks for £60 from plaintiff, and it was agreed that the said bricks should remain on the farm. Naierman gave him a receipt. On the 20th February last he advanced £107 10s. to Naierman in consideration of which he was to deliver to Mr. A. Wilmot, to deponent's account, 50,000 well-burnt bricks. The said Newman was fully aware of the sale of the aforesaid bricks to him. Defendant had received a letter from Naierman, vesting him with his general power of attorney and adding that he had gone to England in response to a cable from Sir Samuel Montague. Naierman added: "As you know, I am not working for my own, but for the benefit of all the Jews."

Counsel having been heard in argument on the facts,

De Villiers, C.J.: Lyons, acting on behalf of the applicant, did not bring to the notice of the judge all the facts necessary to enable him to arrive at a correct conclusion, but I am satisfied that there was no intentional concealment on his part, for if there had been, I should certainly have been in favour of discharging the rule altogether. Lyons was not aware at the time that the respondent held a receipt from Naierman himself, by which this alleged sale took place, Lyons in his individual capacity had already purchased certain bricks from Naierman, and, according to Lyons, Newman was aware of that fact. Under all the circumstances, the Court is of opinion that the rule should be made absolute, but only in regard to the bricks, which respondent must be interdicted from removing, with leave, however, to the respondent to apply for the discharge of the interdict, the question of costs to

stand over. The parties I hope will now come to terms, and if they do not come to terms it might perhaps be the best course for Lyons to have the estate sequestrated, and in that way have the rights of all the creditors determined.

MCKAY AND ANOTHER V. MCKAY. 1903. May 30th.

Partnership — Dissolution — Misconduct of partners—Direction by will to carry on business.

A testator by his will directed his shop business to be carried on after his death, and bequeathed it to the two applicants and the respondent on certain conditions, which indicated a desire on the testator's part that the business should not be discontinued without the consent of all the partners. The legatees accepted the bequest and carried on the business in partnership, but after about eighteen months the applicants became dissatisfied with the respondent's conduct in occasionally absenting himself during business hours, and they offered to purchase his share if he would retire from the firm On his refusal they applied, by motion, for a decree of dissolution and the appointment of a receiver.

Held, *that in the absence of any evidence of such misconduct as would render the continuance of the partnership practically impossible, the Court should not interfere with the directions contained in the will by decreeing a dissolution against the wish of one of the partners.*

This was an application on notice of motion for an order to dissolve the partnership existing between the plaintiffs, Eliza Ellen McKay and John Peter Bischoff, and the respondent, Clarence Albert McKay, carrying on business as music dealers in Church-street, Cape Town, and to appoint Mr. E. R. Syfret as liquidator. Mr. Close appeared for the respondent.

The affidavit of Eliza Ellen McKay stated that she was the widow of the late J. T. McKay. who died in March, 1901, and respondent was her son. Her husband formerly carried on business in Church-street, and under his will he directed that the aforesaid business should be disposed of as to one-half to his widow, and as to the other a quarter each to his son and Bischoff, on condition that the said business should remain under the control of his widow and Bischoff. The said Bischoff, respondent, and deponent had since the 18th March, 1901, carried on the business under the terms of the will. From the commencement of the partnership the respondent had taken no interest in the business. His attendance at the office had been most irregular. Although requested by Bischoff and deponent to take more interest in the business, he had failed to do so. Not only that, but he had been assisting in conducting concerts in opposition to those arranged by the firm. He had done various acts which had alienated custom from the firm. He continued to disregard the lawful orders of Bischoff and herself. There had been negotiations, but no terms of dissolution could be arranged. Deponent was very desirous that the partnership should be dissolved.

The affidavit of J. P. Bischoff corroborated the foregoing statements. Deponent added that respondent when spoken to had treated him in an abusive manner. Respondent had refused an offer to purchase his interest in the business.

The affidavit of applicants' attorney described the unsuccessful attempts to secure a friendly dissolution.

The affidavit of Clarence Albert McKay denied the allegations that he had not taken a proper interest in the business. He declared that his attendance had been regular, and contradicted the statement that he had acted prejudicially to the business. As to the concerts, it had not been the practice of the firm to promote concerts since his father's death until this season, when his mother had decided to organise concerts. He had agreed to take part in

other concerts, but only as a performer, and that would in no way affect the business of the partnership firm. As to Bischoff, he had a dispute with Bischoff about his hours some time ago. The said Bischoff was a young man of about thirty years. He wanted to get deponent out of the business, and he replied that Bischoff would not get him out of the business as long as he lived. Deponent was twenty-one years of age. He considered the offer made to him insufficient. He desired to continue as a member of the firm, and prayed this honourable Court to adjudge that the said Bischoff be no longer a member of the firm.

The replying affidavits of the applicants repeated the charges of neglect of business on the part of the respondent.

Mr. Gardiner for applicants; Mr. Close for respondent.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: The late J. T. McKay by his will directed that his shop business should be disposed of as follows: one half share to his wife, one quarter share to Bischoff, one quarter share to his son, the respondent, the whole control and business remaining with his wife and Bischoff, who are the present applicants. The will next proceeds to direct that neither Bischoff nor the son shall dispose of his share of the business to any one, "nor shall they be entitled to any amount from their co-partners in the event of their wishing to discontinue as a partner, the share held by such partner shall devolve upon my said wife." The will contains other indications of the testator's desire that the business shall not be discontinued without the consent of all the partners. It is common cause that the applicants and respondent accepted the bequest on the death of the testator in 1901, and by their acceptance became partners in the business formerly carried on by the testator. The partnership thus entered into was not one which could be terminated at the will of any of the partners. Unless, therefore, all the partners have agreed to a dissolution, or unless circumstances have arisen which render a continuance of the partnership impossible, it is not competent for two of the partners to claim a dissolution. The applicants by motion ask for a decree for a dissolution of the partnership and for the appointment of a receiver to liquidate the partnership. Before making the application they offered the respondent the sum of £1,000 to retire from the partnership and accept that amount as his share of the assets. It is clear from the evidence that their object in asking for a dissolution of the partnership is to get rid of the respondent and to carry on the business without him. I quite agree that if the respondent had been guilty of misconduct which would make the continuance of the partnership practically impossible it would be the duty of this Court to come to the assistance of the applicants, and grant the decree asked for. But what is the conduct complained of? He has occasionally absented himself from business, and on Saturdays he has gone to his lunch earlier than the applicants considered for the advantage of the business. If there are other serious acts of misconduct the applicants have failed to enumerate them. I am not prepared, therefore, on motion, to grant the order asked for, and the applicants must be refused with costs.

ORPEN V. CELLIERS.

This was an application on motion calling on respondent to show cause why a certain supplementary petition, filed on behalf of Robert George Hadley, should not be withdrawn, and why an order should not be made authorising access to the rejected ballot papers in the recent election at Prieska. Mr. Upington appeared for the plaintiff, and Mr. Burton was for the respondent.

Mr. Burton read the affidavit of Paul de Villiers, respondent's attorney, who craved a postponement, as he had not been allowed sufficient time to receive instructions from his client. Mr. Burton added that the present petition went further than the one of Robert George Hadley, and asked, not only that the respondent should be ousted from the seat, but that the seat should be awarded to the petitioner.

Mr. Upington urged that the petition should be taken on Tuesday.

De Villiers, C.J.: It will have to come on with the motions when they are heard in the ordinary course. All the motions will be heard some time next week; we will fix a date, but we cannot fix a date now.

Ex parte PRETORIUS.

This was an application for an order confirming the sale of certain property in the district of Middelburg.

The petition of Maartin J. L. Pretorius shewed:

1. That your petitioner and one Stephanus J. van der Walt signed a certain petition on or about May 4th, 1903: the former in his individual capacity, as well as in that of executor testamentary to the estate of his late wife Martha J. L. Pretorius (born van der Walt), and the latter in his capacity as executor testamentary to the estate of his late wife Maria J. van der Walt (born Pretorius) and as guardian of his minor children: and your petitioner is informed that the same has already been forwarded by post to Cape Town.

2. That since the signing of the said petition your petitioner has considered it advisable to make an amendment to Section C. of the prayer of the said petition (hereinafter called the original petition), and by way of this supplementary or additional petition to ask your Lordships also for an order whereby your petitioner may receive the balance of the purchase price referred to in Section 8 of the original petition, with the consent of the said Stephanus J. van der Walt and of all the other major children and major grandchildren interested in the said balance of purchase price under the codicil referred to in section 2 of the original petition, it not being the intention of your petitioner and of the said majors so far as your petitioner is aware, that the said balance of purchase price should be paid over to a trust company or other responsible person, either during your petitioner's lifetime or temporarily, as your petitioner and the said majors, so far as your petitioner is aware, wish to save the expense and usual commission connected with such administration, and are desirous of arranging the administration of the said balance of purchase price among themselves and your petitioner.

3. That your petitioner has already obtained the consent of some of the said majors, and anticipates no difficulty in obtaining the consent of the others as soon as he has an opportunity of communicating with them personally, as they are not all resident in the same district with your petitioner.

4. Your petitioner has respectfully to submit that the rights of the children and grandchildren interested under the aforesaid codicil vested at the death of the testatrix, the above-mentioned Martha J. L. Pretorius, so that with the consent referred to in section 2 of this petition your petitioner may receive the said balance of purchase price.

5. That your petitioner is desirous that section 8 of the original petition be taken as amended in terms of this petition and that the costs of petition be also paid out of the said purchase price.

Wherefore your petitioner prays that your Lordships may be pleased to also grant an order:

(*a*) Authorising your petitioner to receive the said balance of purchase price on your petitioner filing with the registrar of your honourable Court the consent of the said Stephanus J. van der Walt and of all other aforesaid majors.

(*b*) Authorising the costs of petition to be paid out of the said purchase price.

The usual verifying affidavit was annexed.

The Master's report was as follows:

It appears that it would be for the benefit of the minors concerned if the sale be confirmed by this Honourable Court.

The balance of the purchase price, after payment on the mortgage bond, which includes the minors' portions, should, I think be paid to one of the Trust Companies on the best terms obtainable, reserving the right to petitioner to draw the interest for life.

The minors would not be entitled to draw their money at majority, and it should not, therefore, be paid into the Guardians' Fund.

On the motion of Mr. Upington, an order was granted in terms of the Master's report.

SUSVEILA V. GARDINER AND EASTON.

Mr. Benjamin moved for a commission to take the evidence of the plaintiff, who was about to proceed to Brazil.

Application granted, Mr. J. E. R. de Villiers being appointed to act as commissioner.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

ROBERTSON v. MOSS. { 1903. June 2nd.

Partnership — Dissolution—Referee.

The defendant being the owner of a licensed victualler's business agreed with the plaintiff to admit him as a partner on payment of £1,000. The plaintiff borrowed the money with the assistance of the defendant, who became surety for the repayment of the loan. The money thus borrowed was paid to the defendant, and thereupon a bank account was opened in the name of the partners, notice of the partnership was published in the newspapers and sent to the customers, and the plaintiff took an active part for three months in the business of the firm. He failed, however, to repay the loan, and the defendant was obliged, as surety, to pay it. The defendant thereupon repudiated the existence of any partnership, and the plaintiff brought an action for the dissolution of the partnership and the appointment of a receiver to liquidate the concern.

Held, *that as a partnership had in fact been created, the circumstance that the defendant had to pay the £1,000 as surety did not entitle him to repudiate the existence of co-partnership, and that the plaintiff was entitled to his share of the assets, including the goodwill, after deducting from such share the sum of £1,000, but that as the business belonged to the defendant at the time of the plaintiff's admission, the defendant should retain the business with the goodwill on payment to the plaintiff of his share.*

No written agreement of the partnership had been signed, but a document was produced at the trial which had been prepared by the solicitor of the parties on their instructions for their signature. By this document the defendant purported to cede the whole business to the plaintiff, who admitted, however, that it was understood that the defendant should retain a half interest in the business.

Held, *that as a partnership can be constituted without any writing, the existence of a colourable document such as that agreed upon did not prevent the creation of the partnership if the facts showed what the real nature of the transaction was.*

This was an action instituted by Mr. Frederick Robertson, ex-licensed victualler, Cape Town, against Alfred Moss, proprietor of the Cafe Royal, Cape Town, for dissolution of partnership between plaintiff and defendant, and the appointment of a receiver, for £10,000, or such other sum, as the Court might adjudge to be his share of the partnership, and for costs of suit.

The declaration set out that in May, 1902, the defendant, in conjunction with one Raymond Savage, was charged with a criminal assault upon one Captain Brandon Kirby, and was committed for trial. Certain negotiations took place between defendant and plaintiff in view of the danger that the defendant's licence and lease were placed in in the event of conviction. The licence would have been cancelled had the defendant been convicted of the charge preferred

against him, and sentence of imprisonment had been passed without option of fine Thereupon the defendant requested the plaintiff, who was carrying on business at the National Hotel, Caledon, to go into co-partnership with him at the Cafe Royal, to give the defendant one moiety in the Caledon interest, and requested the plaintiff to sell the Caledon business immediately, and take over the business of the said defendant, and go into partnership with him. To this plaintiff agreed. An agreement was entered into between the parties whereby the defendant agreed, in consideration of the payment of £1,000, to transfer the business to the plaintiff. A secret trust agreement was entered into between the plaintiff and defendant by which the plaintiff was to hold half-share in trust for the defendant until the result of the trial was ascertained. Thereupon the plaintiff assumed charge of the business as joint proprietor, and the partnership was advertised in various papers, and notice was given to the merchants to send their accounts to Moss and Robertson. Defendant was in due course found guilty of common assault and sentenced to imprisonment for four months, or, in the alternative, to a fine. On his return from the trial at Paarl the defendant denied that he entered into partnership with the said plaintiff, and refused to recognise his just and lawful claims.

In his plea defendant admitted the formal paragraphs, and said he was charged with the assault, but denied that he committed it. He admitted that he was convicted of common assault. He said that in order to increase his business he entered into negotiations with plaintiff, and it was agreed between them that plaintiff should pay him £1,000 in cash and £1,800 within three weeks; the plaintiff was further to pay a sum equal to defendant's outstanding liabilities, and also value of half the stock. The plaintiff borrowed a sum of £1,000 from the Van Rhyn Co., for which the defendant became surety, and for which he was to be re-paid on the sale of the National Hotel. The National Hotel was sold, and realised so much less than anticipated by the plaintiff that he was absolutely unable to carry out his said contract, and thereupon the defendant became entitled to and did cancel the said partnership. As to the draft and trust agreements, he admitted that such agreements were submitted to him, and that he refused to sign them. He said he had not signed the secret agreement, though he could not actually say whether that was the secret agreement. In regard to this trust agreement, one Robert Greening, his attorney in the defence, advised him to execute this to defend himself. Defendant acknowledged all advertising as to the partnership, but said this was before the plaintiff neglected to carry out his contract, and before the said agreement became cancelled.

The plaintiff, in replication, excepted to paragraphs 6 of the plea, but counsel did not press the exception. The replication proceeded to set forth that the defendant was convicted of this assault, and that with regard to the sum of £1,800, referred to in the plea, this sum was not to be paid within any specified time, but he said it was to be paid out of the proceeds of the partnership. In regard to the surety undertaken, as to the repayment to the Van Rhyn Co. of £1,000 borrowed from them, the defendant voluntarily agreed to take upon himself the responsibility of surety, being moved thereto by fear of losing the Cafe Royal licence, and one-half of the proceeds of the business being preserved to him.

Mr. Burton (with him Mr. Rowson) for the plaintiff; Sir H. Juta (with him Mr. Alexander) for the defendant.

The plaintiff, Wm. Frederick Robertson, said he was at present out of business. He had been laid up with illness during the past five months. He was a licensed victualler, and had carried on business in London, Australia, and Cape Town. He had known the defendant as a waiter at a restaurant and a barman at St. George's Hotel. In July last he received a wire from Moss asking him to come down to Cape Town for business concerning the Cafe Royal. He was proprietor of the National Hotel, Caledon, at that time. Moss came to see him at Caledon on or about the 8th or 9th July, and told him that he was in trouble, that he had been arrested, and let out on £2,000 bail. He had also been two days in Roeland-street Gaol. Since this trouble his business had fallen off considerably, his credit had practically been stopped, and he wanted witness to go to Cape Town and help him, and to take over the business. Witness came down to Cape Town on or about the 12th or 13th of the same month. Defendant said that he would see Mr. Hall, husband of the

lady with whom Moss had an agreement to take the hotel, and ascertain if everything could be transferred to witness. Mr. Hall, however, kept putting him off, saying that he wanted to be settled up in full for what was owing to Mrs. Hall before he consented to a transfer. They tried to raise money from various merchants and the South African Brewery to the amount of about £3,700, to the best of his knowledge. The arrangement was that Moss should transfer everything to witness. When witness pointed out to Moss that he had only just taken over the National, and that it would mean his neglecting that business, Moss said: "Oh, sacrifice the place at any price, and come to Cape Town as soon as possible." Witness had only opened the hotel at Caledon on the 24th June. When he came to Cape Town he took full charge of the business. The place was in a terrible state, doing practically no business, and witness pulled up the trade from £18 a day to about an average of £75 a day. Witness was well known as a licensed victualler in Cape Town, and he had a large following. Some time after witness had come down from Caledon and taken charge of the business, Moss received a letter from Captain Kirby's solicitors threatening him with a suit for £2,000 or £4,000—he had forgotten which—as Captain Kirby's eyes had been affected. Then Moss came to the conclusion that it would be best for him to transfer everything to witness, and it was arranged that he should pay to the defendant £1 000 and discharge all liabilities. They met Mr. Greening, Mr. Moss's solicitor, and then Mr. Greening left them together to arrange things between themselves. They finally agreed that witness should pay to the defendant £1.000 under a secret trust. Witness produced copy of the final agreement, but said that it was not signed, the reason being that they were trying to raise the money to pay off Mrs. Hall to get the hotel in their own hands, so that it might be sublet. Witness borrowed the money from the Van Rhyn Company, and the defendant stood surety for repayment. Witness did not ask him to do so, but Moss wanted money at the time, as there was a bill due to Mr. Mulvihal for mineral waters. Witness agreed to pay off at the rate of £50 a month as much as might remain to be paid after the proceeds of the sale of the National Hotel had been utilised for this purpose. The National was sold, and it realised £1,300. Witness lost £2,000 in connection with the National Hotel, owing to the neglect of business through his coming down to Cape Town. Moss's trial took place on the 15th October, and the day after he came back to Cape Town, and the business went on as before. Moss did not complain about his having repaid the £1,000 to the Van Rhyn Co., but some month or so later he one day asked witness to go to Silberbauer, Wahl and Fuller's office, where they saw Mr. Fuller, who spoke about the money. After that witness was laid up for about four months with an ulcerated leg. The partnership had never been denied until they went to Silberbauer, Wahl and Fuller's office. As to the business, when he was there he considered the profits worth £400 a month, but he did not consider that the defendant was even taking £400 a month at the present time. They were taking between £65 and £70 a day on an average right through the month. He did not believe the business was now taking £30 a day. When they were in partnership, they arranged with a Mr. Day to act as bookkeeper, but Mr. Day could not get access to the only room that was available for the purpose. They could only enter the room occasionally.

Cross-examined by Sir H. Juta: The partnership was entered into on the 12th July. He was to give £2,800, to be paid out of the business he had at Caledon. He had paid £1,000, which he borrowed from Van Rhyn's, on Moss's suretyship. He denied that Van Rhyn demanded the money in December. Moss was paying off the money. He had paid to the partnership exactly what he was brought down to pay. There was a secret deed of partnership drawn up between them. There was a partnership arranged between them in September. He was to pay £1,000, and he was to take over the hotel, and all the debts and liabilities. There was £3,300 due to Mrs. Hall, and there was a supporting account of £1.000. The latter was in September. There were other liabilities. Witness thought the total would be about £5.000. He had not paid anything off the liabilities, but they would have been paid off. The firm of Moss and Robertson had

met part of the liabilities. Out of his own moneys he paid what he was liable to as his share of the profits. He considered that he gave a big consideration to the business, especially if Moss had been sent to the Breakwater for two years. The licence was not transferred to him. According to the agreement with Mrs. Hall, the licence could not be transferred without her consent until all that was owing to her had been paid up. He did not know that she would not give her consent until the money had been paid. Mr. Moss told him that. He did not ask Mrs. Hall about the matter. Mr. Hall told witness that he would prefer to see him in the place rather than Mr. Moss. He made a mistake in not approaching Mrs. Hall on the subject. He could have raised the money to pay Mrs. Hall, and had a promise of it from the South African Brewery. There was a secret trust, under which they were to be partners. This was arranged between Moss and his solicitor, Mr. Greening. After the sale of the hotel, Moss never asked witness when he was going to pay. Witness had to use all his money from the sale of the Caledon Hotel to pay his debts. After he had sold the National, and had paid certain of his debts, he still owed a lot. Writs had been out against him for a considerable time. The people he left in the hotel at Caledon ran him into serious debt. Had witness not left his Caledon business to come to Cape Town, it would have become a flourishing business. He could have made a good business of it if he had remained. It was not a fact that witness had to sell the National for less than he expected, and that he therefore was not in a position to carry out the agreement with Moss.

Re-examined: The hotel at Caledon had since become a very flourishing concern. Mr. Greening was not now witness's attorney.

By the Court: Creditors were notified by Mr. Moss that witness had become a partner.

Robert Greening, attorney, said that in 1902 he acted as defendant's attorney. Witness acted for him in connection with the criminal charge, and with the agreement between plaintiff and defendants. Moss had been committed for trial, and there was the risk that he might be convicted. Witness therefore advised him to get into communication with some friend or licensed victualler with an idea of entering into a partnership, so that in the event of anything unfortunate happening, his friend or partner could keep the business going, and look after his interests. Moss agreed, and as a result, Robertson was sent for. The parties had many interviews. The first agreement come to was that Moss should have half the National, and Robertson half the Cafe Royal. This was in the beginning of July. The idea of this arrangement was that if Moss were not convicted of the charge, or was convicted of common assault, he would not like to be about Cape Town for a time, and could look after the Caledon business. Witness prepared several agreements, and then Moss began to think he was giving Robertson too good a bargain. The parties discussed matters between them without reference to witness, and they agreed to leave out the Caledon business, and that Robertson should pay £1,000 for a half-share in the Cafe Royal. It was also agreed that if anything happened to Moss, Robertson should remain in possession of the Cape Town property, and go to Moss for half the profits. Both parties were present when witness drew the agreement, which was practically dictated by the parties. Witness gave Moss all the copies of this agreement.

Sir Henry Juta: You are still the attorney for the plaintiff?

Witness: No, I am not.

Are you sure you have no interest in this case as attorney?—Absolutely none; nor in any other way.

Who is supposed to be acting as attorney for the plaintiff?—Mr. Coulton is acting.

You issued the summons?—Yes.

And a certain little black list came in the way, which prevents you going on?—There is a black list in the way.

I notice that in December, when you were writing on behalf of Mr. Robertson, Mr. Brady was also writing on his behalf?—I hear of it to-day. I was not aware of it at the time.

What do you say was the agreement of the 5th September?—The agreement was that Robertson should take over the whole hotel, pay the debts, and pay Moss £1,000.

Where was the partnership agreement?—That was another agreement.

Where is that?—I gave it to Mr. Moss. Witness added that Robertson had told him that Mrs. Hall was quite ready to take him in place of Moss, and, indeed, would prefer to do so. Moss kept on promising to sign the agreement before his trial.

Wm. George Ross said that last year he was in the employ of Messrs. H. A. Bam and Co., who did business with Mr. Moss. The latter informed witness that after the 13th September the firm of Moss and Robertson would pay accounts. On the 28th October, the cheque for supplies subsequent to the 13th September was signed by Moss and Robertson

Henry Arnold Bam, wine merchant, said that in about June or July last year, Moss asked him his opinion as to taking Robertson into partnership. Witness told him that Robertson was the very best man he could get.

Herbert Wm. Day, accountant, said he was instructed by Mr. Moss and Mr. Robertson, in September last, to open a set of books for Moss and Robertson. Witness understood that after the 13th September all debts would be paid by Moss and Robertson. Witness kept the books for about a month, after which there was a dispute between the two (Moss and Robertson), and Moss refused witness access to the books. Plaintiff for some time managed the business.

Cross-examined by Sir Henry Juta: Witness opened the books by writing the different headings. He did not think he made any further entries, as he did not have particulars. Witness drew up statements to ascertain assets and liabilities, and to take the stock.

By De Villiers, C.J.: In the statements, he went into details as far as possible. He noticed that there was an item of £1,000 to the credit of Mr. Moss. This was put down to capital account.

Cross-examined by Sir H. Juta: He began to make up some statements, but they were never completed. He arrived at most of the debts.

Wm. Otis Bullock, accountant in the National Bank, said he knew the parties to the suit. He produced the partnership form for opening partnership account, bearing the private signatures of the plaintiff and defendant, under the style of Moss and Robertson. The form was dated the 17th September, 1902. An account was opened, and it was operated upon. He could not produce any cheques of Moss and Robertson. A certificate had been given showing that the cheques had been given up, and it was signed by Moss. He could not say definitely whether the plaintiff operated on the partnership account.

Cross-examined by Sir H. Juta: There was no balance in December. The last cheque closed the balance, and was drawn by Mr. Moss.

De Villiers, C.J., said the last cheque was on the 27th November.

Mr. Burton closed his case.

George Alfred Moss, the defendant, said that in August he extended the business at the Cafe Royal, and he entered into negotiations with Mr. Robertson. The first idea was to increase from one bar to two bars, and to open a restaurant, and he proposed to take a partner in, in order to manage the whole business. The idea was that they should look, one after the victualling, and the other after the catering, or jointly. They had negotiations and the arrangement that they came to was the plaintiff should pay £1,000 cash down, and on the sale of the hotel at Caledon, witness was to receive a further £1,800, making £2,800 in all. Plaintiff was to take over the liabilities, pay witness cash for half the stock at valuation, and the debts of the firm were to be met jointly. This was some time in July. It was proposed at one time they should run both the Cafe Royal and the National, and change them alternately Mr. Robertson said he could not keep on the National Hotel, because he was so heavily in debt, and the place was not paying. Clearly, the plaintiff did not keep on the National Hotel. The plaintiff negotiated for the sale of the National Hotel. Witness stood surety for £1,000 to the Van Rhyn Co. for the money advanced to the plaintiff. The £1,800 was not paid after the sale of the National Hotel, plaintiff saying that he was in an awful muddle. Witness afterwards repaid the £1,000 to the Van Ryn Co., on receiving a demand from them. He asked plaintiff for the money, and ultimately he asked plaintiff to go over with him to see Mr. Fuller. Witness then ended the partnership. On the 6th December, he sent out a notification

to the effect that, owing to Mr. Robertson not having fulfilled certain obligations to him, that he (witness) was alone responsible, and he held himself responsible for the whole of the liabilities of the Cafe Royal. Robertson did not put a penny piece into the business. When he spoke to the plaintiff about the partnership, the latter said: "I don't want to be thrown out like a dog; I have got a wife and two children to keep." Witness replied that he did not want to do any such thing, and he referred witness to Mr. Fuller. As to the alleged secret agreement, he put his signature to none of the documents submitted to him by Mr. Greening. Mr. Greening, he found, was acting as attorney for both himself and Mr. Robertson. He told Mr. Greening that he need not act for him any longer. Under the agreement that he had with Mrs. Hall, he could not have transferred the licence. He spoke to Mrs. Hall, and he afterwards reported to Mr. Roertson that she would do nothing whatever in the matter until her money had been paid, viz., £3,300

By De Villiers, C. J.: There was no ground whatever for saying that he proposed to enter into partnership on account of the charge that was pending against him. He could have raised any money that he required from the merchants.

As long as he paid off Mrs. Hall, he could have done what he pleased. He refused to sign the document. He knew of no secret document, as alleged in the declaration. He had not got this document. Several papers were submitted to him for signature, but they were not signed.

Sir Henry Juta said the defence had been wanting this document, and the answer they had received was that it was in the possession of Mr. Brady. It was only at the last minute that the other side turned round and said the defendant had it.

In further examination, witness said he refused to sign any document of partnership until he had received the money from Robertson. In view of the arrangements, witness had held out Robertson as a partner. Witness opened an account in their joint names, and he had complained in correspondence that cheques had been drawn by Mr. Robertson which were not in connection with the business. Correspondence took place with regard to these. Robertson drew no money for himself with witness's knowledge. In connection with the statement that the business was a bad one when Robertson came in, the witness said that he had been doing good business ever since he opened the Cafe Royal. He had been doing very well since Robertson ceased to have anything to do with the business. Last month his takings were £870 odd, and the previous month's takings amounted to over £929. After witness's trial at the Paarl, witness came back; he did not get rid of Robertson until the 16th December. It was on the notice issued to him by the Van Rhyn Co. that witness first took steps in connection with Robertson.

Cross-examined by Mr. Burton: Witness's pending trial had nothing to do with the arrangement. The trouble did not affect his business; it did not affect his credit in the least. No merchants in Cape Town pressed him for money then. Witness did not remember speaking to Mr. Bam in regard to getting a partner in consequence of his trouble. Witness's only consideration in getting a partner was to increase the business. Witness took Robertson to Greening in connection with the negotiations for a partnership. Witness instructed Greening to make a proposition. There was never an agreement that Robertson should take over the whole business. The agreement was that Robertson should come into partnership after Robertson had paid his share. Before he paid, witness thought he would fulfil his promise. Witness knew Robertson could not pay until the Caledon Hotel was paid. Witness asked Robertson to get a loan, and the Van Ryn Co. advanced the money on witness's security. Witness had repaid the whole amount to the Van Ryn Company. Witness employed Mr. Fuller as his solicitor in December. Robertson wanted to sell the Caledon Hotel because it was not paying. Witness had personally made an offer of remuneration to Robertson for his services in connection with the business. Mrs. Hall refused her consent unless she were paid her money. The takings during the time Robertson was there compared favourably with the present takings. The times were better

then, as the soldiers were coming down from the front.

In reply to the Court, witness said that when the summons was served on the 10th December, the liabilities were between £5,000 and £6,000, and the assets, excluding goodwill, were about £900 or £1,000. Witness paid £6,000 for the goodwill.

George Scott Pargiter, manager of the Van Ryn Co., said £1,000 was lent to Robertson. When witness heard the National was sold, he went to Robertson for the money, and the latter said he could not pay. Witness then went to Moss. It was a distinct understanding that Robertson should pay when the National was sold. The £1,000 had been repaid.

Henry C. Fuller, attorney, said he acted for Mr. Moss towards the end of last year. At one time both Mr. Brady and Mr. Greening claimed to act for Moss. Witness asked Mr. Robertson if he was in a position to lay down any of the money. Robertson said he could not, and witness observed that he supposed everything was at an end between him and Moss. Witness told him Mr. Moss would be prepared to give him remuneration for his services. He asked Robertson to call on him with his attorney. Robertson seemed to acquiesce in the view that everything was at an end. He did not take up the position that he had paid the money.

Robertson was recalled, at the direction of the Court, and said that he considered the value of the goodwill was £16,000 at the time he left the place.

De Villiers, C.J.: £16,000! Well, you got it a very cheap share at £1,000.

Witness: I worked up the value. The place was not worth £4,000 before.

Defendant (recalled) said the books showing the receipts from July to the end of the year were not in Court. This was the time at which Mr. Day was supposed to make up the books.

De Villiers, C.J.: Where are the books from which the takings are to be made up? You were told before the Court adjourned that every book was to be here. Now send for every book.

Mr. Burton (for plaintiff): This was clearly a partnership. Moss (whatever his motives may have been) advised his creditors that he had taken Robertson into partnership, he had Robertson advertised as a partner on his menu cards, and a banking account was opened in the joint names of Robertson and Moss. The evidence shows that at the solicitation of Moss, plaintiff gave up a business at Caledon, which, with some little cultivation, would have proved very lucrative; and for what? He was not a salaried servant of Moss; there is no evidence that Moss ever paid him anything. He gave his services. He worked up the business, and if he did not actually pay cash, he, at all events, made himself liable to the extent of £1,000. I submit that the partnership is clearly established, and that the evidence shows that the plainiff has given ample consideration for his interest in this partnership.

Sir H. Juta (for defendant): This is a most extraordinary case. Here we have a man who claims to become a partner in a business, the goodwill of which was worth over £6,000 without putting one single penny into the business. He says he gave up his hotel at Caledon to join the defendant, and that he worked up the business. But the Caledon Hotel seems to have been a losing concern, and it would not appear that plaintiff's efforts materially improved Moss's business, or that the business declined when the plaintiff no longer gave his attention to it. I submit that there is no evidence of a partnership; the defendant refused to sign the deed of partnership which had been drawn up for his signature, and no consideration whatever was given for the alleged partnership in this valuable interest.

Mr. Burton (in reply): No written document is (in our law) required to constitute a contract, whether of partnership or of any other kind. We do not rely upon the document drawn up by Greening (since it was never executed), but upon the verbal assent given to its terms by both parties, and on the fact that the defendant held out the plaintiff as a partner. As to the question of consideration, it has not been denied that plaintiff rendered certain services to the defendant and to his business, for which plaintiff received no direct payment. That he gave up his business at Caledon at defendant's request, in order to assist defendant in his business, and that he, at all events, incurred liabilities to the amount of £1,000 in the interests of this business.

De Villiers, C. J.: The pleadings in this case are certainly open to criticism,

but substantially I think that there is no difficulty in arriving at a conclusion as to what the plaintiff's declaration is founded upon. It is founded upon a partnership, and, in order to declare on the partnership, it is not necessary to state all the facts upon which the existence of which such partnership is founded. It would have been sufficient in this declaration to allege that on December 10, the date of the summons, the partnership was in existence between plaintiff and defendant, and that the plaintiff now claimed dissolution of the partnership and a division of the assets of the partnership and in that case there would have been no reference to all the facts upon which the partnership is founded. Unfortunately, the declaration, in going into details, has somewhat confused the issue between the parties. The plaintiff, in order to succeed, has to establish a partnership, and, in my opinion, he has clearly established the existence of such a partnership on the 10th December, 1902. A document has been put in, upon which the plaintiff mainly relies, which purports to be executed on the 5th September, 1902. That document never was signed by the parties, but I am quite satisfied on the evidence that that document embodies what the parties, not substantially agreed upon, but that it embodied what the parties wished to hold out to the world as the agreement between them. If that document stood by itself, then, undoubtedly, no partnership has been proved, but the plaintiff would be entitled to the whole of this business upon payment of the sum of £4,000. That is the document which the defendant ostensibly agreed to. But I think that the Court would never allow the plaintiff to get the full benefits of that document, because it was not intended to carry out the true agreement between the parties. The Court has repeatedly decided in very analagous cases that it must look at the real transaction between the parties. We have sometimes, for instance, had cases where a document is put in, in which there is a deed of sale between the parties. The Court has been satisfied that it is not intended to be a sale, that it purports to be a sale, but that the real transaction between the parties has been a pledge, and the Court has treated it as a pledge, notwithstanding the terms in which it has been ostensibly worded. In the present case, I am satisfied from all the facts which have come out that, although this agreement purported to be an agreement by which the plaintiff was to take over the whole of the business, the plaintiff is not to be entitled to the whole of the business, even if he is prepared to pay the money, but that he is bound by his own statement that it was intended that, instead of his having the whole business, the defendant should retain one-half share of the business of the partnership. I think that the real reason why this was done was that at that time the defendant was under a cloud; there was a prosecution against him at the Paarl; it was doubtful how that prosecution might end, and it was in order to secure himself against whatever the result might be that this agreement was entered into, and notwithstanding the defendant's denial, I am perfectly satisfied that was one of the objects of his entering into the agreement with the plaintiff. Then, it is not this document alone which should guide the Court in the present case, but all the other facts which have been proved. It has been shown that early in September a banking account was opened; the bank was requested to honour the cheques drawn by both the plaintiff and defendant; notices were sent to the creditors that in future the plaintiff would be a member of the firm of Moss and Robertson; and not only that, but the plaintiff entered upon the management of the business, and for some months took an active share in the management. An advertisement has also been put in, which shows that the plaintiff was held out to the world as a partner. Then we find that the agreement referred to a payment of £1,000 made on the date of that agreement, viz., the 5th September. On reference to the plaintiff's bank-books, it is found that on that very date he paid the sum of £1,000 to the defendant, in terms of this agreement. It is said, however, that that £1,000 had been borowed from Van Rhyn, and that ultimately the defendant had been called upon to repay that sum of £1,000. That does not affect the circumstance that the £1,000 has been paid in consideration of the partnership. If thereafter that amount was to be paid by defendant, it would be paid as a surety, who has been called upon to pay the debt of his principal. But the

money, the original amount of £1.000, which was the consideration for allowing the plaintiff to come into the partnership, had been duly paid. On the 10th December, therefore, in my opinion, there was a partnership between the parties, and if the replication had not somewhat complicated matters. I should have had no doubt whatever as to the judgment which the Court should give. But, unfortunately, the replication again brings in an admission which is wholly inconsistent with the declaration. I think the only explanation of this replication appears to be that there was no admission that the £1,800 formed part of the final arrangement. that it was only an admission that it formed part of the previous negotiations which had fallen through, it would be wholly inconsistent with the declartion that this £1,800 was part of the consideration to be paid by the plaintiff in order to become a member of this partnership. The Court, therefore, must hold that there was a partnership, and must order a dissolution of the partnership. and the Court will appoint a receiver to ascertain the assets and liabilities of the firm on the 10th December, 1902, and to ascertain also the value of the goodwill as part of such assets, and in case the assets should exceed the liabilities, the defendant will pay to the plaintiff one-half of such excess, after deducting from the said one-half the sum of £1,000. As to the costs of this action, the Court will be in a better position to judge of that after receiving the report of the receiver. The parties will have to consider as to who will be a competent man.

Maasdorp, J., concurred.

Mr. Burton intimated that the parties agreed to the appointment of Mr. Maynard Nash as receiver.

Sir H. Juta said he supposed that the defendant would carry on his business as heretofore.

De Villiers, C.J.: Oh, I think the business should belong to the defendant. My suggestion is that the defendant should proceed with his business, and that there should be simply a payment to the plaintiff. Perhaps it would be better not to use the word "receiver," because a receiver might think that he should take over the business. We might call him a referee. The Court will appoint Mr. Maynard Nash as referee to ascertain the assets and liabilities, including, amongst assets, the goodwill, and order that in case the assets should exceed the liabilities, the defendant pay to the plaintiff one-half the sum in excess, after deducting from the said one-half the sum of £1.000, the question of costs to stand over.

[Plaintiff's Attorney: W. G. Coulton; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

ILLIQUID CASE.

PFEIFFER V. CARRE.

Mr. M. de Villiers appeared for the plaintiff; Mr. Upington for the defendant.

The case had been postponed on the previous Saturday, in order that certain affidavits might be prepared.

Mr. Upington now read an affidavit by Mr. Kayser, the defendant's attorney, who said that the defendant brought the summons to him with instructions to enter appearance. Deponent told him that if the case were defended, he did not think it would be brought on for trial during the May term. It was arranged that the defendant should give detailed instructions. When the declaration was filed, deponent wrote to the defendant. The plea was asked for, and defendant called at the office, but deponent was out. If the plea had been filed when asked, it would not have been practicable to comply with the rules of Court.

Mr. De Villiers read the affidavit of Carl Pfeiffer, the plaintiff, who emphatically denied that he induced the defendant to go into speculative transactions. Statements of acounts were rendered from time to time, and defendant never denied the debt. Letters were referred to in which defendant acknowledged liability, and told plaintiff that if he were given time he would pay all.

De Villiers, C.J., asked Mr. Upington what the defence was.

Mr. Upington said he had letters in his possession which were written by defendant, in which apparently there were admissions, but the only question was whether any of these admissions were so clear as to the whole of the debt that defendant would be estopped from disputing certain items. In regard to certain of the transactions, defendant alleged

that plaintiff did not refer to him, and purchased at his own discretion. Then he went into other questions as to its being a gambling transaction. He (counsel) did not know what evidence defendant could adduce in support of that, but he supposed the main line of defence would be that portions of the items were not due by him.

De Villiers, C.J., in giving judgment, said: It is clear that it would be a waste of time and expense to allow any further litigation, and judgment must be given as prayed, with leave refused to purge the default.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

LAZAR V. TABLE BAY HARBOUR BOARD. } 1903. June 3rd.

Non-delivery—Clerk.

In an action for non-delivery of a case of merchandise or its value; an endorsement was made by defendant's clerk as follows, "less seven cases short; see baggage room."

Held, not to amount to an admission by defendant that the seven cases were in the baggage room.

This was an action brought by Hugo Lazar, importer and merchants' agent, Cape Town, against the Table Bay Harbour Board for the delivery of two cases or their value, £24 5s., £4 14s. 6d. freight and clearance dues, and £100 damages.

The declaration set out that in or about the month of February, 1902, the steamer Kildonan Castle arrived in Table Bay, having on board 30 cases consigned to the plaintiff, for which he held a bill of lading. The said cases were duly delivered by the said steamer to the defendant Board, who granted a clean receipt of same. It was the duty of the Board to deliver to the plaintiff the cases, but they only delivered 28, and they neglected and refused to deliver certain two cases. The cases contained samples for the plaintiff's business. Owing to their non-delivery he was prevented from carrying on his business, and was unable to carry out certain contracts. He claimed delivery of the said cases or their value, £24 5s., plus £4 14s. 6d. in the alternative, and a further sum of £100 as damages, alternative relief, and costs of suit.

The defendant Board in their plea admitted that 26 cases were delivered to the Board in or about February last year by the Kildonan Castle, and said that those cases were delivered to the plaintiff. No other cases were delivered to the Board ex the Kildonan Castle for or on account of the plaintiff. Defendants refused to of the plaintiff. Wherefore defendants prayed that the plaintiff's claim might be dismissed with costs.

The Replication was general

Mr. Benjamin for the plaintiff; Mr. Upington (with him Mr. Bisset) for the defendants.

Mr Benjamin informed the Court that one of the cases had since been found at East London, and had been delivered to the plaintiff, so that that particular case would go out of the action. The case was numbered 527, and it was in respect of case No. 700 that defendants were now sued.

Mr. Upington said that the case from East London was still at the Docks, and the Board had offered to allow plaintiff to remove the case.

Mr. Benjamin said the plaintiff admitted that the case was lying at the Docks at his risk. The plaintiff was a commercial traveller, and he required this case in connection with his business, and now it was found a year after it had been lost.

Mr. Benjamin called evidence for the plaintiff.

Sidney James Castleman, a clerk in the employ of the Union-Castle Steamship Company, produced the manifest of cargo brought to this port by the Kildonan Castle in February, 1902. According to this document, 30 packages were consigned to plaintiff. At that time the Harbour Board merely tallied the cargo. The Union-Castle Company tallied the baggage. The Harbour Board gave a short-landed list. On the discrepancy list the case No. 700 did not appear. The last entry was "Seven packages Hugo Lazar; see baggage warehouse." The company took this to mean that these seven packages were in the baggage warehouse. The Harbour Board took the goods out of the slings at

the ship's side. Landing and shipping often took place at the same time. It was quite feasible that goods which had been landed might be shipped again. The baggage warehouse belonged to the Harbour Board.

Cross-examined by Mr. Upington: At that time the Harbour Board employed clerks to tally cargo as it came from the hold. The Customs tallied for revenue purposes at that time. They also made a short-landed list. The discrepancy list did not specify any numbers. Case No. 527 was carried to East London by the Kildonan Castle. Case 700 was landed here. His receipt was the discrepancy list. He would not be surprised to hear that the two cases were shown on the Customs short-landed list. It was quite possible that a case might appear on the ship's manifest without having been shipped.

By Maasdorp, J.: Five of the cases were found in the baggage warehouse.

The evidence of Hugo Lazar, taken on commission, was to the effect that he was a Hungarian. In November, 1901, he was in Vienna for business purposes. He arranged certain agencies that he should take up in South Africa. In one matter he was to carry samples, and he was to receive 800 crowns, equivalent to £40, a year, and, in addition, a commission of 5 per cent. The samples were of handkerchiefs. He selected the samples in Vienna. He saw both the cases in question being packed. He came out by the Kildonan Castle. He was assured that all the thirty cases had been put into the hold. All the cases were delivered in Cape Town except two. He was convinced that if he had had the samples he should have made £500 or £600 at least. Another man who had done business in the same line had had a turnover of £20,000, upon which he received 4 per cent. commission.

For the defence,

Frank Robb, assistant general manager of the Harbour Board, said he was well acquainted with the practice of the Board in the matter of landing cargo. The Harbour Board clerks at the time in question tallied cargo as it was taken out of the vessel. In addition, the Customs officials tallied cargo. The Harbour Board received a copy of the ship's manifest, they had their tally list, and then they furnished a discrepancy list to the shipping company. The entry on the discrepancy list about the baggage warehouse he understood meant that the tally clerk, who made up that list thought the packages might have found their way there, but they were short-landed. The entry was made by a tally clerk in the Harbour Board's employ. Since the action Cohen and O'Flaherty, two of their tally clerks had left. He had got their tally books. The Board did not know where the two men had gone.

Mr. Benjamin objected to the books being put in without the two men being called.

Mr. Upington said they would be able to get evidence on the point from the Customs official.

Witness, continuing, said that as a matter of fact, from his knowledge, goods were often over-carried at the Docks. The ship's manifest was no proof that the cases had been shipped.

[Kotze, J.: The assumption is that the cases were shipped.]

Mr. Upington said his position was that the case No. 700 was over-carried just in the same way as No. 527 had been.

Cross-examined by Mr. Benjamin: Only baggage was delivered in the warehouse. If cargo were put into the baggage warehouse, it would come out at the place at which the tally clerk was stationed. In regard to the words "See baggage warehouse," witness thought the explanation was that the clerk thought these packages might have gone to the baggage warehouse, and put the words as an instruction to the Union-Castle Co. to look in the baggage warehouse.

James Clark, tide waiter, in the employ of the Customs, said he kept a tally of part of the cargo delivered from the Kildonan Castle. Three others, Flowers, Hammond, and Harris were employed, each taking a hatch. Witness entered the number of each case as they passed to the best of his ability. On one side of the case were marked "H. Lazar"; on the other side "J.S.O.W.," with a number, and witness tallied them as J.S.O.W. The officer who relieved him tallied them as H. Lazar. Witness made out the Customs short landed list, showing two cases short, viz., 527 and 700.

By Mr. Benjamin: Cases occasionally missed the notice of officials. Witness was satisfied that the four experienced officers down there did not miss anything.

Harold V. Harris, Harry Flowers, and Kenneth H. Hammond, tide waiters, gave similar evidence.

After hearing Mr. Benjamin in argument on the facts,

Maasdorp, J.: The plaintiff in this case alleges that certain two cases, amongst other goods, were consigned to him by the Kildonan Castle from Southampton, and that on the arrival of the Kildonan Castle, these two packages were delivered to the Harbour Board; that it thereupon became the duty of the Harbour Board to deliver the cases to the plaintiff; that the Harbour Board failed to make such delivery, and that, in consequence, the cases have become lost to him, and he has suffered damages in the sum mentioned in the declaration. When the declaration was drawn, the plaintiff claimed in respect of two cases, which he alleged had been delivered to the Harbour Board, and that the Harbour Board had failed to deliver to him, but he has abandoned his claim in regard to one case, because he has ascertained now that the Harbour Board is not responsible for the delay in delivering the one case, and the case is at his disposal at present in the custody of the Harbour Board. It has been said by Mr. Benjamin that the plaintiff is in a very difficult position in this case, because he has to depend for his evidence upon such information as he can get either from the shipping company or from the Harbour Board. It is very hard upon the plaintiff that he should be, in this respect, as it were, at the mercy of the shipping company and of the Harbour Board, but we cannot for that reason alter the rule of law, which requires that the plaintiff must give clear proof of his case before he can succeed. Now, it appears that the evidence which the plaintiff depends upon in this case consists of what he alleges to be certain admissions made by the Harbour Board, and also some information he has derived from the shipping company. I believe the plaintiff was largely led by the statement made by the shipping company when he determined to proceed with this case. It seems that during the correspondence he was told by someone in the service of the shipping company that the Harbour Board had given a clean receipt for these two cases, and that consequently there was absolute evidence, by virtue of this receipt, that the Board had received these two cases, and were therefore responsible for the safe custody and delivery thereof to the plaintiff. Now it appears that that information was based upon a mistake of a clerk in the shipping company's employ, because no such clean receipt was ever given by the Harbour Board to the shipping company. It seems that a certain discrepancy list was handed by the Harbour Board to the shipping company, in which we find an entry opposite the name of Hugo Lazar, referring to seven packages, which appear in the discrepancy list as short delivered, and there is a further memorandum, "See baggage warehouse." Here, again, it is quite possible the plaintiff was led wrongly as to the interpretation to be put on this memorandum. He contends that it conveys an admission on the part of the Harbour Board that there were seven packages short delivered, but that they were to be found in the baggage warehouse. If that admission were actually made by the Harbour Board, then it would amount to an admission of the receipt of these goods, and of their custody in this warehouse, and the Board would be responsible; but I think that was a mistaken interpretation. It seems to me quite clear it could mean nothing more than that there was some doubt as to whether these packages might not have been missed, and have gone with the baggage into the baggage ware- and not have been tallied out with the cargo; and that consequently, when the discrepancy list was made out, and seven packages were given as short delivered, there was a suggestion made that they might possibly be found in the baggage warehouse. The other interpretation, I think, would be ridiculous, because it would amount to this: that there were seven packages short delivered, and that these packages were in the baggage warehouse. It would follow, if this were so, that they were not short delivered, and the entry that they were short delivered would be wrong. Now, the plaintiff has produced evidence as to the delivery of these two packages to the Harbour Board. The officers of the Harbour Board and of the shipping company have been called, and they have informed the Court as to the manner in which their tally was made, and it seems that the shipping company wholly depends upon the result of that tally as proof of the delivery of goods to

the Harbour Board. The company themselves kept no tally, and they are depending entirely upon the admissions of receipt of goods as they appear by the receipts signed for upon the discrepancy list. Now if the Court is thrown for its information upon the information contained in the documents put in by the tally clerks, then I think it is perfectly clearly proved that these packages were never delivered by the shipping company to the Harbour Board. The discrepancy list put in by the Harbour Board is rather vague in its terms, and in itself might have been very unsatisfactory evidence; but it is supplemented by the more precise evidence given by the Customs House clerks. According to the evidence given by the Harbour Board, we find that seven packages were short delivered, but which packages these actually were is not stated, either by number or by description. That might have left some doubt as to whether these seven packages included the two in respect of which the plaintiff now claims, but when we come to the evidence given by the tally clerks of the Customs department, we find the tallies were very carefully kept, and the result is that there is very clear proof upon the documents that these cases which are in dispute were not delivered by the shipping company to the Harbour Board. Under these circumstances it may be possible that some further evidence may be produced of a more direct character by someone who actually saw the delivery, independently of the evidence of the tally clerks, and if such evidence is produced, the plaintiff might still be successful as against the Harbour Board; but at present I think he has failed to prove that these cases were delivered, and that the Harbour Board became responsible for them to the plaintiff, and the Court should, under the circumstances, grant absolution from the instance, with costs.

Kotze, J., said he was of the same opinion. He thought that for the purposes of this suit they might take it that this particular case in question was placed on board the Kildonan Castle, and arrived at Cape Town in the ship. But then the main point was: Was that case delivered by the Union-Castle Company to the Harbour Board? And there it seemed to him that the plaintiff's case failed. It might be quite true that in a suit like this the Court should not exact the strongest possible evidence from the plaintiff, but should act on the preponderance of presumption and probality, due regard being had to the burden of proof; and it seemed to him that the weight of probability was on the side of the defendants. The plaintiff relied almost entirely on a note made by a clerk of the Harbour Board to the effect, "less seven cases short; see baggage room"; and the plaintiff wished the Court to infer from the words, "See baggage room," that this was an admission on the part of the Harbour Board that these seven cases were in the baggage room. He regretted he could not read that endorsement in the same way. It merely referred to the baggage room as a place where, possibly, these short delivered cases might be found. Mr. Benjamin had argued that five of these cases had been found there, but that was mere supposition, because Mr. Robb said that the five cases never came out of the baggage room, but out of what he called the ex-warehouse on the Loch Jetty. There was the further fact that, of the two cases which were lost, one was found on board the steamer Kildonan Castle at East London. It had been suggested by Mr. Benjamin that in the great confusion and hurry which existed when mail steamers came in, cargo might be landed and put back with the cargo loaded into the ship from the same quay. That might be possible, but it was far more easy to suppose that the particular case found at East London never came out of the ship when in the Cape Town docks. There was, therefore, no evidence to justify the Court in concluding that the particular case in respect to which the claim was made had ever been in the baggage room or delivered to the defendants by the shipping company.

[Plaintiff's Attorney: C. Brady; Defendants' Attorneys: Reid and Nephew.]

SCHERLICH V. SCHERLICH AND ANOTHER. { 1903. June 3rd.

This was an action for a decree of divorce, brought by Auguste Gustave Scherlich against his wife on the ground of adultery with one Hoeftmann, from whom £500 damages were claimed. The second defendant claimed in reconven-

tion £100 for maintenance of the plaintiff's children.

The declaration set forth that the plaintiff resided at Cape Town, and the defendants at Woodstock. The first-named defendant was married to the plaintiff in community of property on the 4th November, 1878. There were four children of the marriage, and since 1897 the first-named defendant had been living with the second defendant as his wife, and had had two children by her. The plaintiff claimed against the first defendant a decree of divorce, and the forfeiture of all the benefits accruing from the community of property, and the custody of the children; and against the second defendant, £500 damages for loss of comforts and the society of his wife, with costs of suit.

The joint plea of the defendants admitted that they had been living as man and wife, but the second defendant denied that he had caused the plaintiff any damage. The first-named defendant stated that the plaintiff had contributed very little to her support ever since the marriage. With the exception of short periods in 1894 and 1895, the plaintiff had ceased to live with her since 1892. The second defendant, in a claim of reconvention, stated that he had contributed towards the maintenance of the children, and claimed £100.

The replication stated that the plaintiff left Cape Town in order to obtain more remunerative work, and that he had repeatedly remitted considerable sums of money to the first-named defendant, and that several of the children had been earning their own livelihood. The plea that the second-named defendant set forth that if money was advanced it was unnecessary, and the plaintiff denied having received the benefits of any such contributions.

Mr. Buchanan for plaintiff; Mr. Benjamin for defendants.

Auguste Gustave Scherlich said that he was married to the first-named defendant in Cape Town, in November, 1878. In 1890 he took his family to Johannesburg, and returned to Cape Town in 1892, but only remained a short time, when he returned again to Johannesburg alone. He left his wife in business in Cape Town, and provided her with a good stock. For the first eight months he was up in Johannesburg he sent his wife £30. For two years his wife never wrote for any money, but he had a letter from her stating that she had taken the part of a French lady at the theatre. In January, 1895, he came to Cape Town to start business, but his wife had no further propensity for kitchen work. Witness returned to Johannesburg, and came back to Cape Town in 1896, when he resided with his wife for a short period. In 1897 he wrote to his wife suggesting again to start business, but she advised him by return that business was bad, and that he had better stay in Johannesburg and make some more money. During his stay in Johannesburg he had sent his wife something like £500. His eldest girl and boy had been earning their own living for a considerable time, and the second boy had also been working for a considerable time. In September, 1901, he heard from Mrs Hoeftmann, the scond defendant's mother, and as a result he wrote to his wife at once. In his excitement he had written several letters, offering to forgive her if she would leave Hoeftmann.

Cross-examined by Mr. Benjamin: The defendant's mother was an invalid, but she did not require much support. He had been very fond of his wife. The amounts that he had sent to his wife he spoke to from memory. When in Johannesburg he made ginger-beer and vinegar. His wife had kept a boarding-house, and he had worked as a fireman in a mine. It was not true that she kept him for ten months. In 1892 they came down from Johannesburg, and they opened a small shop. In 1894, after he had gone back to Johannesburg, he wrote telling her that he would come down, but she said that he should not come down. He was not anxious to get rid of his wife. He admitted writing a letter to the defendant on March 11 asking her to procure two witnesses for him to make the divorce case "as short and easy as possible." He had no property in the Transvaal.

Willem Johann Schwann, of 1, Oxford-street, Woodstock, said he knew the parties. He met Mr. and Mrs. Scherlich in Johannesburg. Mrs. Scherlich was now living in Oxford-street, Woodstock. Witness lived in the same house. The first and second defendant lived together as man and wife. They had two children.

Cross-examined by Mr. Benjamin: As long as the boarding-house was kept by Mrs. Scherlich, her husband did no work outside the house.

Mr. Benjamin intimated that he wished to call Mrs. Scherlich on the question of the custody of the children.

Maasdorp, J.: Do you intend to insist on the claim in re-convention?

Mr. Benjamin: No.

Maasdorp, J.: It seems to me like adding insult to injury. First he harbours the man's wife, then the children are there and maintenance is asked for them.

Mrs. Scherlich, called by Mr. Benjamin, said she had four children still living by her first husband, aged 23, 20, 15, and 12 respectively. The youngest was a girl. The three elder ones were working, and the youngest was at Stellenbosch. Her husband left her in 1895, and he never asked her afterwards to go up to Johannesburg. When they came down in 1892, she came very reluctantly. Then she had a struggle with the shop. The money her husband sent her did not enable her to support herself and children. She did work at the theatre as a dressmaker, but not as a "French lady."

Cross-examined by Mr. Buchanan: Her elder child with the co-defendant was 4½ years of age. She had written to her husband while he was in Johannesburg, and told him about the children, and she signed herself "Your sincere wife." She was obliged to do that, because he wanted to know as to how the children were.

After counsel had addressed the Court, on the facts,

Maasdorp, J.: The plaintiff in this case prays for a decree of divorce against his wife, on the ground of adultery committed by her with the co-defendant. That that adultery has been committed has been proved in this case, and is also admitted by the defendants. The plaintiff is, therefore, entitled to his decree of divorce. There is nothing that was done by him which would debar him from claiming that divorce. The plaintiff further claims that it should be declared that the defendant has forfeited the benefits arising from the community of property. As that is not pressed, no order need be given on that point. It does not appear there is any property in this case, and consequently that such an order will be of any advantage to the parties. The plaintiff further claims the custody of the minor children. There are three minor children, two elder boys, of the ages of twenty and fifteen respectively, and the younger girl of the age of twelve years. Now, by ordinary rule of law, the father is always considered to be entitled to the custody of the children. There have been cases in which children have been of such tender years as to specially require the care of the mother, and in these cases the Court left the children with the mother for the time being, but in this case, having regard to the age of the children, it does not appear that they require any special care on the part of their mother, and, as it has not been proved there is anything on the part of the plaintiff which would disqualify him from having the care of these children, the ordinary rule of law must prevail, and the Court will grant an order giving him custody of these three children. Not only has nothing been proved against the plaintiff in respect to his conduct towards his children, but it appears that for a considerable time past he has maintained the youngest girl, and paid all her expenses at the boarding school where she still remains. The next claim is one by the plaintiff against the co-defendant, in which he claims damages in the sum of £500 by reason of the wrong done to him by the defendant in depriving him, through his adultery for this period, of the "comfort, society, and affection of his wife." Now, it seems to me, from the evidence in this case, that for a considerable time back the plaintiff has been living in Johannesburg, and the defendant has been living in Cape Town, correspondence has taken place between them from time to time, and it has also been proved that small sums of money were occasionally remitted by the plaintiff to the defendant. Therefore, there is nothing to prove that there ever was any strong desire on the part of the plaintiff to return to cohabitation with his wife. For many years he neither visited her, nor the children, and it does not appear that he has laid very much store by the society and comforts of marriage, for the loss of which he now claims damages. Under all the circumstances of this case, it seems to me rather that the plaintiff may be taken to have largely renounced this very society and comfort he now alleges he lost through the conduct of the defendant, and that he had no intention in the very near future of returning to live with his wife. It is said that he wrote to her some years ago, offering to return, and that

she advised him against taking such a step. Well, he seems to have been very easily persuaded not to come back and enjoy the home comforts which he says he was entitled to, and I think the real reason is not so much that he was persuaded by his wife, but that he really had no wish to return and live with her. That is the conclusion I come to from the conduct of the plaintiff in this case. However, there is no doubt that a wrong has been done by the second defendant to the plaintiff, and that, although the plaintiff is not entitled to any damages, because he is largely responsible for his wife having gone wrong as she has done, still, as the defendant is the cause of these proceedings, which have been forced upon him for the purpose of obtaining a divorce from his wife, who committed adultery, I think the second defendant should pay the costs of these proceedings. There is a further claim put in, made by the defendant as against the plaintiff, a claim in reconvention. He claims for the moneys which he has expended for the maintenance of the children during the time he lived with the defendant, and kept the children with him. Now, in my opinion, this is a most impudent claim, and counsel was quite right in abandoning it. He seems to be adding insult to injury. He harbours the plaintiff's wife and keeps her children in the house, so that he does the plaintiff a wrong, and he now claims compensation in the loss he has suffered through the consequence of the wrong that he did against plaintiff. The claim has not been pressed. Judgment must, therefore, be upon the claim in reconvention for the defendant in reconvention. The Court will grant a decree of divorce, giving the plaintiff the custody of the children, with leave of access to the defendant at all convenient periods, and give judgment on the claim in reconvention for the defendant in reconvention, and order the co-defendant in the case to pay the costs.

Kotze, J., concurred.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Honourable Mr. Justice MAASDORP, and the Honourable Mr. Justice KOTZE].

REHABILITATION.

Mr. Rowson moved as a matter of urgency for the rehabilitation of Edward Bernard Lucke, under section 117 of the Insolvent Ordinance. Counsel said that all the creditors had been paid in full.

Order granted as prayed.

SPIEGEL v. EILENBERG. { 1903. June 4th.

Contract — Consideration — *Animus contrahendi* — Request — Vagueness of contract.

The defendant, a merchant in Cape Town, being on a visit to Chicago, U.S.A., was consulted by the plaintiff, a nephew of his residing there, as to the prospects for a young man at the Cape, and after the defendant had left Chicago the plaintiff wrote to him, making further inquiries. In answer, the plaintiff wrote: "If you care to come to Africa, I am prepared to find you employment as a traveller in town or any such work as you may be suited for." About seven months afterwards the plaintiff came to the Cape, and finding, as he said, that the defendant did nothing for him, he found employment for himself at £10 a month. Subsequently he lost this employment and brought an action against the defendant for damages for breach of contract. The evidence shewed that it was the plaintiff's own desire to come to the Cape to improve his position, and that beyond the terms of the letter

the defendant conveyed no request to the plaintiff to come.

Held, *that the alleged promise was too vague to be enforced, but that even if it had been more definite, it was not supported by sufficient consideration.*

This was an action for damages brought by David Spiegel against Maurice Eilenberg for alleged breach of contract.

The declaration set out that the plaintiff was the nephew of the defendant, and that both parties at present resided in Cape Town. Plaintiff was in January of last year carrying on a small business in Chicago, U.S.A. The defendant visited Chicago, and a conversation took place between them. The defendant said that if plaintiff would give up his business and come to Cape Town he would find him employment as a traveller in town or other suitable employment. After due consideration, plaintiff agreed to give up his business, and he came out to this country. Defendant had refused to perform his said promise, or to find plaintiff the said or any other employment. In consequence of the breach of contract, plaintiff had suffered great loss in giving up his said business, and lost the profits thereof, and incurred expenses in coming from Chicago to Cape Town, and of living in Cape Town. Wherefore plaintiff claimed £500 damages, and costs of suit

The defendant, in his plea, admitted that he made a gratuitous promise that, in the event of plaintiff determining to proceed to Cape Town, he would find him employment, but he denied that he entered into any contract or that there was any consideration for the said promise. The defendant admitted that the plaintiff had incurred certain expenses in proceeding to Cape Town, but denied that the plaintiff had suffered any loss for which the defendant was liable.

Mr. Wilkinson for plaintiff; Mr. Upington for defendant.

David Spiegel (the plaintiff) said that at the present time he was earning £6 a month as a painter's labourer. In January of last year he was carrying on a wholesale grocery business in Chicago, for which he paid £350. He had been carrying on the business successfully for two years. In January last year Mr. and Mrs. Eilenberg visited Chicago, and the defendant seemed to take great interest in plaintiff's welfare. The defendant said that his parents had been very kind to his wife, and advised the plaintiff to come to South Africa, where the climate was good, and where there was a better prospect of success. He proposed to give him £6 a week as traveller in Cape Town, and plaintiff accepted his proposal. The plaintiff distinctly specified the position as town traveller. Subsequently, the defendant wrote from London, stating that he was prepared to find him employment as traveller in town, or any work he was suited for, and impressing on him the prospect of success. The defendant further added that if plaintiff could not pay his passage he would advance the amount on condition that it was repaid by instalments. Plaintiff wrote telling the defendant that he had got married, and his uncle replied that that was all the better. The defendant subsequently wrote from Austria congratulating him, and saying that there was a good opening for both of them. Plaintiff had the utmost confidence in his uncle, and immediately sold out his business. He left America on October 15, 1902, in company with his brother. Plaintiff and his brother drove up to the defendant's office, where Mr. Eilenberg asked him what kind of passage they had. Defendant then told one of the clerks to give plaintiff and his brother the addresses of his relations in Cape Town. Subsequently, they visited defendant's house, where plaintiff noticed that his uncle was very cool with them. About a week later they mentioned to him the question of work, and the defendant said that things had not come out as he expected, and referred the plaintiff and his brother to the Docks and the street cars. Plaintiff's aunt said that "beggars could not be choosers," and when he found that his uncle was not going to do anything, he took employment at £10 a month. When he told his uncle that he could not exist on £10 a month, his aunt said she did not wish to do anything for them, as their mother had been very nasty to her. He left the house, but a Kafir boy brought him back, and Mrs. Eilenberg said that if he wished to return to America, the defendant would pay his passage and give him £5. This the plaintiff refused to ac-

cept, because it was altogether too little. The last interview was at another uncle's, when the defendant, in reply to a question, said that it was for the plaintiff to find out what he (defendant) brought him to South Africa for. In Chicago he was making £5 a week, and on the business he lost £250 through selling it for £100. Had he waited, he would have got more, but through the defendant's pressure, he sold out at once. He also earned money from other sources. It took £40 to bring him to South Africa, and during his stay here, he had spent all the money he had. He estimated his entire loss at £500, and he did not think he could reinstate his business in Chicago under £500 or £600.

By De Villiers, C.J.: Witness was 24 years of age.

Cross-examined by Mr. Upington: The terms of the conversation were in one sense embodied in the letter of March 27. The defendant in that letter did not set out what the amount to be paid him was. In the conversation defendant promised him £6 a week. His uncle distinctly offered him £6 a week as town traveller. Defendant offered his brother a similar position. His brother, he supposed, did not proceed with his action, because he had no money. He admitted that he did not mention the offer of £6 a week in his declaration. When Mr. and Mrs. Eilenberg visited Chicago, they sought out witness's mother, who was stepsister of defendant's wife. He was not at that time in a picture-frame manufactory. His business in Chicago was returning him £250 a year; he bought the business for £350, and sold it for £100. Witness based his claim upon what the defendant promised him verbally in America. He arrived in Cape Town in November, 1902. He obtained employment at Raphael's at £10 a month about a week afterwards, where he remained until March of this year, though in the meantime he had once been dismissed. Mr. Raphael took him back, because he could not get anyone else to do the work. He left Raphael because he was sick, and could not do the work. He then took a situation as a painter's labourer at £6 a month. He denied that he ever told his uncle that he would look round and get something to do. His uncle told him that things had not turned out as he expected, and said that there were lots of things in Cape Town for a young man to do—the street cars, docks, and so on. He had never demanded from his uncle that he should set him up in business. He and his brother had not been abusive towards their uncle. His uncle offered to send witness back to America. His uncle had no interest whatever in the sale of witness's business in Chicago.

Maurice Spiegel, brother of the plaintiff, said that he was present at some of the conversations between his uncle and his brother. Generally speaking, what his brother stated in evidence was correct. Witness also gave up his business in consequence of what Mr. Eilenberg had promised him. His brother's evidence with regard to the conversations in Cape Town was correct.

Cross-examined by Mr. Upington: Witness denied that the contents of the letter of March constituted the contract. The defendant also contracted with witness to give him £6 a week as a traveller. He was in the musical business, and sold it out for £150. It was untrue that his brother had told his uncle that he did not come to South Africa to work like a nigger.

Mr. Wilkinson closed his case.

Mr. Upington called,

Morris Eilenberg, the defendant, who said he was a merchant carrying on business in Cape Town. At the end of 1901 he went to Europe, and subsequently to America. In Chicago witness heard there were some relations of his wife. He found the two Spiegels and their mother. Mrs. Spiegel said her boys were working for a firm of picture-frame manufacturers, and she was afraid every day that the fingers of one of them would be cut off by a machine. Witness never made a contract to pay them £5 a week each as travellers. Witness knew nothing of their being in a flourishing business in Chicago. There was some mention made of Morris Spiegel making an attempt to open a small dry goods store. Witness told them they might improve their positions if they came out to the Cape. This was in reply to a question as to the prospects at the Cape. Witness promised to help them if they came out. Witness did not supply them with funds to pay their passage. Witness wrote letters on March 27, and in April, in answer to letters written by plaintiff. The brothers called on him at

Cape Town in November. They did not call upon him to find them employment. David told witness he had found employment with Mr. Raphael. He saw them again in January. They came to his house on a Sunday afternoon. Morris said he would very much like to go into a picture-frame business on Sir Lowry-road. He told witness that he wanted credit to go into the business, and that if witness could support him there was a fortune in the concern. Witness told him that it was not his custom to give guarantees, but that if a few pounds were of any use he would willingly give it. Morris thereupon became very excited, and said he did not come here to work as a painter or a nigger, and would show witness what the justice of the country could do. David also joined him, and alleged that witness had brought them out to this country under false pretences. Witness said that they had no claim on him, but that he was perfectly prepared to give them their third-class fares and a few pounds in their pockets, after which he did not wish to see them again. If they had applied to witness for employment when they landed here he could probably have found them something to do. Witness had never employed a town traveller in his business, and had only recently employed a country traveller. Witness was interested at the time in a small confectionery manufactory at Woodstock, and he told David Spiegel that he might get employment there as town traveller, but that only small wages, about £8, would be paid.

Cross-examined by Mr. Wilkinson: In Chicago witness promised to do all he could for them if they came out to South Africa. All he said concerning employment as a town traveller was, as he had related, in connection with the business at Woodstock. Witness told David he would find him employment as a town traveller for this Woodstock business. When they came out, he did not find David such employment. He was never asked to do so. The Spiegels were respectable people of the working class. Witness had found hundreds of people in this country employment in the same manner as he had promised to do in respect to the Spiegels. Witness did not know of any intention on the part of the Spiegels to bring their family out.

Mr. Wilkinson having been heard in argument on the facts, without calling on Mr. Upington,

De Villiers, C.J. (after stating the facts) said: I am satisfied that no definite agreement was arrived at during the defendant's visit to Chicago. The plaintiff then consulted him as to the prospects of a young man at the Cape, and after the defendant had left Chicago the plaintiff wrote to him making further inquiries. In answer, the defendant wrote the letter of 27th March, 1902, and, if there was any binding contract at all, it must be found in the following terms: "If you care to come to Africa, I am prepared to find you employment as a traveller in town, or any such work as you may be suited for." The argument of the plaintiff's counsel has proceeded upon the assumption that there was an agreement by the defendant to find the plaintiff employment as a traveller in town, but the declaration does not allege any such agreement, nor does the evidence prove it. There can be no binding hiring of a man's services unless he is bound to render them, and unless some definite services are agreed upon; but it is admitted that the plaintiff was not bound under the alleged contract to come to South Africa, and that no definite services or salary were agreed upon. It is said, however, that even if there was no engagement of the plaintiff's services by the defendant, there was a distinct promise to find employment for the plaintiff, and that, as the defendant threw up his business at Chicago and incurred the expense of coming to South Africa, there was consideration for the promise. There would have been force in this reasoning if the plaintiff had thrown up his business and left Chicago in consequence of a request on the defendant's part; but the evidence clearly shows that it was the plaintiff's own wish to leave Chicago, and that the defendant's promise to assist him was induced by his own desire to befriend his nephew, and not by any desire that his nephew should come to South Africa. It is impossible, therefore, to believe that the defendant could have had any *animus contrahendi*; that is to say, an intention of entering into any agreement. Pothier (Obligations, section 3) defines a contract as "an agreement by which two parties reciprocally promise and engage, or one of them

singly promises and engages to the other to give something or to do or to abstain from doing some particular act." He adds that the words "promise and engage" are used because those promises alone which are made with the intention of producing an engagement and of giving the party to whom they are made a right of demanding their performance, can amount to a contract and agreement. He proceeds to give the illustration of a father promising his son at College that if he is attentive to his studies there, he will give him money for a journey of pleasure in the vacation. "It is evident," says Pothier, "that in making this promise the father does not mean to contract what can properly be called an agreement." Under our practice, it would probably be held that the son's performance of a natural duty constituted no consideration for the father's promise. In the present case, the real question to be decided is whether the plaintiff's coming to South Africa constituted a consideration for the defendant's alleged promise to assist him on his arrival here. In my opinion, there was no connection whatever between the plaintiff's act and the defendant's promise. In the innominate contract *facio ut facias* the doing of a particular act by the one party is the inducement for the promise by the other party to perform his part, but the plaintiff's coming to South Africa was no inducement whatever for the defendant's promise. The plaintiff's counsel has relied upon the English case of *Shadwell* v. *Shadwell* (9 C.B., N.S. 159) as showing that a request to do a particular act for the promisee's own benefit may be implied where a person promises to pay him money upon his doing the act. In that case, it was held that the executors of a testator were bound to pay an annuity which the testator had promised to the plaintiff upon his marriage. The plaintiff was engaged to be married at the time of the promise, and yet a majority of the Court held that the marriage had taken place at the request of the testator, and was a sufficient consideration for the promise. The fact that the testator himself paid the annuity for several years may perhaps have influenced the Court, but the decision is not binding in this Court. The defendant in the present case has never recognised a legal obligation to find employment for his nephew, although he was quite willing to assist the plaintiff in finding such employment. In saying that he would be prepared to find employment for the plaintiff in case the plaintiff cared to come to South Africa, the defendant cannot be held to have conveyed a re-request, express or implied, that the plaintiff should so come. In the absence, therefore, of sufficient consideration for the defendant's alleged promise, the plaintiff is not entitled to succeed. Thus far, I have assumed that there has been a definite promise and a breach of that promise on the part of the defendant. The alleged promise, however, is so vague and indefinite as to be incapable of being enforced, and there is no evidence that the plaintiff ever called upon the defendant to find employment or would have accepted such employment when found. Upon every ground there must be absolution from the instance with costs.

[Plaintiff's Attorney: C. W. Slaughter; Defendant's Attorneys: W. E. Moore and Son.]

GENERAL MOTION.

Ex parte HUDSON.

This was an application for an order restraining one Richard Steinbrook from selling certain property.

Mr. De Waal appeared for the applicant.

From the petition, it appeared that petitioner was one of the executors testamentary in the estate of the late B. J. Hudson. The respondent Steinbrook had rented certain two shops at Claremont belonging to the estate at a monthly rental of £14 10s., and had occupied the premises since the 1st December, 1902, since when he had paid no rent, notwithstanding that repeated applications had been made to him therefor. Steinbrook was now indebted to the estate in the sum of £87. Petitioner had been informed, and believed, that Steinbrook was about to sell the assets of his business by public auction, and petitioner now asked for an interdict restraining such sale until the rent had been paid or until action for the same had been instituted.

A rule was granted calling on respondent to show cause on the 12th June why an interdict should not be

granted as prayed, pending action, the rule to operate as an interdict in the meantime.

PORT ELIZABETH TOWN COUNCIL v. RIGG. } 1903. June 4th.

Sale—Re-sale—*Lex commissoria.*

In 1860 the Town Council of P. sold two lots of land to G. on conditions (among others) that on failure by the purchaser to pay any instalment of the price within a certain time the vendors should be at liberty to re-sell the lots at the expense and risk of the purchaser. G. took occupation of the lots and paid the municipal rates thereon, but he failed to pay some of the promissory notes given by him in payment of the price. He sold the lots to the respondent, who for a time paid the rates, and was recognized by the vendors as the owner, but no transfer was ever passed. The respondent, after a few years, left P. and ceased to pay rates. The Town Council, forty years after failure of G. to pay the promissory notes, applied for an order cancelling the sale on the ground that the purchase price had not been paid in terms of the conditions of sale, and the respondent tendered to pay the price still owing and interest due thereon.

Held, *that until re-sale by the applicants in terms of the conditions the respondent was entitled to tender the price and interest, and thus prevent any re-sale or cancellation of the sale.*

This was an application to make final a rule *nisi* which was granted by the Court on the 18th March, and which had been duly published. The original petition alleged that the petitioners were owners of certain two lots of ground, numbered 58 and 60, situated in Middle-street, Port Elizabeth. These lots were sold on the 13th June, 1860, to one C. Green, who gave four promissory notes for the amount of the purchase price. Three of these notes were duly paid, but the fourth was never paid, nor had the rates on the property been paid by Green. On portion of these lots a Congregational Church had been built, and the Town Council wished to make transfer of the land to the church trustees, but were unable to do so, as the property was not registered in the name of the Council. The petitioners prayed that the Court would grant an order allowing the sale of the lots, by reason of the said Green not having paid the purchase price, and interest, or rates for the last forty years.

The respondent, Christopher P. Rigg, made affidavit, in which he stated that he was the sole surviving partner in the late firm of W. and C. Rigg, law agents, etc., of Port Elizabeth. One of the partners in 1876 purchased the two lots in question from Green, and an entry appeared in the firm's books showing a purchase for the sum of £25. Deponent could not say why the ground had not been transferred to Rigg, excepting that it was perhaps owing to the disappearance of Green. The property was shown in the name of W. C. Rigg on the Divisional Council roll in 1876, and rates were marked as having been paid from 1881 to 1886. In 1881 the property was registered in the Port Elizabeth Municipal roll in the name of W. C. Rigg, and the rates for that year were marked as having been paid. Respondent had not visited Port Elizabeth for the last fourteen or fifteen years, and had overlooked the fact that rates were due. Papers relating to the property had been destroyed by fire during the war. Respondent was willing to pay the balance due on the property by W. C. Rigg.

An affidavit made by a former rate collector was read in support of the respondent's allegations. The conditions of sale in 1860 provided that if the purchaser should fail to comply with the conditions, the property should be put up at the expense and risk of the purchaser, who must submit to any loss there might be on the re-sale.

In a replying affidavit on behalf of the petitioners, Gustavus Trollip, attorney, deposed that he had examined papers in the Master's office relating to the insolvency of Christopher Rigg, who became insolvent in 1881. On referring to the insolvent's schedule, he found it was therein stated that there was no immovable property belonging to the insolvent, while no immovable property was brought up in his account.

Mr. Russell for the applicants; Mr. McGregor for the respondent.

Mr. McGregor: The facts in this case have become somewhat complicated; the rates on this property having been paid by the Municipal Council.

[De Villiers, C.J.: Has transfer of the property been passed?]

No, but in paragraph 6 of our affidavit it is clearly set out that the Town Council have lain by for 44 years, and they surely cannot now come forward and deprive us of our rights. These people are *mala fide*. There is clearly a contract between ourselves and them, and if the money agreed upon has not been paid over that is no ground for the cancellation of the contract. See *Pothier on Sales* (Sections 450 and 455). Here the Divisional Council have our name in their books from 1876 to 1890 and from 1890 to 1903. The Church has held the property from 1896 to 1902. This case is not on all fours with that of *White Bros.* v. *The Treasurer-General* (2 Juta, 322; see especially the judgment at p. 326). We cannot be accused of lying by, for we asserted our rights and paid three instalments (more than half the entire purchase price of the property) in 1884.

[De Villiers, C.J.: But have you not lost your rights?]

My whole argument is that we cannot lose our rights; but if the Court finds that we have lost our rights to the property, surely the £29 we have paid for it should be refunded to us. We tender arrears and interest, and I submit are entitled to the property.

Mr. Russell (for applicants): The respondent has not shown any right to this property, and on the insolvency of this very man he denied that he had any immoveable property. Section 8 of the original contract provides that should the rates not be paid, the Town Council could put up the property for sale. Green had no *jus in rem* but only a *jus in personam* in respect of the £29, and a purchaser could have no greater right than that which he derived from the vendor. The property was re-vested in the Council, and all Green can claim is £29 8s. The entries on the Town Council roll are not acknowledgments of ownership, and I submit that the respondent has failed to show cause why the rule should not be made absolute.

[De Villiers, C.J., referred Mr. McGregor to *Voet* (18, 3, 4)].

Mr. McGregor (in reply): The Town Council had no power to sell unless we had refused to pay the rates. We are quite prepared to pay them; in fact, we have actually tendered them. The law does not order a forfeiture for non-payment of rates; and therefore all the Council can now do is to claim that payment which we have already tendered. This debt was a partnership debt, and any partner had a right to collect it. See *Story on Partnership* (p. 430 of 4th edit.).

De Villiers, C.J.: The sale in question took place as far back as the 13th of June, 1860. The lots were sold to Green, who gave promissory notes for the purchase price, and was recognised as the owner, although transfer was not passed in his favour. He paid rates to the applicants, and after he had sold the lots to the respondent the latter was recognised as the owner, and the rates were received from him. The respondent, however, left Port Elizabeth, and as no one was left in occupation of the lots the applicants allowed the Congregational Union to build a church upon the property, saying in effect, however, that the Union would do so at its own risk. The applicants now apply to have the sale to Green cancelled, on the ground, apparently, that the full purchase price has not been paid in terms of the conditions of sale, to which I shall presently refer. Any decision upon this application will, of course, not affect the rights of the Union, which will have to be considered quite independently of the rights *inter se* of the applicants and respondent. The 8th condition of sale reads as follows: "Should it happen that the purchaser shall fail to furnish promissory notes or fail to pay the same when due, or otherwise fail to comply with the conditions, the property will again be put up at his expense and risk, and he shall submit to any loss at the renewed sale with-

out benefiting by any eventual profit thereof." The promissory notes must have fallen due more than forty years ago, and no advantage was taken of the 8th condition, and now, after all that lapse of time, the plaintiff asks the Court to cancel the sale on the ground of the non-payment of some of the promissory notes. During the course of the argument, reference has been made to Pothier, who states that according to the French law, the intervention of the Court is necessary to enable a vendor to take advantage of the so-called commissory pact, and that if the vendor is prepared to pay the price and interest thereon, the Court would not enforce the pact in favour of the vendor. If Pothier refers to the *lex commissoria*, then it is by no means clear that the Dutch law agreed with the old law of France. The *lex commissoria* is a pact or agreement annexed to a sale that if the price should not be paid within a certain time, the thing should be unbought (*ut, nisi certo tempore pretium solvatur, res inemta sit.* *Voet* 18, 3. 1). In the case of such a pact, *Voet* (18, 3, 4) declares that the *lex* takes effect by the mere effluxion of time, and that an interpellation is not necessary in order to constitute the purchaser in default. It is clear, however, that even under the Dutch law the vendor is bound immediately on the expiration of the appointed time to declare whether he will avail himself of the pact, and that, if he has once waived his right to do so, he cannot afterwards claim that the property shall be regarded as unsold (*Voet*, 18, 3, 2). There could not be a stronger proof of waiver of the vendor's right than the delay of forty years which took place in enforcing the applicants' right, if they had any, to treat the sale as if it had never been effected. But in truth the 8th condition of sale is not a commissory pact at all, for there is no agreement that the lots should be regarded as unsold on non-payment of the promissory notes. The agreement embodied in the 8th condition is that on failure of the purchaser to pay the promissory notes when due, the vendor should be at liberty to sell the lots at the expense and risk of the purchaser. The sale remains in force, and the vendor has no right to vindicate the property as his, but he is in the position of a person holding a power, coupled with an interest, to sell the lots on behalf of the purchaser. In the case of the *pactum retrovendendo*, where the agreement is that the vendor shall be allowed within a certain time to receive back the thing sold on restoring the price, the action by *vindicatio* is not allowed to the vendor, but he has only a personal action against the purchaser to carry out the re-sale. It would seem *a fortiori* in a case like the present that the vendors are not entitled to take up the position that the property has reverted to them in consequence of the non-payment of the promissory notes. It is not necessary to decide whether after this lapse of time the applicants could avail themselves of the 8th condition and sell the lots again, but the Court is satisfied that unless and until the right of re-sale was actually exercised, the purchaser was entitled, by tendering the price and interest, to prevent any such re-sale. Such a tender has been made by the respondent, but the applicants claim the right to have the sale cancelled altogether. They are clearly not entitled to succeed, and the rule must be discharged with costs.

[Applicants' Attorney: G. Trollip; Respondent's Attorneys: Walker and Jacobsohn.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

TRIAL CAUSES.

DOMINGO v. TONKIN. { 1903. June 8th.

This was an action for work done, in which Mr. Benjamin appeared for the plaintiff and Mr. C. W. de Villiers was for the defendant.

Mr. De Villiers said he regretted to have to inform the Court that the defendant, who lived at the Paarl, had not arrived yet, and it would be impossible for him (counsel) to go on in the defendant's absence. He did not know why his client had not put in an appearance; it was possible that he might have missed his train. He was afraid that the onus was upon him, as

they admitted the plaintiff's claim, but they pleaded certain set-offs against that claim. Counsel asked the indulgence of the Court for the postponement of the case until later in the day.

Mr. Benjamin did not think his learned friend had given any satisfactory explanation why his client was not present. All plaintiff's witnesses had arrived by the train that morning.

[Maasdorp, J., asked for particulars as to the case.]

Mr Benjamin said that the action was brought to recover £50 18s. 9d., being £20 unpaid balance on a contract, and £30 18s. 9d. extras. The plaintiff entered into a contract to erect a certain building for £595, and only £575 had been paid. Both portions of the claim were admitted. The defendant, however, set off against the claim £4, the price of certain bricks supplied by the defendant. He also claimed £1 for alleged damage to a fence, but this had now been abandoned. He further claimed £2 10s. 6d. overpaid; this plaintiff admitted. The case really came down to this: the defendant filed a set-off for £4 for certain bricks, and £13 7s. 10d., which was said to have been lent to the plaintiff. Defendant also claimed in reconvention the sum of £49, on account of alleged delay in the completion of contracts, in the one case 28 days, and in the other 21 days. Tonkin said it was agreed by the terms of the contracts that the plaintiff should pay £1 per day for every day beyond the time specified for the completion of contract. With regard to that, the plaintiff stated that the delay was caused in completing the contracts by alterations and additions that were made to the contract during the time of the performance. The defendant, in reconvention, said that the bricks were used in place of his own for the erection of a certain w.c., which was extra work. He repudiated the alleged loan, and as to the alleged delay in the completion of the contract, he said it was consequent on alterations ordered by Tonkin after the contract had been completed.

The case was ordered to stand over until later in the day.

On the Court re-assembling, Mr. De Villiers applied for a postponement of the case, and put in an affidavit of the defendant's attorneys to the effect that a telegram had been received from the defendant at the Paarl instructing them to apply for a postponement, owing to two material witnesses being unable to travel through illness.

Mr. Benjamin offered to put the plaintiff's attorney in the box to swear that the defendant had been seen at the Paarl the previous night.

The case was allowed to stand over until to-morrow (Tuesday), the defendant to pay the costs of the day.

GENERAL MOTIONS.

BOLTKER V. ASHBURNE AND OTHERS. { 1903. June 8th.

Mr. De Waal moved for a rule to be made absolute restraining the respondents from proceeding with the erection of a certain fence until the arbitrators had given their award.

Order granted as prayed.

MDLANKOMO V. MDLANKOMO.

Mr. J. E. R. de Villiers moved for leave to sue *in forma pauperis* for divorce. Mr. Benjamin had certified in the matter.

Rule granted, to be returnable on the 12th July.

ATKIN AND PECK V. DALTON AND REID.

Mr. J. E. R. de Villiers moved for leave to sign judgment against plaintiffs on the ground of their failure to file their declaration within the time specified by rules of Court.

Judgment accordingly, with costs.

WEPENER V. WEPENER AND ANOTHER.

Mr. J. E. R. de Villiers moved for the appointment of a commission to take the evidence of plaintiff and another witness in the divorce suit brought by plaintiff against his wife on the ground of adultery. Petitioner said he was a poor man, and could not afford to attend in Cape Town, and he prayed that a commission should take his evidence in the district of Aliwal North, and also that of a witness in the district of Elliott.

Mr. Justice Maasdorp thought it would be more satisfactory if this case were dealt with in the Circuit Court, but

Mr. De Villiers pointed out that the Circuit Court would not sit probably for another six months.

Commission granted, directing the evidence of the petitioner to be taken before the R.M. of Aliwal North, and that of his witness before the R.M. of Elliott.

DOMAN AND LEWIS V. THE MASTER. { 1903. June 8th. „ 9th.

Will—Codicil—Beneficiary interest—Sec. 4 of Act 22 of 1876.

A testator had by will appointed I. P. and A. D. to be her executors and A. D. to be the guardian of her minor children. By a subsequent codicil the testator revoked the appointment of I. P. and appointed A. L. to act with A. D. in his stead. This codicil was witnessed by A. D.

Held, *that as the will and the codicil must be treated as two distinct instruments, the fact that A. D. had attested the codicil did not invalidate his appointment as executor and guardian under the will and that Sec. 4 of Act. 22 of 1876 did not apply.*

This was a motion for an order directing the Master to issue letters of administration to the applicants and letters of confirmation as guardian of the minor children of the testator to the first applicant.

The Acting Master relied for his refusal on the terms of Section 4 of Act 22 of 1876.

The affidavit of Andries Johannes Jacob Dorman was as follows:

Deponent makes oath and says:

1. That by the last will and testament of the late Francina Dorothea Johanna Perold (born Enslin), widow of the late Josua Francois P. Perold, bearing date 11th of November, 1901, to a copy which hereunto annexed to which I crave leave to refer this Honourable Court, Isaac Abraham Periold and myself were appointed executors of the will of the said late Francina D. J. Perold and administrators of her estate.

2. That by the said last will and testament the said Francina D. J. Perold appointed me guardian of her minor children.

3. That thereafter, on 15 March, 1902, the said Francina D. J. Perold, by a codicil, copy whereof is annexed hereunto, and to which I crave leave to refer, cancelled and revoked the appointment of the said Isaac A. Perold as one of the executors of her last will and testament, and appointed Alexander John Lewis as joint executor with myself of her said last will and testament.

4. That the said Alexander J. Lewis and myself have made application to the respondent for issue to us of letters of administration as executors under the last will and testament of the late Francina D. J. Perold, and that I have made application to the respondent for issue to me of letters of confirmation as guardian of the minor children of the said late Francina D. J. Perold, but that the respondent has neglected and refused to issue to the said Alexander J. Lewis and myself such letters of administration as executors of the last will and testament of the said late Francina D. J. Perold, and has neglected and refused to issue to me such letters of confirmation as guardian of the minor children of the said late Francina D. J. Perold.

After various bequests, the will proceeds:

"I nominate and appoint my son Isaac Abraham Perold and Andries J. J. Doman to be the executors of this my will and administrators of my estate, and I nominate and appoint Andriese J. J. Doman to be guardian of my minor children."

Witnesses:

Maria Adams.

A. J. Lewis.

In a subsequent codicil, the testator says:

"I now concel the appointment of my son Isaac A. Perold as one of the executors of my will, and appoint Alexander John Lewis to be joint executor with Andries J. J. Doman in the place of my son Isaac A. Perold."

Witness:

A. J. Doman.

Mr. Close (for applicant): The whole question is whether the executor can be appointed after his son has signed the codicil as a witness.

The Master: The question is whether the Master would be justified in granting letters of administration under the circumstances.

Mr. Close: I anticipated that the Master would take his stand on Sec. 44 of Act 22 of 1876, but see Sec. 3 as to witnesses who are beneficiares. In the English Act there is a clause corresponding to our Sec. 3 of Act 22 of 1876.

[Kotze, J.: How do you get over Sec. 4?]

See *Jarmen on Wills* (Sec. 15—Vol. 1, p. 72). The English Act has nothing corresponding to our Sec. 4, though it has something corresponding to our Sec. 3. A witness to the codicil does not forfeit his right to a legacy under a will, see *Gurney* v. *Gurney* (3 Juta 208). Mr. Lewis has no interest under the codicil, and therefore cannot be debarred from acting.

The Master: These two witnesses have received benefits, and are therefore not impartial witnesses.

Postea (June 9th).

Maasdorp, J.: It appears in this matter that the testatrix, Francina Perold, executed her will on the 11th November, 1901, and in it appointed Isaac Perold and Andries Doman executors, and she appointed the latter guardian of her minor children. The will was attested by Maria Adams and A. J. Lewis. Thereafter, on the 15th March, 1902, she executed a codicil whereby she cancelled the appointment of Isaac Perold as one of the executors, and appointed A. J. Lewis to be joint executor with Andries Doman. This codicil was attested by Andries Doman and D. Doman, of Lewis and Doman, who have applied to the Master for letters of administration as executors, and the latter has also applied for confirmation of his appointment as guardian. The Master has refused these applications, on the ground that Lewis and Doman have attested a will, or other testamentary instrument, whereunder they are appointed executors and guardians, and that, under section 4 of Act 22 of 1876, such appointments are null and void. The Master has treated the will and codicil as constituting one document or instrument, and consequently is of opinion that the witnesses to either are witnesses to the other also. I do not think the section should be so construed. The codicil is a distinct and separate instrument from the will. The one may be invalid, whilst the other remains in full force. The execution of the will and that of the codicil are entirely distinct acts. The section in question enacts that if any person has attested the execution of a testamentary instrument, and is thereunder appointed executor, such appointment shall be null and void. In this case Lewis attested the execution of the will, and is not thereunder appointed executor. Doman attested the execution of the codicil, and is not thereunder appointed executor, or guardian. Each is appointed under an instrument, the execution of which he did not attest. In the case of *Gurney* v. *Gurney*, cited at the bar, in Drewry's Reports, 3, page 208, the Court held, under a section similar to the third section of our Act, that the word "thereby" must be construed to mean the same testamentary instrument which is attested, and that, consequently, a legacy by a will is not void because the legatee attests a codicil which gives him nothing. In the section in question the word "thereunder" must be construed in the same way as the word "thereby" in Gurney's case. In this case also each of the attesting parties attested an instrument which gave him nothing. I am of opinion that the appointment of the applicants as executors and guardians is good, and they are entitled to letters of administration and confirmation of the guardianship. The order prayed for will therefore, be granted, costs to come out of the estate.

Kotze, J.: So far as I am aware, there is no reported decision in this Court precisely bearing on the present question. It seems to me, however, that on the authority of *Gurney* v. *Gurney* (2 Drewry, p. 208), the fact that Doman is a witness to the subsequent codicil does not invalidate his appointment as executor and guardian under the prior will. In the same way, the appointment of J. A. Lewis by the subsequent codicil is not affected by the fact of his being a witness to the will. The codicil and will are to be regarded as separate instruments, made at different times, although executed by the same testatrix, and relating to the same estate. Neither Doman nor Lewis takes any benefit, or receives any appointment as executor or tutor by the separate in-

strument, which each of them has witnessed. Section 4 of Act 22 of 1876 does not apply, and the application for letters of administration to be issued to Doman and Lewis, and for letters of confirmation as testamentary guardian to be issued to Doman should therefore be granted.

[Applicants' Attorneys, W. E. Moore and Son. The Acting Master in person.]

BARLOW V. BARLOW. } 1903. June 8th.

Mr. Alexander moved for leave to sue for divorce by edictal citation. The rule granting leave to the plaintiff to sue *in forma pauperis* had been made absolute, and the return day had been extended from 1st May till the 22nd May. The original petition had been presented at Oudtshoorn. The petition set forth that there were seven children issue of the marriage, and the respondent had been living in adultery with a woman at Johannesburg for a number of years.

Leave granted as prayed, the return day being fixed for the 12th July.

Ex parte THE EXECUTORS IN THE ESTATE OF THE LATE JOHN ANDRIES MEYER.

Mr. Close moved for an order authorising the removal of one Hendrik Jeremias Meyer from executorship. It was deposed that when the rule *nisi* was served on respondent, he said: "I am satisfied to be removed, as my head will not allow me to think or do anything."

The application was granted, costs to be paid out of the estate.

DAY V. DAY.

This was an application for leave to sue by edictal citation.

Mr. Buchanan, who appeared for the applicant, David S. Day, said the matter had been before the Court before. The application was made in connection with an intended action for restitution of conjugal rights, failing which for divorce. When the case was originally before the Court it was ordered to stand over pending further proof of applicant's domicile. Applicant now deposed that he had resided in the division of Victoria West for the last year, and intended to remain there for some time. He had requested his wife, who was at Durban, Natal, to return to him at his present domicile, but she had refused to do so.

Leave was granted to sue by edictal citation, personal service to be effected and the return day being fixed for the 12th July. Leave was also granted to serve intendit and notice of trial with the citation.

Ex parte THE EXECUTORS IN THE ESTATE OF SWANEPOEL.

On the motion of Mr. Close, the rule *nisi* granted by the Court in this case was made absolute. The application was for the amendment of certain letters of administration.

CAPE TOWN COUNCIL V. CAPE GOVERNMENT RAILWAYS.

Mr. Close moved for an award of the arbitrators to be made a rule of Court.

In the notice of motion application was made for interest on capital sums, such interest not being included in the award.

An affidavit was made by Mr. Reid, attorney for the Government, in which he objected to the motion being granted as concerned the interest.

Mr. Close said he would abandon that part of the petition, and would simply ask that the award be made a rule of Court.

The Court ordered the matter to stand over until to-morrow (Tuesday) morning, in order that the Government attorneys might be communicated with.

BOBBINS V. LE ROUX.

This was an application on notice of motion calling upon the respondent to show cause on the 22nd May why an order should not be granted compelling him forthwith to remove certain building and other material deposited by him in a certain lane, the property of the applicant, situated in the Camp Ground, Rondebosch, and for an interdict restraining him from using the lane as a right of way, and from trespassing thereon in future. The affidavit of Sarah Bobbins, the applicant, stated that she was the owner of certain property bounded on the north by land belonging to the respondent. Immediately adjoining the property of the respondent there was a private lane within applicant's boundary, being her property. Counsel pointed out that, as a

matter of fact, this allegation was not correct, but by her deed of transfer applicant had free and uncontrolled right to the use of the lane. It was not, however, included in her property. The affidavit went on to state that in connection with certain building operations, respondent, or his servants, or contractors, had been using this lane, and had deposited building and other material there, causing an obstruction whereby great inconvenience was caused to the petitioner. The affidavit of J. P. Murphy, conveyancer, stated that he had made a search through the deeds relating to the respondent's property, and had found that on a transfer to respondent's predecessor, dated 16th November, 1886, the following special condition was endorsed: "That the present and future owners of the property hereby transferred shall not have any right of way over or be allowed to make any use of the private road running along the southern boundary of the property, nor shall they be allowed to cut a way or in any way interfere with the row of oak trees situated on the southern boundary of the said property." This condition had never been cancelled or withdrawn. John H. Scholtz deposed as to the obstruction.

The affidavit of Carl H. le Roux, the respondent, stated that prior to his purchasing the property, he had rented it, and had resided there in all twelve years, during which period he had used this lane. He had removed some of the material, and had issued instructions to the contractor to have the rest removed. Applicant had been caused no inconvenience by the material having been left there. Deponent had been informed by several old residents that he had a right to the use of the lane, and that the matter had been previously before the Court, at the suit of other persons. Since notice of the application had been given he had not had time to get this evidence. Counsel said that this affidavit was made before the 22nd May, when the matter was first put down for hearing, and was made with a view to an application for postponement. He had not received further instructions in the matter.

Mr. Upington for applicant. Mr. C. W. de Villiers for respondent.

Mr. Upington asked leave to refer to the papers in the case of *Bobbins* v. *Hills*, which arose out of the same matter, and in connection with which an affidavit was made attaching the title deed of the applicant. Counsel then referred to the title deed, which showed that the applicant was forever entitled to have the free and uncontrolled right and use of the lane in question.

Maasdorp, J. said he thought the information was insufficient. The applicant's affidavit did not disclose any bar to the use of the lane by respondent. The applicant referred to an agreement between the respondent and another party, but she could not avail herself of that agreement unless she were privy to it.

The case was ordered to stand over.

MUMFORD V. MUMFORD. { 1903. June 8th.

Mr. Alexander, for the applicant (Charles Herbert Mumford), who is the defendant in an action brought by his wife, Ada Mumford, for maintenance, applied for the appointment of a commission to take the evidence of defendant's witnesses in the Transvaal.

The applicant's affidavit set forth that he was in too poor circumstances to bring witnesses from the Transvaal.

Mr. Close (for the respondent) put in her affidavit, in which she stated that the applicant had not supported her for five years, and that his attempt at a postponement was merely in order to delay the payment of maintenance. As manager of the Field Force Canteens in Waterkant-street, the applicant had been earning £80 per month, and for two years he had been living with another woman. By a private deed of separation, the applicant was to pay £20 per month to the respondent, and the action which was standing over was brought for a recovery of arrears of maintenance.

An answering affidavit by the applicant denied that he had received a salary of £80 per month, or that he had been living with any other woman.

Counsel having been heard in argument,

Maasdorp, J.: The defendant in this case makes application to take evidence of his witnesses, who are supposed to reside in the Transvaal. There is no mention in the affidavit of the witness whom the defendant proposes to bring before the

commissioner. This is merely a vague statement that in the plea to the plaintiff's claim the defendant has set up a defence of adultery. In that plea no time is fixed when the adultery was committed, no place is stated where it took place, and it is impossible for the Court to grant a commission for the examination of witnesses upon facts of which the particulars have in no way been brought to the notice of the opposite party. A good deal more information is required in reference to the alleged adultery committed by the plaintiff in this case before the Court can entertain an application for a commission of this nature, and upon that ground the Court will refuse the application upon the affidavit as it now stands, with costs. If the applicant is in a position to put further information before the Court he may apply again. There is a further application for a postponement of the case, and for the same reason the Court would have refused the application of the applicant for the postponement of his case to any lengthy date, but it appears there is no date available upon which this case can be heard out of the term, and upon that ground the Court will order that the case shall stand over until some day next term upon which the applicant can set the case down. The application must be refused, with costs.

Kotze, J., concurred.

REVIEW CASE.

REX V. SAVAGE AND ANOTHER. { 1903. June 8th.

Implements of housebreaking—Section 8, Sub-section 1, Part I, Police Offences Act, 1882.

An accused found walking at night in a public street in company with another person in whose pocket two skeleton keys were found, and overheard to say to such person, "if we had a jemmy with us we might have lifted the sash."

Held, *not to be in possession of implements of housebreaking.*

Kotze, J.: During the week a case came before me in which two persons were charged with a contravention of section 8, paragraph 1, of the Police Offences Act, and the charge against them is that they were found in possession, without lawful excuse, of housebreaking implements on a certain night, the 26th May. Two constables watched the two accused, named Savage and Swift, in the neighbourhood of Roeland-street during the dead of night. When passing along the street, Swift was overheard saying, "If we had had a jemmy with us, we might have lifted the sash." Thereupon the two policemen rushed forward and arrested the two men. Two skeleton keys were found on Savage, but nothing was found on Swift. Savage pleaded guilty to the charge, and Swift pleaded not guilty. Each was sentenced to six months' imprisonment, with hard labour. Under the circumstances, there is certainly a very great amount of suspicion through Swift being in the company of this man called Savage, but there is no evidence to show they were out to commit anything unlawful, or had actually done so, or that they were out to commit any act of burglary. We do not know what led up to or caused the remark made by Swift, nor to what occasion it referred. Although there is a great amount of suspicion against Swift, I think the case stops there. It would be rather a strained inference to hold that Swift must have known or did know that Savage had skeleton keys in his pocket. The evidence fails to my mind in that respect, and the conviction therefore against Swift must be set aside. The conviction of Savage will, of course, stand.

ORPEN V. CILLIERS. { 1903. June 8th. „ 9th.

Election petition—Signature of agent—Act 9 of 1883.

The language of Section 4, Sub-section 1 of Act 9 of 1883, is peremptory. Where, therefore, an election petition was signed by the agents of the petitioner and not by the petitioner personally.

Held, *that the petition was invalid.*

This was an application arising out of a recent election of a member of Assembly for the Division of Prieska, as a result of which respondent was returned as member for the Parliamentary division, being the candidate for whom the majority of votes were returned to have been given.

The petition of Redmond N. M. Orpen, of St. Clair, Douglas, in the Division of Herbert, was as follows:

1. Your petitioner was a candidate at the election of a member to represent the Electoral Division of Prieska in the House of Assembly consequent upon the retirement of the Rev. Christian W. H. Schrader.

2. Your petitioner is a registered voter, and was duly nominated at the Court or meeting convened and held according to law on the 20th February, 1903.

3. At the said Court there was also nominated Petrus S. Cilliers, and a poll having been demanded, the 28th of March, 1903, was duly fixed for the taking thereof.

4. By Proclamation 119 of 1903, appearing in the *Government Gazette* of the 10th April, 1903, the return of the returning officer was reported as follows:

Petrus S. Cilliers, 222 votes,

Redmond N. M. Orpen, 215 votes;

and the said P. S. Ciliers was accordingly declared the candidate to whom the majority of votes had been given, the duly elected member of the House of Assembly for the Electoral Division of Prieska.

5. Your petitioner has been informed that one Robert G. Hedley, on 23rd of April, 1903, lodged a petition with the Registrar of this Honourable Court, challenging the qualification of the said P. S. Cilliers to be returned, and to retain the seat aforesaid, alleging that he held certain offices of profit under the Crown which vacated his election and seat.

6. Your petitioner has further been informed that on 11th of May, 1903, a further and supplementary petition was lodged by the said R. G. Hedley, alleging that certain disfranchised persons had voted, and asking for a scrutiny and recounting of the votes, in order to have it determined whether the said P. S. Cilliers was legally and properly returned.

7. Your petitioner has instructed his representatives in Cape Town to make enquiries, and to inspect the marked copies of the list of persons entitled to vote, kept by the presiding officer at the various polling stations, with a view to the lodging of a petition asking for a scrutiny and the claiming of the seat.

8. Your petitioner's representatives have discovered that the marked copies of the list of voters belonging to the stations undermentioned are not available for inspection at the Colonial Office, viz.: In the fiscal division of Kenhardt, Ward 6, field-cornetcy Zeekoe, polling station Bland Guand South. In the fiscal division of Gordonia, Ward 3, polling station Keimoes. In the same fiscal division, Ward 7, polling station Rietfontein, making three marked registers that are missing.

9. Apart from the names mentioned in the schedule attached to the supplementary petition filed by the said R. G. Hedley, your petitioner has been informed that votes have been recorded on the name of voter No. 1,258 at two places, viz., at Upington and Kenhardt, and also on the name of voter No. 960, who voted at Onbeep and Koppiesvlei, and further, that voter No. 201, who is reported to have been convicted of treason, is stated to have recorded his vote at Keimoes, one of the stations for which the marked copy of the register is not available for inspection.

10. Your petitioner has received a communication, written from Keimoes, in which there appears the folowing remark: "If any names are required for petition, send here, you will get a lot." Your petitioner's representatives are desirous of inspecting the marked registers relating to Keimoes and the other two polling stations before concluding the schedule of objections.

11. Your petitioner's representatives have applied to the Colonial Secretary for access to these three marked copies of the registers, and are informed that telegraphic enquiries are being made in regard thereto.

12. On investigation of the marked copies of the registers available at the Colonial Office, it appears that crosses in red ink have been placed opposite to

the names of a number of persons who were convicted of treason and other political offences, and disfranchised, but there are many names of convicted persons that are not so marked; and it is desirable that the three missing marked registers be inspected, to see if any of the convicted persons whose names have not been asterisked, recorded their votes.

13. Your petitioner has caused the said R. G. Hedley to be approached, and it has been arranged (subject to the confirmation of this honourable Court), that the supplementary petition, filed on the 11th of May at the instance of the said Hedley, be withdrawn, and that in lieu thereof this petition be substituted.

14. Your petitioner annexes hereto a schedule setting forth the result of the investigations up to date, which are, however, incomplete owing to the absence of the marked copies of the registers, and your petitioner apprehends that it will not be practicable to go to trial on the 11th of June, 1903.

15. Your petitioner is informed that at the counting of the votes, the returning officer discarded twenty ballot papers, six of which are returned as having been rejected for bearing a mark identifying the voter, and fourteen alleged to be void for uncertainty.

16. Your petitioner is desirous of having the decision of the returning officer on these rejected ballot papers brought under review before this Honourable Court, and in order to enable him to set forth his claim and include them in the schedule, it is necessary to obtain access to the rejected ballot papers at an early date.

17. Your petitioner has telegraphed to his attorneys in Cape Town, requesting them to lodge a petition on his behalf claiming a scrutiny of the votes recorded at the recent election at Prieska, and also claiming the seat, and has at the same time advised them that the usual warrant authorising proceedings in the Supreme Court has been posted.

18. Wherefore your petitioner pray: that it may please your Lordships:

(*a*) To allow the supplementary petition filed by the said R. G. Hedley on 11th of May to be withdrawn, with a view to preventing a multiplicity of claimants.

(*b*) To fix another date for the hearing of this petition, other than 11th of June, 1903, leaving that date available for the determination of the questions raised by the said Hedley in the petition lodged by him on the 23rd April

(*c*) To make an order allowing your petitioner's representatives access to the rejected ballot papers, in order to enable them to insert in the schedule annexed to this petition the rejected votes claimed on behalf of your petitioner.

(*d*) To allow your petitioner to supplement the schedule annexed to this petition when the missing copies of the marked registers shall have been available for inspection.

(*e*) To hold an enquiry into the votes rendered, and upon a searching thereof and of the rejected ballot papers, to award to your petitioner the seat as member of the House of Assembly for the Electoral Division of Prieska.

(Sgd.) VAN ZYL & BUISSINE,
Attorneys for R. W. M. Orpen.

There was an affidavit sworn to by Cyril Alexander Owen-Lewis, stating that he had been in telegraphic communication with the petitioner and his agents and representatives, and that to the best of his knowledge and belief the allegations set forth in the foregoing petition were true and correct.

The schedule referred to in the aforegoing petition stated that three voters (Nos. 201, 363, and 871) whose votes had been recorded had been convicted of treason, and that Nos. 691, 960, 1258, 1290, and 1403 had recorded votes at both of two places.

The original petition of Robert George Hedley (supported by affidavit sworn April 23rd, 1903), stated *inter alia* that in the *Government Gazette* of April 10th, 1903, Petrus Stephanus Cilliers had been gazetted as the elected member for the House of Assembly for the division of Prieska, but that inasmuch as the said P. S. Cilliers held divers offices of profit under the Crown, the petitioner said he was disqualified from being returned as a member of the Legislative Assembly, and the petitioner therefore, in accordance with the provisions of Act 9 of 1883 complained of the return of the said P. S. Cilliers, and prayed that the said return might be set aside as null and void, and that the seat might be declared vacant.

In a supplementary petition supported by affidavit sworn to May 9th, 1903, the said R. G. Hedley further disputed

the validity of the aforesaid return, on the ground that sundry persons who had been disfranchised for political offences had recorded their votes at the Prieska election.

The affidavit of Stephanus Z. Grove, of Prieska, retired farmer, stated that at the taking of the poll for the Parliamentary election for Prieska, held in March, 1903, deponent acted as scrutineer on behalf of P. S. Cilliers. R. N. M. Orpen, personally, together with two others, acted for himself as scrutineer, and examined twenty ballot papers which had been rejected by the returning officer, and did not make or lodge any objection against the rejection of all or any of the papers so rejected.

Mr. Upington (for the applicant) said that in regard to the exception taken to the form of the petition, he submitted that, where the Act said that the petition was to be signed by the petitioner or petitioners, it meant nothing more than that the document must be signed in the same way as any other legal document. If Mr. Orpen had signed a promissory note through his attorneys, he surely would not be able to escape liability. The petitioner had ratified the acts of his agents. He submitted that, in the case of an election petition, there was no possible reason why the petitioner should sign in his own handwriting, any more than any other species of petition that was presented to the Court. He submitted it was a full and good signature within the terms of the Act. Security had been lodged by his agent, and he could not see what earthly object there could be in compelling the petitioner, who was a long way from Cape Town, to actually sign the document. As long as the signature was binding, he submitted that the provisions of the Act were fulfilled. He would apply for the withdrawal of the supplementary petition filed by Hedley on the 11th May.

Mr. Burton (for respondent) applied for postponement on ground of short service. I cannot oppose the application for an order on the Under Colonial Secretary directing him to search for these missing ballot papers—*Sec.* 60 *of Act* 9 *of* 1892. The envelopes containing ballot papers can be opened only by order of the Legislative Council, the House of Assembly, or a Superior Court. In 1898 some applications similar to that now before the Court were made, and then the Registrar of the Court was appointed to open the envelopes containing the marked voters' lists. I do not oppose the inspection of these lists, but I am not prepared to assent to that of the ballot papers. I should, however, wish to say a few words regarding Orpen's petition. Sec. 17 of this petition shows that it is really presented by his attorneys. It is drawn up and signed by Messrs. Van Zyl and Buissinné, but we have no information that Orpen himself signed the petition—see *Sec.* 4 *of Act* 9 *of* 1883. As to the presentation of an Election Petition see *Sub-sec.* 3 *of Sec.* 4, *Act* 9 *of* 1883. The petition must be signed by the petitioner, and this is no mere legal technicality. *Sub-sec.* 2 *of Sec.* 4 is of very great importance. The defeated candidate must present his petition within 42 days: so that the elected candidate may not have a petition hanging over his head indefinitely. In the present case, the very last of the 42 days expired on May 22nd, the day the so-called petition was put in by the attorneys. Then it was not signed by the petitioner. It is therefore not an Election Petition in proper form, and I submit that the Court will not go out of its way to grant any extension of time. No doubt Hedley's petition was filed in sufficient time, but its prayer is quite different from that of Orpen's. Hedley only asks that Cilliers should be declared disqualified, but Orpen claims the seat. The Act is imperative that the petition must be signed by the petitioner himself. Even if this petition be held to be in form in other respects, it is now too late for the petitioner to sign it, since the 42 days have expired.

Mr. Upington (in reply): As to the form of the petition: where the Act says it must be signed by the petitioner, nothing more is meant than that the document must be signed like any other document—that is to say, either by the principle or his agent. In this case Orpen has ratified the act of his attorneys. If the Act of 1883 is peremptory, there must be some reason for this, but there can be no reason why an election petition should be signed by the petitioner *propria manu*. A man's agent is always justified in signing on his behalf.

[Kotze, J.]: An agent's act is often taken to be that of his principal, particularly where the principal can ratify the agent's acts, but the question is, can he do so in the present case?]

I know of no case to show that he cannot. The only point is whether the petitioner is bound by this document signed by his agent. I submit that he is so bound. Another point to be borne in mind is that this petition comes from a very sparsely peopled district, a long way off. The only object in getting the petition signed is to bind the petitioner to the respondent as to costs, but the signature of the attorney is sufficient for that purpose.

[Kotze, J.: Suppose the Act had said "by writing under his hand"?]

That would have been ambiguous. If the petitioner had himself to sign, the Act would have said "by writing under his *own* hand." If a warrant had been signed when this petition was filed, it would have been quite legal.

[Maasdorp, J.: But when your petition was filed, no warrant was filled with it. No warrant has been filed even yet.]

I was not aware of that, but I would contend that with regard to Sub-sec. 2 of Sec. 4, although the petition must ordinarily be presented within 42 days, the Court has discretion even in regard to that matter. So here, if owing to no fault of his own the applicant had been prevented from presenting his petition within 42 days, Sub-sec. 2 of Sec. 4 still gives the Court power to deal with it.

Mr. Burton (in reply): As no warrant has been filed, this petition is presented without any authority as to costs, see Sections 19, 24, and 27 of the Act. This, however, is not a case of substitution, for Orpen is not substituted for Hedley.

Postea (June 9).

Maasdorp, J.: The applicant in this matter applies for an order which will enable him to obtain inspection of certain election papers connected with a contested election between him and the respondent for a seat in the Legislative Assembly, which are now in possession of the Colonial Secretary. He also moves for leave to withdraw an election petition filed by Robert Hedley against the election of the respondent, and for other matters mentioned in his petition. He claims these orders upon the ground that he, as the unsuccessful candidate, has lodged a petition in this Court against the election of the respondent, and that for the purposes of the trial of his petition he requires, and is entitled to, the inspection asked for, and other relief he seeks. The application is opposed upon the ground, amongst others, that the applicant's petition has not been duly drawn up and filed in accordance with the provisions of the 4th section of Act 9 of 1883, and that it is consequently invalid, and the applicant is not entitled to proceed further with it. The petition appears to be signed by Messrs. Van Zyl and Bussinné, a firm of attorneys, who sign as the attorneys of the applicant. The section of the Act in question provides as follows: (4) "With respect to the presentation of an election petition under the Act, the following provisions shall apply: (1) The petition shall be signed by the petitioner or all of the petitioners if more than one." This provision is very clear, and in form and time appears to be imperative. It is very often difficult to decide whether words in an Act, which are apparently imperative, may not in reality be merely directory. *Maxwell*, in his "Interpretation of Statutes," says that in some cases the forms prescribed by a Statute are regarded as essential, and their omission has been held fatal to the validity of the thing done, but in others they have been regarded as merely directory. He adds that the principle of regarding them as merely directory has certainly been adopted, but that its propriety has been questioned. He says further, in page 521, "Where powers and rights have been granted with direction that certain regulations and possibilities shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them essential to the acquisition of the right and authority conferred, and it is therefore probable that such was the intention of the Legislature." Taking this class of cases, it seems that where a Statute confers a right, privilege, or immunity, the regulations, or forms and conditions, which it prescribes are imperative, in the sense that the non-observance of them is fatal. It seems to me the case now before us answers this description. It must be borne in mind that the presentation of petitions to the Court are of common occurrence, and if the Legis-

lature had no special purpose in view, they might have allowed these petitions to be presented in the ordinary manner, in which case the signature of a duly-appointed attorney would have been sufficient. Instead of that, the Legislature has made this special provision for the signature of the petitioner himself. It is certain that the signature of the petitioner himself removes all difficulty and doubt which might arise as to the nature and validity of the power of attorney where an attorney might have acted. Such doubt might cause serious trouble to the parties interested in the trial of the petition. This very case is an illustration in point, when we consider what difficulty there seemed to be in the discovery and production of the power of attorney. The want of the petitioner's signature to the petition is, in my opinion, fatal to the validity of the petition presented by the applicant in this case, and he cannot proceed further with it. The application must be refused, with costs.

Kotze, J.: By Section 4 of Act 9 of 1883, it is provided that when an election petition is presented, it shall be signed by the petitioner, or all the petitioners, if more than one. These words are, I think, peremptory, and do not allow of a petition being signed by an agent on behalf of the petitioner. The intention of the Legislature, whatever its reasons may have been, must be gathered from the language which it has thought fit to employ. The Legislature has indicated how the right which it creates of presenting a petition is to be prosecuted, and has provided in what way this is to be done. It has chosen to say that the petition *shall* be signed by the petitioner, and this is equivalent to providing that it *must* be so signed. We cannot depart from the clear and exact language of the Act. I am therefore of opinion that the application should be refused, with costs.

[Applicant's attorneys, Van Zyl and Bussinné; Respondent's attorneys, P. De Villiers.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. LE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

SAMPSON V. SAMPSON. { 1903. June 9th.

Mr. Rainsford applied on notice of motion for a decree of divorce, respondent to be declared to have forfeited the benefits of community, and to be ordered to pay the costs of suit. Counsel said that the applicant's affidavit stated that the respondent had failed to restore to her conjugal rights within the period appointed by Court.

Decree granted in terms of prayer.

BRAWN V POWRIE. { 1903. June 9th. „ 10th.

Servitudes, urban and rural—Non-user — Prescription — Right of way—*Iter—Actus.*

Rural servitudes are lost by non-user during the period of prescription, whereas urban servitudes, such as that of lights, are only lost by non-user if, in addition to such non-user on the part of the owner of the dominant tenement the acts of the owner of the servient tenement have been inconsistent with the existence of the servitude.

Where a person, who is entitled to a right of way for vehicles as well as for going on foot, uses the road only for going on foot, he does not on that account only lose the servitude by non-user.

Sed quaere *where, although the road is used by foot passengers, it is blocked by an*

obstruction and trees were allowed to grow on it for the period of prescription which prevented the road from being used for vehicles?

This was an application for an order calling upon the respondent, Mrs. Herman Powrie, of Osborne Lodge, Cape Town, to remove all fencings and other obstructions on the roadway on the north side of her property, by which the applicant claimed that he was entitled to have access to Breda-street.

The affidavit of the applicant, Julius Brawn, said that he was the owner of a piece of land in Breda-street, and he had been prevented from using a roadway, 14 feet 6 inches in width which he had a right-of-way over as owner of his property. He was consequently interfered with in carrying on the building operations for which he had arranged.

The affidavit of the respondent said that the road had been used as a fowl-run. The applicant proceeded to cut down some trees on the road, which must have stood there for 40 years when he became the owner of the adjoining ground. She denied the right of the applicant to use the road, as she verily believed that the said road had not been used for thirty years by his predecessors in title. People living in the neighbourhood of Breda-street declared that, to their certain knowledge, the road had been closed for the last thirty years and more, and never opened.

Two further affidavits were also read in one of which deponent swore that, to his knowledge, the road had been closed for the last thirty years, and had never been opened to traffic, and in the other, deponent said that, to his knowledge, the road had been closed for 23 years.

The replying affidavit of Frederick Myburg, son of a former owner of the adjoining property, stated that, although the said roadway was never used for vehicular traffic by their family, they always exercised their right-of-way over it by passing backward and forward over it into Breda-street whenever they pleased. It was never used for vehicular traffic, because his father had access over another and more convenient road.

Other affidavits were also read, to the effect that the owner of the property now belonging to the applicant had a right-of-way over the road in dispute.

The affidavit of W. A. Currey, secretary of the Estate and Orphan Chamber, stated that he sold the property, Osborne Lodge, to the respondent, and he explained to her at the time that the owner of the adjoining property had a right-of-way over the road.

Sir H. Juta, K.C., for applicant; Mr. Close for respondent.

Sir H. Juta said that from the documents it was clear that there was a servitude. The respondent said that a right had been acquired by prescription. The evidence, he submitted, was such as could not prevail against the clear grant that appeared to have been made to the applicant's predecessors in title.

Mr. Close submitted that the applicant had lost all right over the roadway in question owing to non-user during the period of prescription. He urged that whatever remedy the applicant had was by way of action, and that the applicant had not established a clear right to an interdict.

Sir H. Juta argued that the plaintiff's right was clearly set out in the title, and that it was for his learned friend to show that that right had been abrogated.

De Villiers, C.J., said he would like to read the affidavits over again before giving judgment.

Postea (June 10th).

De Villiers, C.J.: This is an application to compel the removal of an obstruction to a right of road claimed by the applicant over the respondent's property. The transfer to the respondent's predecessor in title, dated 14th October, 1861, reserves the right of road in favour of the applicant's land, and, therefore, unless the right has been lost in any of the modes in which a rural servitude may be lost, the respondent had no right to obstruct the road. Her case, however, is that the road has never been used as such for over thirty years, and that the applicant, who has only recently become the owner of his tenement, broke down an obstruction which had existed there for thirty years or more, and cut down three old oaks on her land, now claimed for a road. The applicant does not deny the latter statement, and I am bound to

say that as the respondent was in peaceable possession, the proper course for the plaintiff was to apply to the Court in the first instance instead of taking the law into his own hands.

That a rural servitude may be lost by non-user alone on the part of the owner of the dominant tenement without any adverse act on the part of the owner of the servient tenement is a clear rule of the Dutch, as it was of the Roman law. In this respect rural servitudes differed from urban servitudes, such as the servitude of lights, which could only be lost by non-user, if, in addition to such non-user on the part of the owner of the dominant tenement, acts which are inconsistent with the existence of the servitude had for the period of prescription been done by the owner of the servient tenement (Digest, 8, 2, 6, *Voet*, 8, 6, 7, and 11). This distinction arises from the circumstance that urban servitudes are negative in their nature, while rural servitudes are affirmative. If no one actively uses a right of way for the period fixed by law, the right of way is destroyed, whereas a servitude of lights consists in the owner of the servient tenement not doing something, and, as justly remarked by Hunter (Roman Law, 252), "so long as that is not done the servitude is kept fully alive." It is impossible upon the affidavits in this case to arrive at a definite conclusion as to whether, for a period of thirty years, there has been such an entire cessation of the use of the road on the part of the applicant's predecessors in title as to destroy his right of way. Some of his witnesses say that although the roadway was not used for vehicular traffic, it was used for passing backwards and forwards into Breda-street. If the roadway was open, and was used by persons going to or from the applicant's land as a footway, the fact that it was not used for vehicles would not deprive the applicant of his right to use it for vehicles. Upon this point the digest citing *Paulus* says, *Qui iter et actum habet, si statuto tempore tantum icrit, non perisse actum, sed manere, Sabinus Cassius Octavenus aiunt*, and *Voet* cites the passage without disapproval. There is a lack of evidence, however, as to the manner in which the roadway was approached and used by foot passengers. According to some of the respondent's witnesses, the road has been closed for the last thirty years or more and never opened in the interval. According to the respondent herself, when she bought the property last year she found that the entrance had been closed up with galvanised iron, and that the road itself had been used as a fowl run. There were, she says, several oak trees on the road, which she considers to be over forty years old. If the road was kept closed for thirty years by the respondent's predecessors in title, the fact that the applicant's predecessors in title went through or over the obstruction without removing it would not necessarily prove that they used the road on foot in the exercise of their right to use the road either on foot or with vehicles. On the whole, I am of opinion that the applicant's case has not been so clearly made out as to justify the Court in giving him the relief asked for on motion. It is quite possible that the respondent may be able to prove that the obstruction to the road was placed there by her predecessors in title, and kept there for thirty years, and that the applicant's predecessors in title did not openly use the road even for going on foot, in which case the servitude could no longer be claimed. On the other hand, if the obstruction was placed there by the applicant's predecessors in title for their own protection, and if they continued to use the road, notwithstanding the obstruction, the respondent would be well advised in not incurring the expense of further litigation. As the matter stands there will be no order on this motion, but the applicant must proceed by action, the notice of motion being allowed to stand in lieu of a summons. The question of costs is reserved.

[Applicant's Attorneys, Silberbauer, Wahl and Fuller; Respondent's, Jno. Ayliff.]

Ex parte EXECUTORS OF THE ESTATE OF THE LATE MOODIE.

Mr. Searle, K.C., on behalf of the executor testamentary, moved for the appointment of a *curator ad litem* to assist the heirs in the preparation of a special case to be brought before the Court to determine the construction of a certain clause in the will of the late George Pigott Moodie. Testator died in 1891, leaving a widow and four children. The said widow died in 1896. One of the children, aged about 17 years, died in 1903. The surviving children were all

minors, and their guardians were resident in England. By his will the testator made certain bequests to his children, payable when they reached the age of 21 years, and the point to be determined was whether the legacy of £20,000 left to the deceased daughter devolved on her heirs, or fell into the estate along with the rest of the money.

An order was granted as prayed, Sir H. Juta being appointed *curator ad litem*.

CAPE TOWN TOWN COUNCIL } 1903.
V. CAPE TOWN RAILWAYS. } June 9th.

This was an application to have an award of arbitrators made a rule of Court with costs. The applicants had originally asked for interest on the capital sum of the award, and upon this the respondents had entered an appearance to oppose, but that claim was withdrawn on objection being brought to the notice of the applicants. The only question was with regard to the costs of the opposition to the application in so far as it concerned interest on the capital sum of the award.

Mr. Close for the applicants.

Mr. Searle, K.C., for the Government, said that part of the application was only withdrawn just before the matter was coming on in Court.

De Villiers, C. J., in giving judgment, said that the award would be made a rule of Court with costs, excepting the costs of opposition, which would be paid by the applicants.

ANNEAR V ANNEAR.

Mr. J. E. R. de Villiers moved on behalf of the applicant for leave to sue by edictal citation for divorce from her husband on the ground of his malicious desertion. The applicant's statement was that she was married at Johannesburg in 1890, that there were three children of the marriage, and that without lawful cause or excuse her husband deserted her in 1898, and he was now residing at Fordsburg, Transvaal, beyond the jurisdiction of this Court.

[De Villiers, C. J.: Where are they living?]

Mr. De Villiers: They used to live at the Paarl. She is now suing in *forma pauperis*.

De Villiers, C. J., said that the case must stand over, so that an amended petition could be presented. The particulars were too scanty; there was nothing even to show that the respondent had ever lived in this colony.

WEINTROB V. SCHAVEREIN.

This was an application to have a rule *nisi* granted on the 20th May made final. The respondent had on the 30th May filed certain affidavits, to which the applicant had not yet been able to reply.

Mr. Bisset for applicant; Mr. Gardiner for respondent.

Mr. Gardiner pointed out that his client was under a temporary interdict.

[De Villiers, C.J.: There has been ample time to have the replying affidavits prepared.]

Mr. Bisset said that his attorneys had been led by the other side to believe that a postponement would be applied for until the 12th June, and accordingly his attorneys had not yet prepared the affidavits. The applicant's attorneys had now sent to the Paarl, and they hoped to have the affidavits ready to-morrow (Wednesday).

Mr. Gardiner: Under these circumstances I shall not oppose.

The matter was ordered to stand over.

WIENER V. KUKARD.

This was an application against the respondent to have him declared guilty of contempt of Court. Mr. J. E. R. de Villiers appeared for the applicant, and Mr. Close was for the respondent.

Mr. De Villiers said that the respondent sold to the applicant certain property, and the latter afterwards obtained judgment against him for the transfer of the property on tender of the purchase price. On the 16th April last an application was made on notice of motion to this Court to authorise the High Sheriff to pass transfer to the applicant, seeing that the respondent had failed to pass transfer; but then, on its being mentioned that the respondent could not pass transfer, because the title deeds were in the possession of his wife, their Lordships thought it would be better to grant an order calling on him to show cause why he should not be committed for contempt unless he passed transfer before the 30th May.

Mr. Close said he appeared to show cause, and he proceeded to read the affidavit of the respondent, Christian Frederick William Kukard, who said that he was married in community, but he had been living apart from his wife during the last fifteen years. He had been the owner of certain property at King William's Town. His wife had occupied that property free of rent. Deponent sold the property on condition that the purchaser undertook to get the title deeds from his wife, as he did not wish to approach her in their strained relationships. He further agreed to accept £100, and allow her to take the remainder of the purchase price, on condition that she paid the rates and taxes due. He afterwards received a letter from Messrs. Yates and Murray, in which they stated that his wife refused to pass transfer, unless she received £150, rates and taxes to be paid by the respondent, leaving a balance due to deponent of somewhere about £55. He replied to that letter, stating that he agreed to pay the rates and taxes due, and that he would be prepared to let his wife have £125 clear in order to settle the matter. Without having had a reply to that letter, he next found that an action had been instituted against him to compel him to pass transfer. Having no means to defend the action, he was obliged to let it go by default. He was a working mason, and he had no means to institute an action against his wife to compel her to pass transfer.

Mr. De Villiers contended that the sale was unconditional, and that it lay upon the defendant to sue his wife. If he could not sue her in any other way, then he should do so *in forma pauperis*.

Mr. Close submitted that the applicant's remedy was to sue the wife of the respondent.

De Villiers, C. J., said that the Court would order the respondent's wife to hand over the title deeds to Messrs. Yates and Murray upon payment to her of the sum of £112 10s., less £18. He considered that there should be tender to the wife of half the purchase price, less what was bound to be paid, and that the costs of the proceedings should be paid by the respondent, who had entered into contract that he had failed to fulfi

LOGAN V. COLONIAL GOVERNMENT. { 1903. June 9th

Expropriation for railway purposes—Brick-making.

The applicant had obtained a judgment of the Supreme Court, declaring that the respondents were not entitled to use certain land save for necessary railway purposes. Against this judgment the respondents had appealed to the Privy Council. Applicant now asked for an interdict to restrain them from making bricks on the said land.

Held, *that the respondents might burn the bricks already made, but that pending the judgment of the Privy Council they must be interdicted from making any further bricks.*

This was an application on notice calling on the Government to show cause why the Railway Department, their contractors, and servants should not be interdicted from trespassing on part of the farm De Dries at Touws River, for the purpose of making bricks.

The affidavit of the applicant stated that in May, 1901, he obtained judgment against the Railway Department, the Supreme Court declaring that the Department was not entitled to use land at Touws River for other than necessary railway purposes. An appeal had been noted, and was down for hearing on the 21st inst. While away in Scotland, the applicant was asked by the Railway Department for permission to use the land for a native location. Applicant intimated that the matter must remain in abeyance pending the decision of the Privy Council on the appeal; and in the meantime he allowed the land to be used at a native location. The Department, however, had exceeded the leave and licence given by him, and had used the land for purposes of brickmaking.

The answering affidavit of Allan G. Dobson, acting engineer, stated that the land in question was expropriated by the Railway Department for railway purposes on the 5th November,

1902. The notice of expropriation was attached.

Sir H. Juta, K.C., for the applicant; Mr. H. Jones for the respondent.

In the course of argument, Sir Henry Juta said that if the Railway Department had taken up the position that they recognised their liability to pay compensation, the applicant would not have come to the Court.

Mr. Jones said that the question of compensation was left open in the notice of expropriation. Whether compensation had to be paid would be determined by the appeal to the Privy Council.

Sir Henry Juta argued that the making of bricks was not a railway purpose.

De Villiers, C.J.: It is to be regretted that the applicant did not, upon receiving the notice of expropriation from the Railway Department, at once raise his objection to the expropriation, and to the land being used for any purpose connected with the railway. It is impossible to say how far the expropriation has gone, but it is reasonably clear that the land has not yet been transferred to the Government. In the meanwhile it would appear that important questions will be raised in their appeal before the Privy Council which would have an important bearing on the present application. It is quite possible that the effect of the Privy Council judgment may be to render it illegal for the Railway Department to excavate on the land now in question. I consider, therefore that the respondent ought not to proceed with the excavating of any more clay. The bricks that have already been made may be burned and removed, but there should be no more excavation until the decision of the Privy Council has been given and the rights of the parties determined. For the present the Court will grant an interdict restraining the respondent from excavating clay for the purpose of making more bricks pending a further order of the Court. This interdict is not to prevent the burning or removal of bricks already made. As to the question of costs that will stand over until the decision of the Privy Council has been given.

In reply to Mr. Jones, His Lordship said that, if the decision of the Privy Council were in the Government's favour, it would be for the Government to apply to have the interdict removed.

[Applicant's Attorneys: Van Zyl and Buissinné; Respondent's Attorneys: Reid and Nephew.]

Ex parte GREENBERG. { 1903. June 9th.

Mr. Russell applied for leave to petitioner to pass certain transfer without the assistance of her husband, who is confined in a lunatic asylum in America.

Granted.

MAXWELL AND EARP V. VAN DER MERWE

Mr. Russell moved to attach certain moneys and to have the same declared executable in satisfaction of a judgment of the Court.

Granted.

STORK V. STORK.

On the motion of Mr. Russell, leave was granted John Dry Stork to sue his wife for divorce by edictal citation, personal service to be effected, and the return day being fixed for the 1st August. Leave was also granted to serve intendit with notice of trial.

MILLER V. KOTZE.

This was an application on notice calling on respondent to show cause why a decree of civil imprisonment granted against applicant should not be removed.

Mr. Close appeared for the applicant; Mr. C. W. de Villiers for the respondent.

The original action was brought by the respondent for damages for seduction and for maintenance of a child, of which applicant was alleged to be the father. Judgment for £50 damages and costs, and for the payment of £1 10s. a month as maintenance was given. Subsequently a decree of civil imprisonment was granted.

Mr. Close now put in an affidavit, in which applicant stated that when the decree was granted he was in the Criminal Sessions, under the misapprehension that that was the Supreme Court. He had then intended to appear before the Court and make an offer. He was only earning £4 a month, and offered to pay 5s. a month in liquidation of the debt.

In an affidavit for the respondent, Mr. Pearson, attorney, stated that after having been arrested, the applicant was, through the fault of the Sheriff, or his officers, or the gaoler, allowed to go free.

The Master had taken up the position that having once been arrested and liberated the debtor could not again be arrested on the same decree.

The Court suspended execution of the decree pending the payment of 10s. a month, the first payment to be made on the 15th of June, with leave to applicant to apply for an increase.

His Lordship said that this would revive the decree of civil imprisonment, and there would be no occasion for a fresh decree.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

DOMINGO V. TONKIN. { 1903. June 9th.

This was an action to recover £50 18s. 9d., being £20 of an unpaid balance of the contract price for the erection of certain buildings, and £30 18s. 9d. for extra work done.

Defendant claimed damages in reconvention for breach of contract.

Mr. Benjamin was for the plaintiff, and Mr. C. W. de Villiers for the defendant.

The case had been postponed from the previous day on a telegram from the Paarl that two material witnesses for the defence were ill and unable to travel.

Mr. De Villiers said that a messenger had been sent to the Paarl, and it appeared that the persons referred to in the telegram were the defendant and his wife, and although it would be impossible for the defendant's wife to be there that day, he would not say that it was impossible for the defendant to be there. He would leave the matter in their lordships' hands.

Judgment was entered for the plaintiff for £45 8s. 3d., with costs on the claim in convention, and absolution from the instance on the claim in reconvention, with costs, plaintiff declared to be a necessary witness.

BLACK V. KAISER.

This was action brought by W. Black, architect, of Cape Town, against Abram Kaiser, a land speculator, for the recovery of £350 for work done.

The declaration set forth that in February, 1901, the defendant employed plaintiff as an architect to prepare plans and specifications of certain buildings situated at the corner of Sir Lowry-road and Stuckeris-street. The defendant agreed to pay to the plaintiff the customary and usual remuneration, which was 5 per cent. The plaintiff entered into the agreement, and he was further requested to alter and enlarge the premises. Thereafter one McNaughton, a builder, proceeded with the erection of the building, and it was specially agreed that the plaintiff was only to pay occasional visits to the building, and in consideration the defendant agreed to pay 3 per cent. on the total cost of the said building. The plaintiff had duly carried out his duties, and the defendant refused to furnish the commission.

The plea admitted the formal allegations. The defendant was dissatisfied with the estimate of £11,000, which he considered too high, and he decided to sell the premises. About April, 1901, the premises were sold to one James McNaughton, and the plans made by the plaintiff were handed to him by the plaintiff. In July, 1901, the plaintiff and McNaughton entered into an agreement whereby McNaughton agreed to pay 3 per cent. on the total cost of the building. The total cost of the building was £4,700, and the defendant tendered 3 per cent. on that amount. If the plaintiff was entitled to any more money he must recover from McNaughton.

The replication set forth that at an interview between plaintiff, McNaughton, and defendant, it was expressly agreed that the altered claim upon the defendant should not interfere with the claim referred to in the declaration. Plaintiff admitted the tender, but said it was wholly insufficient.

The rejoinder was general.

Mr. Upington (with him Mr. Alexander) for plaintiff; Mr. Buchanan (with him Mr. Bissett) for defendant.

William Black, the plaintiff in the case, said that he was a qualified architect, practising in Cape Town. Early in 1901 the defendant requested him to furnish plans and specifications for a two-storied building at the corner of Sir Lowry-road and Stuckeris-street. Witness was to get 5 per cent. on the total estimate. Subsequently, the defendant asked witness to prepare the

enlarged plans and requested witness to increase the estimate. and he would pay him on the total amount. All the plans were signed by the defendant. The 5 per cent. included the usual 2½ per cent. for supervision. In July the defendant came to him with McNaughton, and Kaiser told him that he had disposed of the property to Mr. McNaughton, and, at the same time, that he had taken Mr. McNaughton into partnership. Witness told the defendant that he would look to him for payment, but, if McNaughton cared to pay, he would accept the money. The 3 per cent. was arrived at through the defendant saying that McNaughton was a builder, and that the plaintiff would only require to make occasional visits. The defendant did not carry out the plans as witness specified. At the interview nothing was said about the cost of the building. Subsequently witness wrote to McNaughton accepting the 3 per cent., but specifying that the agreement would, in no way, interfere with the defendant's agreement. A letter of demand was sent through witness's attorneys on the 19th November, 1902, and on 4th December defendant's attorneys replied that there was a written agreement between McNaughton and the defendant that the cost of the buildings would be £4,700, and tendering payment of 3 per cent. on that sum. Witness's attorneys replied that it was incredible that buildings which were estimated by an architect of Mr. Black's standing at £11,000 could be erected for £4,700, and asking for a duly accredited statement of the total cost of the building.

By Maasdorp, J.: Witness did not think the buildings could have been erected for double the amount stated by the defendant.

Cross-examined by Mr. Buchanan: Supervision was not charged for if the building was not proceeded with. He admitted that the defendant was a comparatively illiterate man, but he was one of the smartest men in the community, as he had accumulated a fortune. Defendant asked witness to give a higher estimate, and witness agreed to include his fees in the amount. Witness refused to enter into any partnership on the building. At the interview on the 26th July defendant said that he was taking McNaughton into partnership, but witness did not believe that any sale took place, and although the agreement was drawn up before Mr. Arderne, witness thought that possibly Mr. Arderne knew nothing about it. Witness knew nothing of transfers or anything else, and all the documents produced in court were news to him.

By Maasdorp, J.: He would estimate the building at £10,000. In his occasional visits he noticed that the work was not proceeding in the same substantial way as he had specified.

James McNaughton, builder and contractor, said that the defendant asked him what he would undertake certain alterations for, and witness replied that he estimated the outlay at £4,300. It was only the positions coloured red on one of the plans that he had anything to do with. He never saw the plan with the two-storied houses. His subsequent estimate of £4,783 was verbally accepted From his books the cost was £8,682, exclusive of profit, and he used the plaintiff's plans. In July he was brought to the plaintiff's office by the defendant, who told the plaintiff that as witness was interested in the building it would be unnecessary for the plaintiff to visit the building. The plaintiff, in reply to defendant, said that if witness paid the commission he would accept it, but that he would hold the defendant liable for the money. The property, which was transferred for £18,000, was bonded to the extent of £25,000.

Cross-examined by Mr. Buchanan: The witness did not repudiate the agreement. He did not think that he was liable for more than a half per cent. for supervision.

R. F. McNaughton, partner in the firm of McNaughton and Son, said that he kept the books of the building, showing the total cost at £8,682 1s. 8d. The defendant was constantly at the building, and gave several instructions with regard to alterations.

Cross-examined by Mr. Buchanan: He could not say where his father got the £3,000 from to complete the building.

For the defence, Mr. Buchanan read the defendant's evidence, which was taken on commission. The defendant denied that any terms were mentioned in January, 1901, and that the only

understanding was that the usual customary architects' charges would be paid. When the plaintiff estimated at £11,800, defendant made up his mind to sell the property and not to rebuild. The property was sold to Mr. J. McNaughton, and the plaintiff was aware of the sale. In May, 1901, the plans and specifications made by the plaintiff were handed over to Mr. McNaughton, and the plaintiff was aware of that. At the interview the plaintiff said nothing about the plans, but he could not remember whether any arrangement was made in his presence. He never engaged the plaintiff to reconstruct the building. On his return from England, he was surprised to get a letter of claim from the plaintiff.

Cross-examined by Mr. Upington: The plaintiff had prepared further plans, but not at his request. He would adhere to the statement that he did not agree to pay 5 per cent. before the sale to McNaughton. He could not remember whether he had spoken to the plaintiff about three additional shops. He had nothing to do with the matter of 3 per cent. between McNaughton and the plaintiff in the latter's office.

Counsel having been heard in argument on the facts,

Maasdorp, J.: It appears from the evidence in this case that an agreement was made between the plaintiff and defendant by which the plaintiff agreed to furnish the defendant with plans and specifications for a building which he then contemplated, and also to supervise the erection of the building. The defendant on his part agreed to pay the plaintiff the usual remuneration, which both parties understood to be 2½ per cent. for the plans and specifications, and 2½ per cent. for the supervision of the work. This agreement is virtually admitted by the defendant in the evidence which he gave on commission. Thereafter, the plans and specifications were made and furnished to the defendant, and the building was commenced. The plaintiff undertook supervision of it, and continued to do work in respect of this building for some five or six weeks. Some time after the building was commenced, the defendant sold the property to Mr. McNaughton. Mr. McNaughton seems to have been the builder who was engaged in building the property before the sale took place, and then the parties modified the agreement they had entered into before it was contemplated that Mr. McNaughton would be himself interested in the building, and that no close supervision would be required. The parties then came to the understanding that the plaintiff should in future only pay occasional visits, and as his labour was in respect of the building very much reduced, he agreed, instead of taking 5 per cent. upon the total cost of the building, as was originally agreed upon, to take 3 per cent., which was estimated at 2½ per cent. for the plans and specifications, and ½ per cent. for his labour in supervision. At the time when this contract was entered into the question arose as to who should be liable to the plaintiff for this remuneration for his work. It was suggested by the defendant that as the property had been bought by Mr. McNaughton, the plaintiff should thereafter look to Mr. McNaughton for his remuneration. This the plaintiff refused to do, and stated at the time that though he was perfectly willing to take such remuneration from Mr. McNaughton he would hold the defendant to the contract, and would look to him for the payment of the 3 per cent. There is some conflict of evidence on this point. The defendant in his evidence denied that he was a party to this agreement. Upon this point we have some valuable evidence in a letter written at the time by the plaintiff to Mr. McNaughton, in which he sets forth the whole of the understanding arrived at between the parties. He there states that he was prepared to supervise the work for the future, and that he expected payment for his past work at the rate of 3 per cent., and that he would accept such payment from McNaughton, at the same time, reserving his right in the agreement he entered into with the defendant himself. It seems to me that the contract which then existed between the plaintiff, and the defendant was for the payment of 3 per cent. upon what should turn out to be the actual cost of the building. That, I take it, is proved by a letter written by the defendant himself, when the plaintiff made claim upon defendant, in his letter of the 19th November, 1902, in which he placed his demand at £354, which would be 3 per cent. upon what he estimated then, in his ignorance of the real facts, to be the actual cost—that is, the sum of about

£11,000. In answer to that the defendant writes a letter, which virtually amounts to an admission that he was liable for 3 per cent. upon the actual cost of the building, but he adds, as such actual cost had been fixed at the sum of £4,700 he was then prepared and actually tendered the sum of 3 per cent. upon £4,700. If the point is once established that the 3 per cent. was to be paid on the actual cost of the building then it has been clearly proved that £4,700 was not the actual cost, and it has not been proved that the plaintiff was a party to any agreement in which the cost was limited. That amount seems to have been arrived at from a tender which was made from Mr. McNaughton for a portion of this building, that portion being about one-half of that which was subsequently built, and supervised by the plaintiff The actual cost of the building ultimately turned out to be £3,682, and I think we can come to the conclusion that the 3 per cent. was to be paid upon such actual cost. That would mean the amount of the sum of £260. The plaintiff will, therefore, be entitled to £260, and judgment will be entered for that amount, with costs.

Kotze, J., concurred.

[Plaintiff's Attorneys: Walker and Jacobsohn; Defendant's Attorneys: J. C. Berrangé.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.].

GENERAL MOTIONS.

Ex parte VORSTER. { 1903. June 10th.

Mr. Russell moved for an order authorising the Colonial Orphan Chamber to sign the necessary documents to release certain land mortgaged by the petitioner in the division of Middelburg from the operation of a mortgage bond in favour of one W. H. Maskew, and subsequently ceded to his widow, subject to the terms of an ante-nuptial contract. It appeared that the petitioner and two others passed a mortgage bond for £1,100 upon certain farms, and that petitioner had now reduced the bond by £500, and he had sold part of the land mortgaged, and was desirous of passing transfer and raising a loan on the remainder.

Order granted as prayed.

Ex parte HAUMAN.

Mr. Russell moved on behalf of the applicant, who lives at Frenchhoek, for an order confirming the sale to him of certain landed property in the estate of his late mother, Frances Magdalena Hauman (born Hugo). The petition set forth that applicant was executor testamentary of the estate of his mother, who died in 1901, and that by her last will and testament she instituted her seven children, all majors, as heirs. The heirs were convinced that it would be better for all concerned that the said property should be disposed of by public auction, and accordingly a sale was held, the total amount realised being £2,266. Petitioner bought certain of the lots, and before transfer could be passed to him, it was necessary to obtain consent of Court. The petitioner's co-heirs consented to the sale and purchase. The difficulty (counsel pointed out) was that one of the heirs, who appeared to have consented at the time of the sale, had since become insane, and she could not now, of course, sign the consent paper.

Order granted as prayed.

Ex parte WOOD.

Mr. C. W. de Villiers moved for an order authorising the Master to pass transfer in his name of a tenth undivided share in certain property held by the applicant as executor under a will. The property in question adjoined the town commonage of Graham's Town, and was acquired by the petitioner in his capacity as executor along with nine other persons for £1,025, with a view to its being handed over to the Town Council of Graham's Town. The Council were now prepared to take it over, and the owners were prepared to let the Council have the property without taking any

profit for themselves, the Town Council paying the purchase price of £1,025, plus certain expenses. The transfer was proposed to be made solely with a view of benefiting the said town.

Order granted as prayed.

APPEALS.

REX V. BELINKEN.

This was an appeal from a judgment of the Resident Magistrate of King William's Town.

The appellant, who was the proprietor of the "Metropole" in King William's Town, had been convicted under the 22nd section of the Licensing Act of 1883 of selling liquor to a native in a prohibited area, and he had been fined £10, or in default, two months' hard labour. The charge was "in that on or about the 9th day of April, 1903, at or near King William's Town, in that district, he did wrongfully and unlawfully supply to an aboriginal native, Mary James, one-half bottle of brandy for other than medicinal purposes, in the prohibited area of King William's Town."

Mr. Benjamin (for the appellant) said that the appeal was brought on the ground that the conviction was against the weight of evidence. The witnesses for the prosecution were the woman herself, to whom the liquor was alleged to have been sold, and two police constables, Walkers and Cooper. The evidence as to the sale to the woman was only that of the woman herself. Walkers and Cooper were not there at the time. They said they saw the woman come out of the Metropole, and she had a bottle of brandy with her, but there was no proof that the brandy was ever sold to her.

[De Villiers, C.J.: The evidence is distinct that she bought it, and the magistrate believes her. Then she is found with the liquor in her possession.]

Mr. Benjamin admitted that that was so, but said that there was the evidence of the accused himself, a man named Levy, and also the barman, that they did not sell liquor to the woman, and that they never sold to anyone else than registered voters. The appellant relied on the fact that this conviction was against the weight of evidence, and also on the technical ground that the sale was to the son and not to the woman.

Without calling upon Mr. Jones,

De Villiers, C. J.: There is no ground whatever for disturbing the verdict of the Magistrate. Upon the question of the credibility of witnesses, the Magistrate is the best judge, and he was satisfied that the witnesses for the prosecution spoke the truth, and he was not satisfied that the witnesses for the defence spoke the truth. If the evidence is correct, then there is no doubt as to the appellant's guilt. The woman who bought the liquor was a Kafir, apparently having all the appearances of a Kafir, and the accused sold liquor to her, knowing that she was a Kafir. It is said, however, that she bought the liquor on behalf of her son, but she never informed the accused that she bought the liquor on behalf of her son. So far as the accused is concerned, he sold it to the Kafir woman. In regard to the statement in the defence that the son was entitled to buy the liquor, accused, at all events, knew at the time whether or not the woman said that she bought for her son, and if the accused had wished to raise the defence, she might then and there have raised it, if it were a defence at all, that the son was a registered voter and entitled to buy the liquor. That question was not raised, no evidence was given on the point, and the Court is therefore bound to uphold the judgment. The appeal must be dismissed.

REX V. BAILEY.

Scab Act—Hand dressing of sheep—Dipping—*Res judicata*—*Autrefois acquit.*

The owner of scab-infected sheep does not in terms of the 21st section of Act 20 of 1894 "make proper and diligent efforts to cleanse them," if he dresses them by hand without curing them.

The accused was charged in a Resident Magistrate's Court with failing on a certain date to make proper and diligent efforts to cleanse his sheep, and was acquitted. A week afterwards he was charged in

the same Court with committing the same offence between certain dates, including the date mentioned in the first summons, but the offence, if any, was proved to have been committed at that date.

Held, *that he could not be convicted on the second charge.*

This was an appeal from a judgment of the A.R.M. of Queen's Town, sitting at Sterkstroom.

From the record in the Court below it appeared that on the 4th May of this year the appellant was charged with contravening the 21st section of Act 20 of 1894, the Scab Act, in that, "On, or about, the 26th March, he, being the owner of certain sheep running on the farm Lismore, and having a reasonable amount of suspicion that the sheep were infected with scab, did fail to give notice to the inspector in the field-cornetcy in which the said flock was running, and did fail to take proper measures to cleanse the said sheep." The accused was discharged for lack of evidence. Then, on the 11th May, he was also again before the same magistrate charged with the contravention of the same section of the same Act, under the same circumstances, only on this occasion the charge was split into two. The first count of the indictment was that he was the owner, and failed to give notice to the inspector within seven days of his becoming aware or having reasonable suspicion that the sheep were infected. The second part of the charge was that between the 12th March and the 10th April he failed to take proper measures to cleanse his sheep.

The Magistrate's reasons for judgment stated that on the first occasion the prosecutor failed to bring sufficient evidence, and then closed his case, whereupon the attorney for the defence applied for the discharge of the accused. This the magistrate was bound to give. As to the second occasion, the first part of the indictment was exactly similar to that appearing on the former occasion, but in the second part he was charged with failing to take proper measures between the 12th March and the 10th April to cleanse his sheep. As to the second occasion when the case was heard, he found himself justified in acquitting the defendant on the first count as the man in charge of the flock had proceeded to Sterkstroom to report the outbreak to the inspector, but he was away at the time. As to the second part of the indictment, he held that hand-dressing did not constitute "proper and diligent efforts," and he therefore convicted the defendant on this count. He called attention to the evidence given by the inspector and others as to the inefficacy of hand-dressing, and said that it was borne out by the fact that some of the sheep were infected by scab in April.

Mr. Burton for the appellant; Mr. H. Jones for the Crown.

Mr. Burton said that the main ground of the appeal was previous acquittal. He submitted that that plea was a justifiable one, and that the magistrate should have found in favour of the defendant when it was raised. It was quite clear that the defendant was charged on the 11th May with the same offence, and in respect of the same inspection. The same facts were under consideration, it was the same case, the same flock of sheep, and the only difference was in regard to the date. In the first charge the defendant was accused of committing the offence on or about the 26th March, and the week later he was charged with having committed the offence between the 12th March and the 10th April. As to the question of hand-dressing, he was disposed to say that the magistrate had acted rather hardly upon the defendant, seeing that there was no water convenient. March was a dry month, and the defendant did the best he could, next to dipping, by hand-dressing the sheep. It would have been very difficult for him under the circumstances to have complied with the Act.

Mr. Howel Jones supported the conviction, and contended that time was the essence of the offence.

De Villiers, C. J.: I wish it to be clearly understood that I do not accept the defence that hand-dressing is a proper mode of curing scab; the evidence is conclusive that it is a wholly improper mode of curing scab. It will cure the parts where the insect has become visible, and its ravages have become visible, leaving those parts wholly uncured where the scab may exist with-

out the ravages having become visible to the naked eye. In the present case, it would appear that the scab was cured where the accused had hand-dressed it, but was still alive on other parts of the sheep, and it is clear that the only effective mode of curing the scab is by proper dipping. Therefore, if the sole defence had been that the accused did make "proper and diligent efforts" to cleanse the sheep, then, in my opinion, it would have failed altogether in the absence of proof that it was wholly impossible for the accused to use other means for the purpose. But the further defence is raised that the accused had been previously acquitted. The summons in the previous case was put in where the prisoner is charged with "having on or about the 26th March, 1903, being then the owner of certain sheep, and having become aware or having reasonable ground to suspect that the sheep were infected with scab, failed to give notice thereof to the inspector within the field-cornetcy where the flock was situated and forthwith to make proper and diligent efforts to cleanse the said sheep." The prisoner pleaded not guilty, and the judgment was that he be discharged Clearly that judgment amounts to a verdict of not guilty. If, therefore, the subsequent charge embraced the same charge as the one upon which the prisoner had been previously acquitted, clearly it was not competent for the Magistrate to try the prisoner again on that charge. Well, the offence is contravening the 21st section of Act 20 of 1894, and the part relating to this offence is that "Every owner failing to make such effort or to give such notice within seven days aforesaid shall be deemed to be guilty of a contravention of this Act." On the 26th March the accused knew that his sheep were infected with scab, and if it had not been proved in the first case before the Magistrate that he did not make such efforts within the time when under the second summons he could be convicted he would have been found guilty. In the present case, it is admitted that the failure to cure the scab was after the 26th; that is admitted, and if so, identically the same evidence to establish guilt in the first case would establish guilt in the second case. Therefore it is clear that the Magistrate should not have convicted the prisoner on the second charge after the acquittal on the first charge, and the appeal must be allowed.

[Appellant's Attorneys: Michau and De Villiers.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

TABLE BAY HARBOUR BOARD v. SACKS, CHIAT AND CUMES. } 1903. June 10th

This was an action brought by the Table Bay Harbour Board against Messrs. Sacks, Chiat, and Cumes for the recovery of the sum of £64 12s., being the value of certain cases of eggs delivered to the defendants in error.

The declaration set forth that in January, 1903, part of a consignment of eggs, per the Kanzler, for Messrs. Berman, Grolman and Co. had been delivered in error to the defendant firm. The defendants were unable to return the goods to the Table Bay Harbour Board, who had paid the consignees the sum of £64 12s. The defendants admitted liability to the extent of some £43 odd.

In their plea the defendants admitted receiving the eggs, which bore the same marks as a consignment they were receiving at the same time. They tendered the amount of £43 odd, which they allege was the value of the twenty-nine cases.

The replication was general.

Mr. Searle, K.C. (with him Mr. Gardiner) for plaintiffs; Mr. Alexander (with him Mr. Pymont) for defendants.

Samuel Berman, partner in the firm of Berman, Grolman and Co., produce dealers, said that they dealt largely in imported eggs, and disposed of on an average a hundred thousand per week. On the 5th January one hundred and ninety cases of eggs consigned to his firm arrived per the Kanzler from Lisbon. Twenty-nine cases had gone in error to the defendants. Witness claimed of the Harbour Board the sum of £64 12s., being at the rate of 15s. per hundred. Each case contained two hundred and ninety-seven eggs. In January the average price per hundred was 15s. In

February the Table Bay Harbour Board paid him the amount of his claim.

Cross-examined by Mr. Alexander: When Lisbon eggs came good they were quite as valuable as Madeira eggs. Witness paid for the eggs about £1 1s. or £1 2s. per case. He was not aware that Klein Bros. sold the same eggs for 9s. per hundred. After the eggs were sorted he classified them as table eggs, frying eggs, and baking eggs. Seven days after he claimed 11s. he sent in a claim for 15s. The market price of Lisbon eggs at present was about 11s. Witness had four cases consigned by the Briton during the same month, and, although they were so bad that the firm lost £19 out of a total outlay of £26, he would still adhere to the statement that the eggs that came to this country were very good.

[By Maasdorp, J.: Witness refused to accept a tender of eggs from the defendant firm because he was afraid they might be bad.]

Gabriel Teixeira, partner in the firm of Shalovsky and Teixeira, wholesale importers, said that in January from 14s. 6d. to 15s. was a fair price for imported eggs.

William Edward Morrow, claims clerk of the Table Bay Harbour Board, stated that the consignment per the Kanzler was delivered to Berman, Grolman and Co. between the 5th and 13th January.

Cross-examined by Mr. Alxeander: He did not remember any claim for 11s. on the same matter.

For the defence, Mr. Alexander called Mr. Abraham Meyer Solomon, partner in the defendant firm, who stated that one of the partners (Sacks) attended to the shipment in Lisbon. The Kanzler eggs arrived in very bad condition, and several customers refused to accept them. Manuel Ferreira Cerraro was the only shipper at Lisbon. Forty to fifty per cent. of the eggs were bad, and when they were picked witness disposed of them at 11s. Madeira eggs were always 3s. dearer than Lisbon eggs, for which 10s. would be the utmost price obtainable in January. The usual loss on Lisbon eggs was 15 per cent.

Cross-examined by Mr. Searle: He was not aware that he had received twenty-nine cases over his warrant for two hundred and seventy-six cases, and in all probability they were mixed up with another consignment. He had no entry of his purchase of eggs at 14s. 6d. from Teixeira.

Louis Levin, egg merchant, said that in January he bought some Lisbon eggs from Klein Bros., and paid for them 9s. per hundred. Madeira eggs were always worth a couple of shillings a hundred more than Lisbon eggs.

Cross-examined by Mr. Searle: It was cheaper to buy by the case, as the purchaser had to take the risk.

Joseph Cohen, egg merchant, said that in January he bought 20 cases of eggs from defendant company for 10s. They were delivered to witness. Witness examined the contents of five of the cases, and found they were not good, and so he returned the lot. Lisbon eggs were the cheapest on the market. Witness had never known Lisbon eggs to go higher than 10s. when bought by the case.

Israel Lewis, egg merchant, said the Lisbon eggs were the cheapest on the market. Next came Madeira and English; the Colonial were the dearest on the market. When picked eggs were sold, about 15 or 20 per cent. had to be thrown away. Picked eggs sold for 11s. 6d. would represent a greater profit than eggs bought by the box at 10s.

After hearing argument on the facts,

Maasdorp, J.: The plaintiffs in this case received 29 cases of eggs for delivery to the firm of Berman and Co. By some mistake they failed to deliver the cases to Berman and Co., but delivered them to the defendant. The result of this was that the cases became lost to the firm of Berman and Co., and plaintiffs became liable to that company in the damage suffered by them. Having satisfied the claim made by Berman and Co. they acquired all the interest in the cases, that company having been satisfied, renouncing all interest they had in the matter. Plaintiffs were therefore entitled thereafter to get possession of these goods. The defendants were bound to deliver these cases to the plaintiffs, and being unable to do so, they are now liable to pay plaintiffs the value of the cases. The question the Court has to decide is as to what was the value of the eggs at the time when they should have been delivered by the defendants to the plaintiffs. It appears that when the question of the value arose between the Harbour Board and Berman and Co., the Harbour Board was satisfied to pay the sum of £64 12s., which was arrived at by taking the eggs

as being of the average value of 15s. per hundred. There being 29 cases containing each 297 eggs, the result of that calculation was that £64 12s. became due by the Harbour Board to Berman and Co. But the defendants in this case are not bound by that calculation; it is still necessary to prove what the actual value of these eggs was. Berman has stated that the whole of the shipment he got by the Kanzler contained a very good quality of eggs, and that he had a good market for these eggs in January. He stated that he sold some of them at as high a price as 18s., and that the lower prices were 12s., and he places the average value of the eggs he received by the Kanzler at 15s. per hundred. He is not wholly unsupported in placing what seems to be a very high value upon these eggs. Mr. Teixiera has been called, and he says that during that very month he himself sold certain eggs to the defendants for from 14s. 6d. to 15s., but he says these were Madeira eggs. At the same time he states that there have been occasions when Lisbon eggs were equal in quality and value to Madeira eggs. This is very valuable evidence, because it supports Berman to some extent, as showing that it is not at all improbable that the eggs were of the average value of 15s., this being, according to Berman, a shipment of very good eggs. If we take 15s. as the average value, the question arises as to whether there should be any reduction in the number of eggs. In the calculation which the Court has to make some ingredient must enter which was not taken into account when a similar calculation was made between the Harbour Board and Berman and Co. It now appears that there is an average of broken eggs amounting to about 15 in every hundred. That was not allowed for when the claim was made by Berman and Co., against the Harbour Board. It should now be allowed, and to that extent the number of eggs should be reduced. If that is so, then we find that the defendants are now responsible for 29 cases of eggs, containing each not 297 eggs, but, say, 280 eggs, and if we place the average value of the eggs at 15s. per hundred we arrive at a result in round figures of £60. Now I think, in a case of this kind, where the plaintiffs may be looked upon in law as wrong-doers, that a liberal allowance should be made in calculating the value of the property of which such wrong-doers have deprived the owner, and the value of the property should not be cut down very nicely to the lowest that it might possibly have realised. I think the Harbour Board was very wise in not cutting down the claim of Berman and Co., but allowing it at the average value of 15s. per hundred eggs, and I think the defendants in this case would also have acted wisely if, instead of attempting by evidence to reduce the value of the eggs to the lowest possible figure, they had made a more liberal allowance, and had been willing to pay at the rate of 15s. per hundred eggs. Judgment must be given for the plaintiffs for £60 and costs.

Kotze, J., concurred.

[Plaintiff's Attorneys: Reid and Nephew; Defendant's Attorneys: Friedlander and Du Toit.]

WATSON V. VON DURING.

Brokerage.

A broker instructed to sell property who introduces a client to his principal is entitled to brokerage, even though the principal may afterwards deal with the client and sell the property to him through another broker.

This was an action brought by John Watson, broker, of Cape Town, to recover from Carl von During, a builder, of Cape Town, the sum of £38 10s. in respect of brokerage on certain property.

The declaration set forth that the plaintiff entered into a contract with the defendant in July, 1902, whereby the plaintiff received instructions to sell a certain store in Strand-street, and in consideration, was to receive 2½ per cent. on the purchase price. The plaintiff introduced a purchaser named David Israelson, and he alleged that Israelson was the principal for whom the property was purchased by another broker named Honikman. Wherefore plaintiff prayed for judgment for £37 10s. with costs.

In his plea, the defendant denied giving any instructions to the plaintiff, but admitted that the plaintiff introduced David Israelson. He denied that Israel-

so was not aware that the said store was for sale before the plaintiff introduced him. On the 11th July the defendant sold the said store to Honikman, but he was not aware at the time that the said principal was Israelson.

The replication was general.

Mr. Rowson for plaintiff; Mr. Gardiner for defendant.

John Watson said that he was a broker, residing at Cape Town. He had had previous transactions with the defendant, who asked him to sell the store in Strand-street for £2,000. Witness brought Mr. Israelson to the store, and they afterwards met the defendant. Mr. Israelson offered £1,500, and the defendant was willing to accept that amount if Mr. Israelson would pay the brokerage. Witness told Mr. Israelson that £1,550 was the lowest, and it was understood that that amount was to include the brokerage. The defendant promised to see witness next day, but failed to keep the appointment. That day Mr. Israelson told witness that he had just bought the store through Mr. Honikman. Witness called on the defendant for his commission, but he refused to pay him. The defendant led witness to believe that Mr. Honikman had bought the property without disclosing the principal.

Cross-examined by Mr. Gardiner: The defendant never mentioned anything about any other brokers. Witness did not tell Israelson that his brokerage was £50. The defendant said that if witness could get £1,550 for the property, he (the defendant) would pay the brokerage. Witness merely told Israelson that he was taking him to a store in Strand-street, but he could not remember whether he mentioned that it was the defendant's store. Everything was settled the same afternoon.

David Israelson said that the plaintiff introduced him to the defendant over a store in Strand-street. Witness knew four months previously that the store had been included in a sale. The plaintiff pressed on him to come to the store. When he met the defendant, witness told him that the price of £2,000 was too much. Witness instructed the plaintiff to get the lowest offer, and plaintiff subsequently mentioned £1,550 or £1,600. In consequence of having seen the store with Watson, witness purchased it.

Cross-examined by Mr. Gardiner: Nothing was mentioned to the plaintiff about brokerage. Honikman made very easy terms.

This closed the evidence for the plaintiff, and Mr. Gardiner submitted there was no case, as the purchaser had said that there was no definite arrangement between himself and the plaintiff.

[Maasdorp, J.: I think there is a very strong case to be met.]

Carl von During (defendant) said that he told the plaintiff about the store being for sale, but at the same time told him that several other brokers had it in hand. He remembered meeting the plaintiff and Israelson in Strand-street, where the plaintiff mentioned an offer of £1,500, which was refused. A few days later a Mr. Millar brought him a message from Honikman, whom witness saw at the Langham Hotel. A sale was eventually effected, and Honikman made out the broker's note, but there was no name mentioned.

Cross-examined by Mr. Rowson: Witness never showed plaintiff over the store, which was usually left open. He would swear positively that the name "Israelson" was not on the note when he signed it. Honikman received 2½ per cent. commission from witness through his attorneys.

Isaac Joseph Honikman, broker, stated that in October, 1901, he learned that the property was for sale, and at that time he mentioned the fact to Israelson. In July one Millar came to his office, and arranged an interview with the defendant at the Langham Hotel, where the broker's note was passed. The buyer's name was not disclosed until the sale had been verbally concluded. Witness told the defendant that if Israelson would not take the property he would accept it himself.

Cross-examined by Mr. Rowson: He mentioned the fact of the property being for sale to Mr. Israelson. He was positive that the name of the purchaser was not on the note when the defendant signed it.

Hugo Millar stated that he introduced the plaintiff to the defendant about fifteen months ago. He arranged the whole thing up to the settlement. The name of the purchaser was not on the note when the defendant signed it.

Cross-examined by Mr. Rowson: He knew the defendant for about twenty

years, and was at present living with him. When he introduced the plaintiff the defendant mentioned to him about some property that he had for sale. A few seconds after the defendant signed the note Honikman disclosed the name of the purchaser. He was to get half the brokerage, but did not accept it, as the defendant was in very bad circumstances.

[By Maasdorp, J.: He could not explain why he did not accept half the brokerage from Honikman, who, according to the defendant, was paid his commission in full.]

Mr. Rowson (for the plaintiff): The plaintiff has done everything necessary to entitle him to brokerage. He introduced a purchaser who himself says that he would not have purchased the property had it not been for plaintiff's introduction. If the defendant thought fit to afterwards complete the sale through another broker that does not disentitle plaintiff to his commission. Defendant's objects were clearly (1) to oblige a personal friend (Honikman) and (2) to save half the usual commission.

Mr. Gardiner (for the defendant): Clearly no definite agreement was arrived at between the plaintiff and Israelson, the eventual purchaser of the property. Plaintiff spoke about it to Israelson, just as he may have spoken about it to dozens of other people. He offered the property to Israelson on certain terms, which Israelson refused. No sale was actually effected by him, and therefore I submit he cannot claim brokerage.

Maasdorp, J.: The plaintiff in this case sues the defendant for brokerage, alleged to be due to him in respect of the sale of certain property of the defendant to Mr. Israelson. The plaintiff says that he was employed by the defendant to sell his property, and it is quite clear from the evidence of Mr. Israelson that the plaintiff was at some pains to effect this sale. He took some trouble to show Mr. Israelson over the store, and also persuaded him to become a purchaser of the property, and after some negotiations he took him to introduce him to the defendant in this case. Now, there is no doubt that a meeting did take place, and through that meeting there were negotiations between the defendant and Mr. Israelson, through the instrumentality of Mr. Watson (who seems to be a go-between) in this meeting an offer was made of the property at a certain price, which Mr. Israelson was not prepared to pay. Ultimately, the property was offered to him for £1,600, and it came down finally to £1,550. We have that on the evidence, and Mr. Israelson corroborates the statement of Mr. Watson to that extent that during that interview an offer was made to him of this property for £1,550. The defendant says that that offer came about in this way: That after the offer had been made by Mr. Israelson of £1,550 the defendant was willing to sell it on condition that he should not become liable for the brokerage. To bring that about Mr. Watson proposed to Mr. Israelson to buy the property for £1,550, in which case the brokerage should have been paid according to the understanding between Mr. Watson and the defendant, and on this additional £50, Mr. Watson says that the contract for the sale of the property was finally concluded at the figure of £1,550, but there Mr. Israelson differs from him when he says that the contract was not finally concluded, but that before they parted he had stated to Mr. Watson: "You must bring me a final offer of the property at £1,550, and then I will make an offer." Mr. Israelson says if that final offer had been made, he would have been prepared to close. I can understand that a misunderstanding might arise when Mr. Israelson expressed himself in such a way that Mr. Watson came to the conclusion that the matter was finally settled. On the other hand, Mr. Israelson says if the sale had been concluded, he was willing to pay £1,550. The parties then separated, without concluding negotiations. Mr. Watson says it was understood that the contract should be finally entered into next day, but if we take the other evidence, it would amount to this, that the parties agreed that this matter should be further prosecuted, and the negotiations go on. In that way we can reconcile the evidence that there was a misunderstanding. Mr. Watson, under the impression that negotiations were still on, went to Mr. Israelson the following day for the purpose of closing this matter. Upon his arrival, he found the property had already been sold through the instrumentality of some other broker by the defendant to Mr. Israelson. Now the question arises: through what agency was this sale brought about, and who

brought about the introduction between the parties which finally led to the conclusion of the contract? If we take the evidence as it stands, it would lead almost to the conclusive inference that the saleof the 11th July was brought about through the introduction and agency of the plaintiff in this case. The defendant, on the other hand, states that he never employed the plaintiff at all to effect this sale, that he never was his broker, and whatever pains he had taken were through his own motion, without any request on the part of the defendant. Now I must say I cannot accept that statement. We have the positive evidence of Mr. Watson that he was at great pains to sell the property, and he is corroborated by Mr. Israelson, and I think that must have been on the request of the defendant to sell the property. It is now contended that that sale was not brought about through the instrumentality of the plaintiff, but that a broker named Honikman effected this sale. It seems to me that the evidence given by the defendant in this respect is of a very unsatisfactory character. We hear from Mr. Israelson that the property was offered to him a day or two before he actually purchased it, and that the first person that offered it to him was Mr. Watson, so a day or two before that he got into negotiations with Mr. Watson. The statement of Mr. Honikman and Mr. Millar that they had the property some days before, and that they had discovered Mr. Israelson as a likely purchaser is contradicted by Mr. Israelson. I accept Mr. Israelson's statement to that effect, and consequently the introduction was wholly through the instrumentality of Mr. Watson. Now a great deal of suspicion is thrown upon the case of the defendant by several circumstances. It appears that Mr. Honikman came into the transaction, and when he met the defendant, they set about drawing up a broker's note. Now there seems to me to be no reason why there should have been any secrecy as to who the purchaser was at the time the broker's note was signed. The only reason given at the time was that he thought if he once revealed the name that Mr. Von During might effect the sale himself, but that could not possibly have occurred, because at that very moment the transaction was being concluded by the signatures on the broker's note, and on the signing of the broker's note there could have been no pos-go behind his back to effect the sale. There is certainly a conflict of evidence as to the reason for this secrecy in revealing the name, and there may be an explanation in the evidence which may be an explanation in that which Mr. Von During and Mr. Honikman have offered us in this case. Mr. Von During says that he accepted the broker's note signed by the broker without his revealing the purchaser's name, and that a little time after the name of the purchaser was inserted. That evidence to some extent is contradicted by Mr. Honikman himself when he says that Mr. Israelson's name was inserted at that very interview, and that for some reason or other which even now I am unable to fathom "q.q." was placed after his name. It may be then that this may be the explanation of the secrecy with reference to Mr. Israelson's name, that it is quite possible that Mr. Honikman was aware that these transactions were going on through the instrumentality of Mr. Watson, and that if he had told Mr. Von During that he could sell the property and given the name of Mr. Israelson that the defendant would have told him, "The negotiations are proceeding now through Mr. Watson, and I cannot accept your agency in the matter." It is quite possible for that reason Mr. Honikman concealed the name of Mr. Israelson until the contract was closed, but that would not have bound the defendant to pay Mr. Honikman the brokerage if he was convinced that the sale was really effected through Mr. Watson, and that Mr. Honikman was not entitled to expect anything, but he could have said, "I cannot accept your agency at all. I do not recognise you in the matter, and will not pay you your brokerage." The payment of this brokerage is also a question in a very unsatisfactory position. If Mr. Honikman had sold the property he would have been entitled to full brokerage. What possible reason could he have for doing a wrong to Mr. Watson? It appears that Mr. Honikman was not paid the whole of the amount, and that Mr. Honikman received one-half of what Mr. Watson would have received, and I think we cannot come to any other conclusion but that this sale was virtually effected through the agency of Mr. Watson, and that the other parties, to

gain some profit, abandoned Mr. Watson, and allowed this matter to pass through their hands to the broker, Mr. Honikman, and in that way Mr. Honikman got one-half the commission, and the defendant saved one-half the commission. That leaves the defendant's case in a very unsatisfactory position, and I am bound to take the view put forward to the Court by Mr. Watson as correct, that the sale was effected through his agency, through his having introduced the parties, and that he is entitled, under the circumstances, to claim his brokerage upon the sum for which it was sold. He would have been entitled to claim brokerage on the sum of £1,550, but upon his declaration he seems to claim only £37 10s., which would be the brokerage on £1,500, and not £1,550. Judgment must therefore be for the sum of £37 10s., with costs.

Kotze, J., concurred.

[Plaintiff's Attorney: W. G. Coulton; Defendant's Attorneys: Tredgold, McIntyre and Bisset.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

HEADLEY v CILLIERS. { 1903. June 11th, „ 13th.

Constitution Ordinance—Election petition—Office of profit—Acting appointment.

The office of messenger of a Resident Magistrate's Court is an office of profit under the King in terms of the 47th section of the Constitution Ordinance.

A person holding such office, although only acting, is not eligible to be elected a member of the House of Assembly.

The office of Deputy-sheriff is not an office of profit under the Crown.

This was a petition brought by Robert George Headley, a registered voter, in the division of Prieska, to have the recent election at Prieska, wherein Petrus Stephanus Cilliers was returned as member of the House of Assembly, declared null and void on the ground that Mr. Cilliers held certain offices of profit under the Crown at the time of the said election.

The petition of Robert George Hedley showed:

1. That he is registered at Prieska as No. 48.

2. A public Court or meeting was duly and legally held at Prieska on February 20, 1903.

3. Petrus Stephanus Cilliers and Redmond Orpen were duly nominated as candidates for the Electoral Division of Prieska as Members of Assembly in succession to Christian W. H. Schroder at the said meeting, and a day was fixed for the poll.

4. P. S. Cilliers was thereupon returned and was gazetted as the elected member of the House of Assembly, of which House he claims to be a duly-elected member.

5. The said P. S. Cilliers is the secretary of the Divisional Council of Britstown, and at the time of his nomination and of his election held also the following offices:

(*a*) Deputy Sheriff for the Division of Britstown.

(*b*) Messenger of the Court of the Magistrate of Britstown.

(*c*) Field-cornet of Ward No. 1, Britstown.

6. Petitioner is advised that each of these appointments is held under His Majesty's Government, and is an office of profit under the Crown.

7. By reason of his holding and retaining the said offices, the said P. S. Cilliers is, by section 47 of the Constitution Ordinance, debarred from being elected or returned, or from retaining his seat as a member of the House of Assembly for the Division of Prieska.

8. The petitioner, in accordance with the provisions of Act 9 of 1883, presents this petition and complains of the undue election and return of the said P. S.

Cilliers by reason of his want of qualification and in consequence of his disqualification as aforesaid.

Wherefore petitioner prays that the Court will return the election and return of the said P. S. Cilliers to be null and void, that his return as member for Prieska may be set aside, that the seat may be declared vacant, or that this Honourable Court may grant such further or other order in the premises as shall be meet, and make such decree regarding the costs of this petition as shall be in accordance with law.

This petition was dated April 23, 1903. On April 25, 1903, the aforesaid R. G. Hedley filed a supplementary petition stating that sundry persons who had been deprived of the franchise for various political offences had voted at the said Prieska election, and that other persons had recorded their votes at more than one polling-station.

Sir H. Juta, K.C. (with him Mr. Benjamin) for petitioner; Mr. Burton (with him Mr. C. W. de Villiers) for respondent.

[De Villiers, C.J.: Does the respondent admit that he holds these positions?]

Mr. Burton: Yes, my lord. We sent a letter to the petitioner stating what we were prepared to admit that the respondent was before, at the time of, and after the time of his nomination, and still is the Deputy-Sheriff of Britstown. As to the messengership he admits that from the 11th July, 1901, to the 30th April, 1903, he temporarily discharged the duties of messenger at the request of the Resident Magistrate of the district. He admits that he was in receipt of a special allowance from the Government of £75 per annum for forage for two horses, which were used in the service of any process that might be necessary.

Leonard Tennant Thomas, clerk in the Colonial Office, produced the list of voters for the division of Prieska for the year 1899. The nomination for the recent election took place on the 20th February, and the poll was held on the 28th March.

Robert George Headley, the plaintiff, said his name was on the list and he signed the petition.

Godfrey Wm. Shaw, clerk in the Audit Office, produced the appointment of Mr. Celliers as messenger in the Court of the Resident Magistrate at Britstown, with a forage allowance at the rate of £75 per annum. Mr. Celliers was paid by the month.

Emile Henry van Noorden, relieving officer in the Civil Service, said he was acting as Magistrate at Britstown from March to May this year. During that time the respondent was Deputy-Sheriff and Messenger of the Court. He resigned his office as messenger on the 30th April last. Messengers were paid by the Government by way of forage allowance.

Cross-examined by Mr. Burton: He had the letter of the 11th July, 1901, from the Magistrate to the department. In this letter the Magistrate said that Mr. C. S. Andrews had resigned his appointment as messenger of the Court. The letter went on to say that Mr. P. S. Celliers, the deputy, and one of the few persons in Britstown who was in possession of a pair of horses, had signified his willingness to perform the duties of messenger until a chief constable was assigned to that division, and he had therefore appointed Mr. Cilliers, subject to the approval of the department, to act, with a forage allowance of £75 per annum. Mr. Cillier's letter of resignation was dated April 30. Mr. Cilliers received no fees from the office of messenger. The forage allowance was conditional on his keeping two horses for the public service.

[De Villiers, C.J.: What would it cost to keep a pair of horses at Britstown?]

It would cost about £6 a month.

Forage was very scarce during martial law, and consequently the keep was dear. Witness had given respondent certificates for the forage allowance. Respondent did not receive any remuneration, except the forage allowance. He had no pension, and he did not come within the scope of the Civil Service Act. He could follow any occupation he liked outside his office as messenger. Mr. Cilliers was an attorney, and he would have had the right to appear in Court to defend prisoners

[Maasdorp, J.: Who was the respondent's predecessor in the office of messenger?]

The Chief Constable. Fees were paid to the messenger in some places where that official had no other source of income.

John Henry Gately, Acting High Sheriff of Cape Colony, said that the respondent was now, and had been since 1894, one of the deputy-sheriffs. The appointment was made by the Sheriff. The deputy-sheriff was entitled to fees for civil and criminal work. For civil work, he was paid by the litigants. Money received from the Government went to pay him for criminal work.

Cross-examined by Mr. Burton: The High Sheriff was the only officer responsible to the Government. The Government had nothing to do with the deputies, and those were matters entirely between the High Sheriff and his deputies. It was not usual to appoint civil servants; attorneys as a rule were selected for the office in the up-country towns. The only restriction placed upon those holding the office was that they should not undertake criminal defence. In his experience deputy-sheriffs had been members of Parliament; there were several now.

[De Villiers, C.J.: Who hold both positions now?]

Yes; deputy-sheriffs who are now members of Parliament.

The Sheriff had dealt with the deputies simply as his agents controlled by himself alone.

Re-examined by Sir H. Juta: The Sheriff relied upon the Charter of Justice and the Sheriff's Ordinance for the power to appoint deputy-sheriffs.

[De Villiers, C.J.: How many members of Parliament are there at present who hold the office of deputy-sheriff?]

Witness: There are three at least besides Mr. Cilliers.

Sir H. Juta closed his case.

Petrus Stephanus Cilliers (the respondent) stated that about July, 1901, the Magistrate asked him whether he would act as messenger temporarily until a Chief Constable was appointed at Britstown. Martial law was in force at the time. Witness was one of the few persons who had any horses that could be used. Beyond the allowance for the horses, he received no remuneration, and he spent more than he received in keeping the horses. Witness resigned on the 30th April this year, but previously he had mentioned the matter to the Magistrate. He never had a letter of appointment. When he put in his letter of resignation of the field-cornetcy, he asked the Magistrate to make other arrangements with regard to the messengership. On his return from Prieska, he found his clerk had still been dealing with criminal work.

Mr. Burton closed his case.

Sir H. Juta (for petitioner): The facts of this case are very simple. In the first place, Mr. Cilliers was deputy-sheriff and he was also a messenger of the Magistrate's Court. No person who holds an office of profit under the Crown is eligible for election to Parliament. English law distinguishes between offices held *from* the Crown and offices held *under* the Crown. A member who accepts an office from the Crown is eligible for re-election. Thus, *e.g.*, by accepting the office of Steward of the Chiltern Hundreds a member's seat is vacated, but he may be re-elected. See *Rogers on Elections* (p. 10), where he refers to the Statute. 6 Anne, c. 41, Section 24 and 25. Section 24 deals with offices under the Crown and Section 25 with offices from the Crown. It is not at all necessary that moneys should be received from the Crown in order that a seat may be vacated. The distinction I have pointed (p. 10). The distinction I have pointed out is also dealt with by *Rogers* at pages 44 and 45. The deputy-sheriff is appointed by the sheriff, it is true, but then this power vested in the High Sheriff is derived entirely from the *Charter of Justice* (Section 27). See also *Ordinance* 37 *of* 1828 (Section 1). The initial authority under which the deputy-sheriff is appointed is the Charter of Justice. In all criminal cases the Crown pays the deputy-sheriff to serve process, but it is not at all necessary that money should come direct from the Crown that a man may be disqualified. Ministers would be holders of offices of profit under the Crown save for Act 1 of 1872. See also Act 7 of 1899, Section 17. The whole object of this rule by which a member vacates his seat on obtaining an office of profit under the Crown is to prevent the Crown from exerting undue influence in Parliament. As to the office of messenger of the R.M. Court, there can be no doubt as to this being an office of profit under the Crown. Mr. Cilliers was appointed by the Attorney-General, and this was an appointment by the Crown. A fixed sum of money is paid by the Crown, and hence this

is an office of profit held under the Crown. I may add that in all criminal cases the deputy-sheriff is paid directly by the Crown.

Mr. Burton (for respondent): It is unfortunate that the statutes do not afford more help to enable us to interpret the term "office of profit under the Crown." This, however, is a disqualifying statute, and must therefore be construed in favour of the person disqualified. In this connection, I would wish to refer to the office of sheriff as it existed in England when this Ordinance was framed. The contention of counsel for the plaintiff is a novelty. Many deputy-sheriffs have sat and several still sit in Parliament. The office of deputy-sheriff is not under the Crown, nor is it an office of profit. The Crown deals with the High Sheriff only. He is the only person responsible to the Crown. (Section 27 of Charter of Justice.) He alone receives a regular salary, and he appoints deputies to assist him in carrying out duties which it is impossible for him to perform *in propria persona*. The Government has nothing to do with the deputy-sheriff, who is responsible to the High Sheriff alone for misfeasance. (See *Insolvent Ordinance*, Section 16.) As to the distinction between the holder of an office *under* the Crown and *from* the Crown, see *Encyclopædia of the Laws of England* (Vol 11, pp. 530 to 532). In England the sheriff is not disqualified from being a member of Parliament, and his duties are the same as those of the deputy-sheriff here. Both are paid only by fees for work done. In criminal cases the High Sheriff is responsible to his deputy for fees. In England the sheriff is also returning officer, and for that reason cannot be elected as a member for the county for which he is sheriff. That is a very important restriction, because it shows that he is disqualified only as returning officer. *Rogers on Elections* (Vol. 2, p. 7). See the cases there cited. The respondent was not deputy-sheriff for Prieska, but for Britstown. The deputy-sheriff is not an officer of the Crown, but of the Court, much as an attorney is. He is not a member of the public service, but is the servant of the High Sheriff, and, unlike members of the Civil Service, he is at liberty to undertake any business provided he does not neglect his duties as sheriff. His position is very analogous to that of a Government auctioneer. In England all Government contractors are specifically excluded (*Rogers*, p. 26). Here it is not so. While Mr. Van Noorden was Acting Magistrate at Britstown, the respondent received nothing, because there was no work to do. The question is whether the term "office of profit under the Crown" does not refer exclusively to public servants. There is every reason why they should not be members of Parliament. Looking to the time when the Constitution Ordinance was framed, and bearing in mind the state of the English law at the time, it is difficult to see how he could be considered a public servant. As to the messenger of the Court, he fulfils the same duties in the Magistrate's Court which the deputy-sheriff fulfils in the higher Courts. I do not admit that the messenger holds office under the Crown, and I contend that his office is not an office of profit. He is not a civil servant, and his status is not provided for by law. He is a kind of Government contractor. He is allowed to conduct defences in the Magistrate's Court if he happens to be a law agent or an attorney, and that would be monstrous if he were supposed to be under the influence of the Crown. As to the object of excluding persons under the Crown from Parliament, see *Rogers* (Vol. 2, pp. 8 and 26). Rules of Court 294, 307, and 309 put both the deputy-sheriff and the messenger, as to fees, on much the same footing as attorneys. As to the messenger's horse allowance, that is not intended as a remuneration, but as a provision to ensure proper horses being kept for the public service. Another point is that the Government demands security from deputy-sheriffs and messengers, but not from Civil Servants.

[Maasdorp, J.: They used to have to find security.]

I was not aware of that; but now they contribute to a guarantee fund. Respondent, moreover, was not actually holding the office of messenger at the time of his election. He merely filled the position for a time to oblige the Magistrate. He never accepted the office, but merely undertook to perform its duties temporarily.

Sir, H. Juta, in reply: The office of messenger of the Court

is an office under the Crown. It is not a philanthropic office, but as a matter of fact, it is one of the most lucrative offices in the country. He got £75 for horse allowance, but attached to that was the most lucrative office of process serving. Take a big water case, with many witnesses, for instance, from a place like Oudtshoorn. The messenger might go out and serve fifty subpœnas in about an hour and a half at £1 2s. 6d. each. With the very high living now prevalent in the Colony, it might be said that there were a good many offices held under the Crown just now that were not offices of profit. In fact, if one might be permitted to say so, the new Estimates showed that.

Cur. Adv. Vult.

Postea (June 13):

De Villiers, C.J.: The 47th section of the Constitution Ordinance enacts that no person holding any office of profit under the Crown shall be eligible to be elected a member of the House of Assembly. The object of this enactment, which applies also to elections for the Legislative Council, was to ensure, as far as possible, the independence of members of the Legislature and to prevent the servility and corruption which had led to similar legislation in England. Until the time of the Revolution there seems to have been no limit to the number of so-called place-men who might be elected members of the House of Commons. During the reign of William the Third, Parliament ineffectually endeavoured to grapple with the growing evil, and it was not until the reign of Queen Anne, when the subservience of Parliament to the Ministry of the day had reached its highest point, that a practical measure was passed to limit the number of public officers who might occupy seats in the House of Commons. Instead of entirely excluding all office-holders from the House of Commons, as had been seriously proposed during the previous reign, it was now recognised that it was essential for the proper conduct of the business of the Government that a limited number of officers of the Government should be members of the House of Commons. By the 24th section of 6th Anne, c. 41, it was enacted " that no person who shall have in his own name or in the name of any person or persons in trust for him or for his benefit, any new office or place of profit whatsoever under the Crown, which at any time since the 25th of October, 1705, shall have been created or erected, or hereafter shall be created or erected . . . shall be capable of being elected or of sitting or voting as a member of the House of Commons." There remained, however, a numerous class of officials, holding offices under the Crown, who were still eligible to be elected. Their exclusion was gradually effected by numerous statutes subsequently passed, so that as a general rule no office-holders are now competent to sit in the House of Commons except such as have a representative character in connection with particular branches of the public service. In regard to offices created before the 25th of October, 1705, the 25th section of the Act of Queen Anne enacts that if a member shall accept such office his election shall be void, but such persons shall be capable of being again elected. "If," says Lord Macaulay, " persons who received salaries from the Crown had been suffered to sit without restriction in the House of Commons, those commissionerships, assistant secretaryships, chief clerkships, which are now held for life by persons who stand aloof from the strife of parties, would have been bestowed on members of Parliament who were serviceable to the Government as voluble speakers or steady voters. As often as the Ministry was changed, all this crowd of retainers would have been ejected from office, and would have been succeeded by another set of members of Parliament, who would probably have been ejected in their turn before they had half learned their business. Servility and corruption in the Legislature, ignorance and incapacity in all the departments of the executive administration, would have been the inevitable effects of such a system." On the other hand, he points out how still more noxious, if possible, would have been the effects of a system under which all the servants of the Crown, without exception, should be excluded from the House of Commons. In this Colony, Parliamentary Government would have been impossible without an amendment of the 47th section of the Constitution Ordinance. The Act 1 of 1872, which is generally spoken of as an Act for the introduction of responsible government, did no more than

this, it allowed certain public officers, who are now known as the responsible Ministers of the Crown, to be elected as members of Parliament, "anything in the 33rd and 47th sections of the Constitution Ordinance to the contrary notwithstanding." As the law now stands, no person holding any office of profit under the Crown, other than one of the responsible Ministers of the Crown, is eligible to be elected a member of either House of Parliament. It is admitted in the present case that at the time of his election the respondent held the office of deputy-sheriff for Britstown, as well as that of messenger of the Resident Magistrate's Court of Britstown. As to the former office, it was conferred upon him by the sheriff of the Colony. In the performance of the duties of that office he acts only as the deputy of the sheriff, who is responsible, under the 27th section of the Charter of Justice for the due execution of all process. The deputy-sheriff, again, is responsible to the sheriff alone, and not to the Government, which had no voice in his appointment and has no control over him in the performance of his duties. The dangers, therefore, which the Legislature intended to guard against by prohibiting the election of persons holding offices of profit under the Crown do not exist in the case of a deputy-sheriff. His office is one of profit, but it cannot be reasonably regarded as being an office under the Crown. The position of a messenger of a Magistrate's Court stands on a different footing. He is appointed by the Attorney-General in his capacity as a responsible officer of the Crown, and although the messenger does not receive his appointment directly from the Crown, he is an officer under the Crown. If, therefore, the office is one of profit, all the reasons for excluding salaried officials would reasonably apply to him. An office may be an office of profit without any salary being attached to it, provided, of course, that the holder is entitled, by virtue of such office, to some fees or other emoluments. In England, it appears to have been held in Mr. Bathurst's case that in order to relieve from disqualification a person who accepts an office which would otherwise be an office of profit under the Crown, it is necessary for the holder to make a formal renunciation not only of any salary but of any fee or emolument in connection therewith. As messenger of the Magistrate's Court, the respondent in the present case was entitled to charge fees for the service and execution of civil process. It does not appear whether the fees actually received by him compensated him for the expenditure incurred by him in the performance of his duties, but this is not a matter which should enter into the consideration of the legal or constitutional question. It is well known that some messengerships of Magistrate's Courts are exceedingly remunerative, whilst others hardly pay the expenses of the holders. But it may safely be assumed that no one accepts the office unless he hopes to make some profit out of it. It is taken for the sake of the emoluments attached to it, and those emoluments cannot be earned without an appointment to the office by the Government. In England it would appear that the High Sheriff of a county, who is appointed by the Crown, is allowed to charge certain fees, but as the office of High Sheriff is one which existed before 1705 he is eligible to be elected by any constituency except that within which he is High Sheriff. But does a person who is appointed, while member of Parliament, as High Sheriff, vacate his seat in terms of the 25th section of the Act of Queen Anne? If he does not, it would show that a High Sheriff is not considered to hold an office of profit under the Crown, but counsel was unable to answer the question whether in England he would vacate the seat although eligible to be re-elected. Since the adjournment of the Court I have made further inquiries, and I find that it would be impossible for such a case to arise, seeing that, by a Resolution of the House of Commons of 7th January, 1689, it was declared to be a breach of privilege to nominate any member of that House for the office of Sheriff. It would be vain, therefore, to look for any asistance from English decisions upon this aspect of the case. But there is a decision of a Committee of the House of Commons upon a parallel case which appears to be entirely in point. In the *Frome* case, referred to in Rogers on Elections, (Vol. 2. p. 11), it was held that the office of Secretary of the order of St. Patrick (instituted in 1783) was an office of profit under the

Crown, created since 1705, and that the sitting member was incapable of being elected under the 24th Section of 6 Anne c. 41. It was contended on the part of the sitting member that although he was in fact appointed by the Sovereign, it was because the Sovereign of the realm happened to be constituted Sovereign of the Order, that the secretary of such order derived his profits, not from the public, but from those becoming members of the order; and that therefore the mere fact of nomination by the Crown did not make the appointee an officer of the Crown within the meaning of the act. The Committee, however, held that he was disqualified. The 47th section of our Constitution ordinances places the holders of all office of profit under the Crown upon the same footing on which the holders of offices of profit under the Crown created since 25th October, 1705 are placed by the 24th Section of the Act of Queen Anne. If, therefore, the decision in the *Fromc* case is correct it is impossible to avoid the conclusion that the sitting member in the present case was not eligible to be elected.

Quite independently of that decision I am of opinion that the office of Messenger of a Magistrates Court is an office of profit under the Crown, and the only other question to be determined is whether the temporary nature of the respondent's appointment prevents the operation of the disqualification. It was certainly intended to be only an acting and temporary appointment to meet the difficulty occasioned by the sudden resignation of the Chief Constable and the respondent resigned the appointment, not long after his election. Unfortunately, however, for him he omitted to resign before his election. It is quite impossible to hold, whatever hardship the contrary view might entail that because the appointment was an acting or temporary appointment any disqualification which would have arisen from a permanent appointment ceased to operate. The danger which the legislature intended to guard against was that of the loss of independence on the part of members of the legislature, and that danger would exist whether the appointment is an acting or a permanent one. Indeed, under certain circumstances, the danger might be greater in the case of an acting appointment, when the hope would exist that the appointment might be made permanent, than in the case of an appointment already permanent, when the rules of the service would prevent a summary dismissal without good cause. The present is not such a case but the decision of the Court must proceed upon certain definite principles without reference to any special peculiar circumstances of hardship.

In regard to the horse allowance of £75 per annum to which the respondent was entitled under the terms of his appointment, if that had been his only emolument there would have been fair ground for holding that, as he had to expend the money on the keep of a pair of horses, his services as messenger of the Court were wholly gratuitous. But he was also entitled to charge for the service and execution of civil process and it is impossible to say that the horse allowance did not increase the profits made by him in the course of such service and execution. Moreover the very fact that he was allowed to charge fees for such service and execution constituted the office one of profit, and as the office was under the Crown he was not eligible to be elected. The Court will, therefore declare that the respondent has not been duly elected for the electoral division of Prieska, and that no other person was or is entitled to be declared duly elected. The respondent will pay the cost of the petition.

Maasdorp, J., concurred.

Kotze, J.: In this case, which is if some public interest, I should have liked to have given a written judgment like the Chief Justice, but as we are agreed as to what our judgment should be, and it is of importance that our decision should be speedily known, I merely now wish to say that I agree with the judgment just delivered. The office of Deputy Sheriff is not an office of profit under the Crown. A Deputy Sheriff is appointed by the High Sheriff. He may at any time be removed by the High Sheriff, and the fees which he may draw are merely a remuneration for the services which he renders in the same way as an attorney employed by the Government would be entiled to his fees. The Messenger, however, is appointed by the Government, and besides a certain allowance of £75, which in the present case is said to have been paid for forage for two horses to be kept by the Messenger,

he is also entitled to make certain charges in civil matters. The appointment to this office, to which an emolument and other pecuniary advantages are attached, is vested in the Government. It is, therefore, an office of profit under the Crown. As Mr. Cilliers, at the time of his election as a member of the House of Assembly, held this office, he was disqualified, and his election is consequently void.

[Petitioner's Attorneys: Van Zyl and Buissinné. Respondent's Attorney: P. de Villiers.]

APPEALS.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.

NQUMBELA v. CULLIGAN.

Medical practitioner — Fees — Proof of status—Sec. 56, Act 34 of 1891.

A medical practitioner who sues for his fees must prove that he is duly licensed to practise as such in this Colony, either by the production of his licence or by a certificate given under the hand of the Colonial Secretary. Louw v. Fryer (*15 S. C. R. 214*) *followed.*

This was an appeal against the judgment of the Acting Resident Magistrate in the district of Qumbu, in a case heard on the 6th March, in which the appellant was the defendant, and was sued by the respondent for £17 4s., being fees and charges for medical attendance. The appellant pleaded that he tendered £7 1s., and he also pleaded the general issue. Judgment was given for the plaintiff for £10 1s., and costs of suit.

Mr. Upington for the appellant. Mr. Benjamin for the respondent.

Mr. Upington (for the appellant). An initial point in this case is that the petitioner sues as a medical practitioner and produces no proof that he is one. See Section 60 of Act 34 of 1891.

[Maasdorp, J.: Does not that appear from the record?]

He has not produced the best evidence —viz: his certificate to practice.

[Kotze, J.: Suppose he goes into the box and says "I am a medical practitioner"?

That is not the best evidence.

[Kotze, J.: Suppose a man has lost his licence?]

He can get another, and if practising he ought to have a licence in his possession. A medical practitioner cannot sue for fees unless he can prove his licence, and Section 56 of Act 34 of 1891 provides for the proof being by certificate under the hand of the Colonial Secretary.

[Mr. Benjamin: I must admit that *Louw* v. *Fryer* (15, S.C. R., 214) shows that the evidence as to respondent being a medical practitioner is not sufficient.]

The Act implies that the best evidence should be produced, and that best evidence would be the production of his licence. Section 60 refers to proof both in civil and criminal proceedings, and excludes all proof which does not reach the standard of proof therein laid down. See *Conry* v. *Bezuidenhout* (13, S. C. R. 301).

Mr. Benjamin: In the case cited there was no evidence given by the doctor himself as to his being a medical practioner. In the present case the doctor said he was a District Surgeon and licensed medical practitioner.

Judgment reserved pending the production of the record in *Louw* v. *Fryer*.

Poitea (June 12):

Maasdorp, J.: This is an appeal to have a judgment of the Magistrate set aside in a case in which the plaintiff sues the defendant for fees due to him as a medical practitoner. The defendant in the Court below pleaded the general issue. Evidence was taken, and the Magistrate gave judgment for the plaintiff for a reduced amount of fees, not for the full amount of fees claimed by the plaintiff. The amount of fees is not now in question, but upon appeal the point is raised that there was no evidence in the Court below that plaintiff was a medical practitioner in the terms of the Medical Act. That question was not pointedly raised in the Court below, but is now made a ground of appeal. It appears that the plaintiff in giving his evidence in that case stated "I am a district surgeon of Qumbu, and

a duly licensed medical practitioner." Appellant contends that that is not sufficient evidence under section 60 of Act 34 of 1891. That section provides that no person shall be entitled to recover any charge in any Court of Law for medical attendance, unless he shall prove upon the trial that he is licenced under this Act. Now the question arose whether the statement on oath by the plaintiff was sufficient proof. It appears that under certain circumstances under section 56 a certificate given under the hand of the Under-Colonial Secretary that the plaintiff is a duly licensed medical practitioner is allowed as *prima facie* evidence. The question arises whether in this case it is necessary for the plaintiff to provide the best proof, that is to produce his licence as a medical practitioner, at the trial. It seems that the Legislature has provided that in certain cases where some difficulty may arise a less valuable proof than the licence itself may be given at the trial, but that that proof, which consists of the certificate from the Under-Colonial Secretary, shall only be *prima facie* evidence. There was a case before the Court the case of *Louw and Fryer*, in which a similar question was raised, and yesterday, when the case was cited, there was some doubt whether any evidence at all had been given in that case that the plaintiff was a medical practitioner. If no evidence at all had been given, that case might not have been conclusive on this point, but if similar evidence had been given in that case, as was given in this case, then it would be conclusive against the respondent in this case. When the matter was referred to yesterday there was some difficulty as to the evidence, but on referring to the record again I find that similar proof was given in that case. The plaintiff is asked his name, occupation, and address, and he gives his name as Richard Charles Fryer, and states that he is a medical practitioner. Here, therefore, you have got similar evidence to that which was given in the case now before the Court, and the Court held that that evidence was insufficient proof that the plaintiff was a medical practitioner. It is conclusive that the evidence was regarded as insufficient proof that the respondent was a medical practitioner, and upon that decision the present appeal must be allowed, absolution from the instance being entered in place of judgment for the plaintiff.

Mr. Benjamin raised the question of costs.

Maasdorp, J.: I do not see any reason why the ordinary rule should not be observed, that the unsuccessful repondent should pay the costs of the appeal, and the costs of the Court btlow.

Kotze, J., concurred.

[Appellant's Attorneys: Faure and Zietsman; Respondent's Attorneys: Scanlen and Syfret.]

NIEKERK V. WAKEFIELD. { 1903. June 11th. Sept. 4th. „ 12th

Condition in a perpetual quitrent grant—Magistrate's decision on facts reversed.

Where the finding of a Magistrate is against the weight of evidence, the Court will depart from the rule not to disturb the finding of a Magistrate on questions of fact.

Where a perpetual quitrent grant contained a condition "that all roads and thoroughfares running over the land shall remain free and uninterrupted."

Held, (*1*) *that, upon the facts, the road claimed by appellant was a road or thoroughfare at the time and within the meaning of the grant*; (*2*) *that appellant, although the diagram attached to the grant did not shew a certain road or thoroughfare claimed by him, could prove by evidence* aliunde *the existence of such a road or thoroughfare at the time of the grant.*

This was an appeal against a judgment of the Acting R.M. of Umzini, in which the appellant was the defendant and the respondent was the plaintiff.

The plaintiff had sued the defendant in the court below for £10 damages for

trespass, and judgment was given for the plaintiff for £1 and costs, except that the plaintiff was ordered to pay costs of an adjournment. On or about the 21st October, 1902, the defendant by himself or his boys entered upon the plaintiff's farm, and conveyed by a team of oxen trees from the forest of Zimunkulu along a private road, alleged to be the property of the respondent.

The magistrate, in his reasons for judgment, said that the claim was for trespass and damages, and from the evidence he found that there was a short cut on the farm of plaintiff to that of the defendant, which was sometimes used for half loads, or for return empty wagons. He thought that plaintiff had a right to prevent the defendant from cutting up his farm. Apart from that he had not used the road properly by bringing a sledge over it. The road being out of sight of the plaintiff's house, that might account for him not preventing others from using it.

Mr. Upington for appellant; Mr. Burton for respondent.

Mr. Upington said that he took it that the claim for damages was merely formal, the real point being whether the plaintiff had a right to a small strip of road, branching off, almost at right angles, to the Zimunkulu Bush, across Strahlhoek and Driefontein, and joining the Harding-road. The magistrate, in his reasons, believed the evidence of the plaintiff and his witnesses rather than that of the defendant. He did not specify any particular witness. The evidence produced for the plaintiff was very inconclusive. The magistrate seemed to have relied simply on the evidence of Mr. Strong, who stated that he did not know the road in question. That was quite possible, because all the evidence that had been led showed that it was a rough track, up which, with great difficulty, wagons could be drawn. All the witnesses who knew the Zimunkulu Forest in the sixties, seventies, eighties, and nineties stated that the road was in existence then, and gave instances of the road having been used by people during those periods. With one exception they had all used the road before the country was annexed by the English. The transfer deed, he had no doubt, would reserve all rights of road in existence at the time of the annexation, and although it might not appear on the diagram, it was held in *Chamberlain* v. *Hulley* that that would not interfere with the reservation.

The appellant was sued in the Court below for trespass, and he set up the case that he was entitled to a certain short cut or footpath, and evidence was called to prove that this short cut had been in existence for a considerable period. The Magistrate did not found his judgment upon the question of whether the road was in existence prior to the date of the grant from which the plaintiff in the Court below, now respondent, took his title, but on the fact that in that grant all existing roads and thoroughfares were expressly reserved. The grant in the present case, as he (counsel) understood it, was exactly of the same nature as that upon which the Court decided in the case of *Chamberlain* v. *Hulley* (11, Sheil, page 193), and the two cases were from almost the same neighbourhood. The whole point of fact was whether this short cut or thoroughfare was in existence at the time this property was given by grant. The trespass complained of was that sledges were used over the path. One of the witnesses, a native chief, said that the road was used many years before Wakefield came into existence for sledges coming from the forest. He contended that the road was in existence before the grant of road was given. Niekerk said that he had always had the uninterrupted use of the road for about thirty-five years. Counsel submitted that on the facts disclosed appellant was entitled to the use of the road in common with other persons, and that the Magistrate was wrong in holding that a trespass had been committed.

Mr. Burton argued that there was no evidence to show that this was a recognised rood before the grant was made. The spasmodic use of the short cut would not upset respondent's title. He would not go so far as to say that the path must have all the characteristics of a public road, but it must be a thoroughfare used regularly by people of the neighbourhood for the purposes of their business. The appellant had failed to prove that at the time this grant was made in 1883 there was actually existing a thoroughfare—a thoroughfare which was used as of right by the people living in the neighbourhood.

Kotzé, J.: This is an appeal from the decision of the Acting Resident Magistrate at Umzimkulu. The respondent, Wakefield, owner of the farm Driefontein, sued the appellant, D. Niekerk, owner of the adjoining farm Middelwater for trespass and damages. Wakefield complained that the defendant had dragged a quantity of poles by means of oxen over his farm Driefontein, and he claimed the sum of £10 as damages. The defendant's answer to the action is that he was lawfully on a road leading from his farm Middelwater across the plaintiff's farm, and he denies that he committed any act of trespass. The Acting Magistrate, after hearing the evidence, gave judgment in favour of the plaintiff for £1 damages and costs. It appears that on the 20th July, 1883, a perpetual quitrent grant of the farm Driefontein, in the Umzimkulu district of Griqualand East, was issued in favour of Philander Niekerk, the plaintiff's predecessor in title. The grant was made "on condition that all roads and thoroughfares running over the land shall remain free and uninterrupted," and the simple question, therefore, is whether the defendant used a road or thoroughfare within the meaning of the grant. The Acting Magistrate, in the reasons given by him for his judment, says that there was a short cut over the farm Driefontein, which was sometimes used for bring along half-loaded wagons, or for the return of empty wagons in the very early days, and he adds that had a proper road been made there, the witness Strachan would have known it. He, therefore, came to the conclusion that the plaintiff had a right to prevent the defendant cutting up his farm by now using old short cuts as a wagon road. The Magistrate further observes that apart from this the defendant is using the road improperly by taking a sledge over it, and that he believed the evidence of the plaintiff and his witnesses in preference to that of the defendant and his witnesses. Now, while it is a rule of this Court not to disturb the finding of a Magistrate on a question of fact, depending upon the credibility of the witnesses, who have given evidence before him, cases may arise where the Court will depart from the rule, where, for instance, the finding of the Magistrate is clearly against the weight of evidence. I have carefully read through all the statemnts of the witnesses, and find it extremely difficult to set aside their evidence for the defence, except upon the hypothesis that what they have said with regard to the road in question is a pure invention. But I must hesitate to accept such an assumption, especially when two of the four witnesses called by the plaintiff to a considerable extent support the defendant's case. Thus the witness Banger stated that when he was sawing wood in the Umzimankulu Forest, that is from 1877, and for some 12 years after, there was a footpath, or short cut, which used to be traversed by horsemen, and also the four wheels of a wagon without the buck. This short cut could also be used for sledges, although he never saw any sledges drawn along it. Then the native Luben, *alias* Kok, said that he was in Banger's employ for six years, and people used to employ sledges on this road, or short cut. He also stated, "this track was commonly used." This evidence, therefore, shows that this footpath, short cut, or track, was used in 1877, and, subsequently, as a thoroughfare for people on foot, on horseback, and with sledges and wagon wheels, and that this was so not merely in the very early days, as the Magistrate expresses it in his reasons, but also at the time of the grant of the farm Driefontein, that is, in the year 1883. The evidence for the defence is that the defendant has used this road for thirty-five years, and that it was generally used by wood-cutters and natives for the purpose of conveying wood either in sledges or in half-loaded wagons. Without repeating the statements in detail of the ten witnesses called by the defendant, I will merely mention the evidence of the native headman, James Nyangwe, which is of importance. He has lived in the district for forty years, and says the disputed road has been in existence for many years before Wakefield came there. He has himself used this road since Wakefield became owner of Driefontein, and has never been stopped by him, and he adds, "all the people living on the other side use this road on horseback and on foot." Two other witnesses saw this road actually being made, and others again remember this road during the time when Mr. Strachan was magistrate, which was about 1880. The Acting Magistrate seems to attach considerable importance to the fact that the witness

Strachan had no knowledge of this road, for he says that had a proper road been made there, this witness would have been aware of it. It is not explained what meaning the Magistrate attached to the words proper road. Strachan states that the only recognised road, whatever that may mean, is past Niekerk's farm, on to Beacon Hill. But the fact that Strachan does not know this road in question cannot weigh against the positive testimony of the defendant and his witnesses. Upon the evidence, it appears to me satisfactorily established that before and at the time of the grant (1883), this road was generally used by persons going to or coming from the Umzimankulu Forest on foot, on horseback, and with sledges and empty and half-loaded wagons. It is, therefore, a road or thoroughfare in its widest sense, and also within the meaning of the grant, which provides that all roads and thoroughfares running over the land, that is, existing at the time of the grant, shall remain free and uninterrupted. I may observe here that the nature or kind of road, and whether this road is a short cut or not, or whether the defendant can use some other road equally well, or by using this road in dispute, is inconveniencing the plaintiff, or whether the defendant may lawfully use a sledge upon this road, are all questions which do not affect the real issue. Although the road is not marked on the diagram which accompanied the original deed or grant, that does not prevent the defendant from proving the existence of the road or thoroughfare *aliunde*. As he has succeeded in so doing, and showing that the road existed at the time of the grant, the appeal must be allowed, and the judgment below altered into judgment for defendant, with costs. The appellant is entitled to the costs of appeal.

Kotze, J., mentioned that Maasdorp, J., concurred in this judgment.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

ADMISSIONS. { 1903. June 12th.

Mr. Benjamin moved for the admission of John Christian Wrensch as a conveyancer.

Application granted, and oath administered.

PROVISIONAL ROLL.

SOUTH AFRICAN MILLING CO. V. GRAND JUNCTION RAILWAYS. { 1903. June 12th.

Mr. Benjamin said that he had to move for provisional sentence on certain bills, and also to apply for sequestration of the defendant's estate, but he understood that application was to be made for the matter to stand over until the 13th July, to enable the referee, to whom the matter of Hills v. Colonial Government had been reforred, to make his report.

Mr. Searle, K.C., said that he had not been instructed, but he had heard that that was so.

Case ordered to stand over until the 13th July.

ROWE V. ROWTOWSKY AND ANOTHER.

Mr. Close moved for provisional sentence for the sum of £115, less £30 paid on account of certain surety bonds, leaving an unpaid balance of £80.

Order granted.

B. LAWRENCE AND CO. V. PATTERSON.

Mr. Alexander moved for the provisional order for the sequestration of the defendant's estate to be made final.

Order granted.

BLACKBEARD V. SWARTBOY.

Dr. Greer moved for provisional sentence for £5 18s. 1d., being judgment given in the Resident Magistrate's Court at East London, and costs, and asked that the property be declared executable.

Order granted.

LITHMAN AND CO. V. GOODMAN.

Promissory notes.

G. owed L. certain sums of money and gave to L. promissory notes to the amount of such sums owing. G. now contended that these were accommodation notes, but the Court held that they were given as security for moneys owing by G. to L., and granted provisional sentence against G. on the notes.

Mr. Close moved for provisional sentence on three promissory notes of £760 7s., £473 6s. 6d., and £474 4s. 6d. respectively, and costs. Counsel mentioned that there was also a claim on the illiquid roll, but that was not before the Court at present.

Mr. Searle, K.C., for the defendant, read the latter's affidavit, which set forth that nearly the whole of the debts were contracted before he came into partnership with the firm Augman and Lewis. Bonds were to be passed on certain property at Sea Point and Salt River. The said bonds were to be paid in on the sale of the properties to be mortgaged. At the time of signing his power of attorney, he asked plaintiff to furnish them with a detailed account of their indebtedness. He had often promised to do so, but had never carried out his promise. It was clearly understood that the notes were signed to accommodate the plaintiff, and they were renewed from time to time, on the understanding that they were to accommodate the plaintiff, and not for any valuable consideration. When deponent took over the business of the said partnership, he asked the plaintiff to furnish him an account of his indebtedness, and he renewed the notes from time to time as they became due, on the express understanding that they were accommodtaion notes. He offered to carry out the agreement arrived at between the parties, and to pass a mortgage bond for the amount which might be due to the plaintiff, on condition that he rendered a detailed account, showing the amount due, and how it was arrived at.

Mr. Close read the replying affidavit of the plaintiff, in which he denied that the notes were given as accommodation notes. He said that the firm were indebted to him in various sums, and he agreed to give facilities to meet the same, provided they gave him security by two covering bonds on their properties. Owing, however, to a certain dispute, the bonds were not executed. Detailed accounts were always rendered when the goods were supplied, and monthly statements were always rendered, so that the firm were always well aware of the amount due to him. A number of notes were renewed from time to time by the defendant, as agent for Lewis. The bills were held for valuable consideration, and were from time to time renewed solely at the request of the said firm. Defendant asked deponent to accept him as debtor in place of the firm, and he agreed to do this, on condition that he gave a covering bond on certain property. At that time the firm were indebted to deponent in the amount of £1,869. He declined to render further accounts, because at that time he considered the defendant's request merely a quibble to delay passing the bond.

Mr. Searle said that the defence was that the promissory notes were given merely as accommodtaion notes, there being an arrangement between the defendant and the plaintiff in order that the plaintiff should discount these notes. The arrangement was that the bond should be passed for the indebtedness of the defendant's firm to the plaintiff, and that the indebtedness should be paid when the landed property was sold. That there was some such arrangement was clear from the letter of the plaintiff's attorney. The defendant did not incur these liabilities, they were incurred by the firm before he took over the business, and it was only reasonable that the plaintiff should furnish him with a detailed account.

Mr. Close (for the plaintiff) was not called upon.

Maasdorp, J.: It is quite clear in this case that the defendant, at the time when the notes were made, was indebted to the plaintiff in a sum exceeding the amount of these notes. There was a request on the part of the plaintiff that this indebtedness should be secured by a covering bond, and the defendant and his previous partners expressed a willingness to pass that bond, but a difficulty arose, and

in the meantime it was not passed. The promissory notes were made for the amounts for which the plaintiff now claims judgment. It seems quite clear that when the notes were made, there was an indebtedness for the amount by the defendant to the plaintiff. Under ordinary circumstances, one would draw the conclusion that the notes were given in settlement of these amounts. Even when the notes were given, the plaintiff did not press the defendant, but allowed them to run on from time to time; renewals were given, and when these renewals were given from time to time, he expressed his willingness still to take this security bond which was given. The defendant says that these notes were not given in settlement of the debt that was due, but for the accommodation of the plaintiff. The plaintiff states that he was in no want of assistance at the time these notes were given, and that he took them in the ordinary course of business in settlement of the accounts he had against the defendant. On the whole, I think the allegations made by the plaintiff are more probable, and under the circumstances, it is more likely, with the information now before the Court, that the plaintiff will be successful, if this mater is further proceeded with, and the Court will give provisional sentence, with costs against the defendant.

Mr. Searle asked that the plaintiff should be directed to furnish defendant with an account of his indebtedness.

Maasdorp, J.: There is nothing before the Court now on which an order can be made to that effect. It seems there is a further amount due, and it is a question that can still be raised upon a claim for goods sold and delivered, but there is nothing now before the Court on which an order can be made. At present there will be provisional sentence, with costs.

Mr. Close: And interest from due date as prayed?

Maasdorp, J.: Yes.

BOXALL V. BROAD.

Mr. Buchanan moved for the final adjudication of the defendant's estate as insolvent. The provisional order was granted by Mr. Justice Kotze on 13th May.

Order granted.

EATS V. WHALLEY.

Mr. Russell moved for provisional sentence for £1,400 on a broker's note for the sale of certain property at Diep River, with interest and costs of suit, plaintiff tendering transfer.

Order granted.

THE MASTER V. LOUW.

Mr. Howel Jones moved for the usual order calling upon the respondent to file account in his capacity as executor testamentary of the estate of Matilda Louw.

Usual order granted.

NEL V. LATEGAN.

Mr. M. Bissett moved for the provisional order of the sequestration to be made final. Order granted as prayed.

THESEN AND CO. V. JACKSON AND CO.

Mr. Benjamin moved for the provisional order of sequestration to be made final.

Order granted accordingly.

TALJAARD V. BAUMAN.

Mr. C. W. de Villiers moved for provisional sentence for interest on a promissory note for £200, at the rate of 6 per cent. from the 1st August, 1899.

Order granted.

ILLIQUID ROLL.

W. AND G. SCOTT V. PINKER. { 1903. June 12th

Dr. Greer moved for judgment for £56 1s. 11d., for goods sold and delivered with interest *a tempore morae*, and costs of suit.

Order granted as prayed.

PURCELL AND CO. V. WILKINSON AND ANOTHER.

Mr. Buchanan moved for judgment under Rule 329d for £153 17s. 9d., amount due and owing for work and labour performed and materials supplied by the plaintiff to the defendants at their instance and request, with interest *a tempore morae*, alternative relief, and costs of suit.

Order granted as prayed.

TABLE BAY HARBOUR BOARD V. BUCKNALL STEAMSHIP LINE.

Mr. M. Bisset moved for judgment under Rule 329d for £540 14s. 3d., due and owing for work done, ship's dues, etc., with interest *a tempore morae*, and costs of suit.

Order granted as prayed.

TABLE BAY HARBOUR BOARD V. BERGL.

Mr. Searle, K.C., moved for judgment under Rule 319, but said he understood there was a motion on the roll by the defendant, and he thought it would be desirable to take the two matters together.

Mr. Benjamin said he appeared for the defendant in this matter, and the applicant in the action, and he asked that the matter should be allowed to stand over until the end of the roll.

Allowed to stand over accordingly.

LOCHNER V. WHITE.

Mr. Russell moved for judgment under rule 329d for £5, money lent by plaintiff to defendant, with interest, *a tempore morae*. and costs of suit.

Order granted as prayed.

PUGH AND CO. V. SEDDON.

Mr. Pyemont moved for judgment for the sum of £58 12s. 6d., for work and labour and material supplied by plaintiffs at the defendant's request, less £10 paid, leaving due £48 12s. 6d., with interest, *a tempore morae*, and costs of suit.

Order granted as prayed.

BRAUDE V. BRAUDE.

Mr. Upington moved for judgment in terms of the report of the Official Receiver. The matter arose out of an action in which the present plaintiff sued the defendant for the amount of certain partnership transactions, and the defendant, who was defended in the action, claimed, in reconvention, the sum of £300 odd. The Court gave judgment for the plaintiff in convention, and for the defendant as plaintiff in reconvention for the sum claimed. The whole matter was referred to Mr. Maynard Nash as referee, who had awarded £359 12s. 6d., after deducting the claim in reconvention, to the plaintiff as his share of the partnership transaction.

Order granted as prayed, defendant to pay costs of reference.

MARSH AND SON V. NEL.

Mr. Russell moved for judgment under rule 329d for the balance of an account for goods sold, with interest *a tempore morae* and costs of suit, less £50 on account.

Order granted as prayed.

REHABILITATION.

Mr. Pyemont moved for an order for the rehabilitation of Anthony George D'Arcy.

Granted.

RAPLEY V. RAPLEY. { 1903. June 12th

Mr. Upington, who appeared for the plaintiff, said that this was the return day of an order calling upon the defendant—the husband— to return to or receive plaintiff on or before the 31st May, 1903, failing which to show cause to-day why a decree of divorce should not be granted and plaintiff declared entitled to the custody of the minor children, and why he should not be ordered to pay the sum of £8 per month for the maintenance of the children. The Court had ordered personal service to be effected, but it had been found impossible to so serve the order, and application was now made for leave to make substituted service and for an extension of the return day. In support of the application, an affidavit was filed by Mr. Arderne, one of the plaintiff's attorneys, who detailed the steps taken to effect personal service, and said plaintiff had spent over £40 in her endeavour to trace her husband.

The Court made an order calling on defendant to make restitution of conjugal rights on or before the 12th July, failing which to show cause on the 1st August; personal service to be effected, if possible, failing which service by publication once in "The Star," Johannesburg.

WASSERMAN V. WASSERMAN.

Mr. Buchanan, for the plaintiff, asked that the rule *nisi* should be made absolute calling upon the defendant to show cause why a decree of divorce should not be granted, giving the plaintiff the custody of the children of the marriage. The matter had been before the Court on the 3rd February, when the defendant was ordered to return to or receive his wife by the 15th May, failing which, to show cause by the 30th May. On the 30th May the affidavit that defendant had neglected to comply with the order of Court could not be made, and the matter was allowed to stand over. The plaintiff, in her affidavit, stated that her husband had not returned to her.

The decree of divorce was granted, the plaintiff being declared to be entitled to the custody of the minor children.

DUTTON AND CASTLE V. TABLE BAY HARBOUR BOARD.

Mr. M. Bisset asked for a rule *nisi* calling upon the defendants to show cause why the plaintiffs should not be granted leave to sue *in forma pauperis*

Order granted as prayed, the rule to be returnable on the 13th July.

GREEN AND SEA POINT MUNICIPALITY V. SEBBA AND OTHERS. } 1903. June 12th.

Building regulations — Building line — Municipality — *Ultra vires*—Interdict—Sec. 4 (*h*) of Act 20 of 1896.

In contravention of certain building regulations of the Municipality of G. and S., and notwithstanding warning received from the municipal authorities, the respondent had proceeded with the erection of certain buildings without having previously had his plans approved of by the Municipality. The Municipality now sought to have him interdicted (1) from proceeding with the said buildings until the plans thereof should have been duly approved; (2) from building within 7 feet of the centre of the road.

Held *that, as under Sec. 4 (h) of Act 20 of 1896, the Municipal regulation as to approval of plans was* intra vires, *the respondent must be interdicted from proceeding with his buildings.*

Held further, *that in the absence of fuller information as to the general line of buildings, the Court should not grant the second part of the interdict for which application was made.*

This was an application to make absolute a rule *nisi* granted in Chambers on an application by the Municipality for an interdict restraining respondents from proceeding with the erection of certain buildings at the corner of the Main-road and St. John's-road, Sea Point, until such time as the plans therefor are approved by the Municipal Council. A rule was granted calling on respondent to show cause why the interdict prayed for should not be granted.

The affidavit of R. H. Heward, Municipal Engineer, upon which the rule was granted, stated that plans for the shops and dwelling over and at the rear thereof were submitted to his Council by respondents. On several occasions these plans were returned with objections, which were clearly defined. Notwithstanding that the plans had not been approved, respondents had commenced laying the foundations of the buildings. Such foundations had not been approved of, and were contrary to the regulations. In the plans submitted, the air space provided at the rear of the buildings was shown at 15 feet, whereas it was provided by regulation that the air space should not be less than 20 feet. According to the plans, the building line was not set back from the footway as required, while a balcony was shown projecting over the footway, contrary to the regulations.

In his answering affidavit, Henry Rowe Rowe, the respondents' archi-

tect, referred to certain correspondence which had passed between him, acting for the respondents and the Municipal Council. These letters he annexed to his affidavit. In the letter with which the plans submitted were first returned by the Council, several objections were made. In this and subsequent letters, the chief objections were that the building should be set back 7 feet, and that a balcony shown as projecting over the footway should be removed. In the correspondence, respondents objected to setting back the building unless corresponding advantage were given by the Council, or unless the Council expropriated the 7 feet in the manner provided for by law. Deponent stated that during the period of this correspondence he had an interview with the Council, and discussed the objections. All the questions were settled, with the exception of the setting back of the building 7 feet and the removal of a certain balcony. The respondents denied the right of the Council to insist on the building being set back 7 feet, but expressed their willingness not to proceed with the balcony if the Council did not press their objection concerning the setting back of the building. Deponent further stated that owners of other properties in the road had been allowed to erect balconies such as the respondents proposed to erect.

In a replying affidavit, Mr. Heward denied that all other questions save that of the building line and balcony had been settled at the interview referred to. The respondents only conditionally agreed to the suggestions of the Council. In a letter written on the 30th April, the Council had asked for the return of the plans stating that they could not come to any conclusion in the absence of the plans. On the 4th May a copy of the plans was sent by Mr. Rowe with a letter stating: "We hand you the plans for the information of your Council. In the meantime, we are proceeding with the work." In replying, deponent stated that he regretted to note the respondent's intention to proceed with the work before the plans were approved. He warned respondents that the Council would have no alternative but to apply for an interdict. He denied that other properties there were erected up to the back line of the footway.

Mr. Schreiner, K.C., for the Municipality. Mr. Searle, K.C., for the respondents.

Mr. Searle, K.C.: The only point in this matter refers to some 7 feet of footway. We deny the right of the Municipality to set back our property 7 feet.

[Maasdorp, J.: Your balcony projects over this 7 feet?]

We are not going on with the work.

[Maasdorp, J.: Your plans show the projection, and you now complain that the Municipality will not approve of your plans.]

We offered to submit other plans without the balcony. The case of *Green and Sea Point Municipality* v. *Kramer* (12 C.T.R., 560), is in point. In that case also building operations had been continued, just as they were here. In both cases the whole point is whether the Council can compel a man to set back his buildings. These two cases are not precisely on all fours, but they are very similar. See also *Town Council of Cape Town* v. *Shenker* (12 C.T.R., 120). In that case it was held that the Town Council could not call upon a man to put back his building in order to give a street 40 feet wide. In this case no building line has been laid down by the Engineer, as in *Short* v. *Town Council* I admit that the majority of the buildings in the street stand further back than ours, but under the Sea Point Act, the Engineer has no power to determine the line of building. *Short* v. *Cape Town Town Council* (15 S.C.R., 190) is also very much in point. There the matter was decided under section 170 (sub-section 9) of Act 26 of 1893. That section is very similar to section 4 (g) of Act 20 of 1896, under which Green Point is governed. There there was a regulation authorising the Engineer to fix the building line, but providing that it should be approved by the Town Council. Here the regulation of the Council is *ultra vires*. I admit we have no right to put a balcony on the main road without the consent of the Town Council—*Claremont Municipality* v. *Hudson* (9 Sheil, 390)—but neither there nor anywhere else can I find that it has been decided that a municipality can fix an arbitrary building line. The Court has never decided that the Council has a right to lay down a building line in old streets. There is nothing on the record to show that the bulk of the houses on

the Sea Point road are 7 feet from the road. The whole object of this Act is to secure regularity of the building line, but regularity cannot be secured in an old street, where the houses are placed anyhow. The Council cannot draw a line within a man's property, and say, "You must not build within this line." This the Court has never decided, and I therefore submit that the Town Council has acted *ultra vires* in laying down such a rule as this. Possibly the defendant may be technically in the wrong, but no similar case has ever been crisply decided.

Mr. Schreiner, K.C. (for the Town Council): Counsel has avoided the main issue in the whole case. The first point is that municipal government is on its trial in this country. If a man might defy local regulations, local government could not possibly be carried on. Here the applicant gives notice to the Council that if he is not allowed to take his balcony over the public road he will do so without their consent. By their regulation (No. 251) they must have a certain air space in front of a three-story building. In this case the Council consented to curtail the air space, in consideration of one of the stories of this building consisting of a mansard roof. On April 23 we objected to their plans, and on the very next day they announced their intention of going on with their building. The proper course of the respondent would have been to have asked the Court for an interdict. If a man may set a municipality at defiance, and take the law into his own hand, there is an end to all municipal government. *Spoliatus ante omnia restituendus.* Here the Town Council is *spoliatus.* Therefore we are in the first place entitled to our interdict. In *Town Council of Cape Town* v. *Shenker* no objection was raised to the plans as such. Short's case is an authority for saying that the respondents in this case ought to bring their action. The applicant, in his affidavit, gives quite an erroneous measurement, and the answering affidavit shows that all we ask is to have this building put in line with the other buildings in the road (see the letter of April 23). Short's case shows that they were bound to put back their buildings. *Short* v. *Cape Town Town Council* (8 Sheil, 221). This is not a question of air space, but of building frontage. The building line may be irregular, but there is a line even if it is irregular. The line of the respondent must be on the same line with that of the neighbouring shops. There is a building line in the street, and now the respondent comes before the Court, and says: "I mean to drive a hard bargain, and if you do not allow me space for a balcony, I will build up to my line." If municipal government is to exist at all, a man cannot take up this position. Our Act does not (like the Cape Town Act) require the building line to be laid down by the Municipal Engineer. The whole question is whether, as a matter of fact, these buildings are out of line. We say they are, and if we are wrong in our contention, let them bring their action.

Mr. Searle (in reply): If they object merely to our building line, see Hudson's and Shenker's cases, and I submit that the Court will follow the decisions in these cases.

Maasdorp, J.: In this matter the applicants move for an interdict to restrain the respondents from proceeding with certain buildings, until the plans of these buildings have been approved of by the Municipality. Sub-section H, of Section 4 of Act 20 of 1896, gives the Municipality power to make regulations in regard to the deposit for the Council's approval of plans by persons intending to construct any building. By virtue of that sub-section, the Council has made a regulation, by which it is provided that no person shall proceed to erect any building without the previous sanction and approval of the Council. Upon that regulation, the applicants have now come into Court. It appears that certain plans have been submitted by the respondents to the Municipality, but they were found by the Municipality's architect to be objectionable in certain respects. One objection was that these plans provided for the construction of a balcony projecting over one of the public streets, and under Sub-Section G, of Section 4, of their Act, the Municipality has power to prevent the construction of projections over the public roads. Another objection which was raised was that the building, being a three-storied one, provision should be made for a certain air space at the back of this building. It is admitted now by the respondent that he cannot maintain his right to construct a balcony projecting over the street without the consent of the Municipality, and he has also ad-

mitted that sufficient air space is not provided for at the back of the building, and he makes certain proposals by which this may be rectified. The way in which these objections might be rectified is by omitting the balcony from these plans, and by constructing a Mansard roof over the proposed third story of this building. If plans to that effect are submitted, the Municipality seems to take it there would be no objection to the proposed building in itself, but, as it happens, the plans have not yet been submitted to the Municipality to remove these objectionable features. No plan has been submitted which provides for a Mansard roof at the back of the building over this third story, consequently there have been no plans submitted to the Municipality to which they can be asked to give their approval. Under these circumstances, the Municipality was perfectly right to come to this Court to object to a building being put up which was obviously objectionable in its character, and which they had not yet approved of. Upon that ground, an interdict must be granted restraining the respondent from proceeding with this building. But a further question has been raised, which was also one of the grounds of the objections raised by the Municipality, that this building should be put back from the street some seven feet further than the respondent proposes to place it. A further important question of law has been raised upon that objection, viz., the right of the parties in respect of the powers of the Municipality with reference to putting back the building into the general line of buildings, or, otherwise, of widening the streets for the purposes of improvement. I do not think there is sufficient information put before the Court upon which to dispose of that question. If that question is raised upon the ground that the Municipality has a right to regulate the general line of building and to force persons intending to put up a new building to confine themselves to that line, then there is not sufficient information before the Court to prove that this limit of seven feet would bring this building into the general line of building, and, consequently, the interdict must be somewhat modified in this form: The Court grants an interdict to restrain the respondent from proceeding with the building until the Municipality have approved of the plans, or until the interdict shall have been set aside on action brought by the respondent. The respondent to pay the costs of this motion.

Kotzé, J.: By a regulation framed by the Municipality under Act 20 of 1896, no persons are allowed to commence or erect buildings without first having submitted plans and obtained the approval of the Municipal Council. Plans were submitted by the respondent, to which objections were taken, and these plans were returned in order that they might be amended by the respondent and then resubmitted. It appears, however, from the correspondence that there is a dispute between the parties as to a building line, and several cases decided in this Court have been referred to in connection with the subject. The argument of the learned consel thereon may be very instructive, but in the view I take of this application I do not think it necessary now to say anything with regard to the merits of the dispute between the parties. That must be left for some future occasion The respondent is not entitled to act in the manner of which the Municipal Council complains. He cannot proceed with the building without having the plans first approved, and he should resubmit them with that view. If the Council refuses to approve the plans, and he feels himself aggrieved thereby, he has his remedy, and it is not now for us to say what particular form that remedy should take. Instead of doing that he has acted in defiance of the Municipal Regulation, and therefore I think the rule should be made absolute, but modified, as stated by my brother Maasdorp.

[Applicant's Attorneys: Van Zyl and Buissiné. Respondent's Attorneys: Tredgold, McIntyre and Bisset.]

HIDDINGH V. ESTATE HERZOG.

Mr. Upington, for the applicant, moved for the appointment of another commissioner to take the evidence in London of Mr. C. H. van Zyl, who was at present on a trip round the world.

Mr. Searle, for the respondents, objected on the ground that the case had been standing over for a considerable time.

Order granted as prayed, Mr. Mackarness being appointed as commissioner.

ESTATE McGREGOR V DE BEERS CONSOLIDATED MINES. { 1903. June 13th.

Company — Dividend — Profit — Income tax.

The defendants being directors of a joint stock company registered and carrying on its diamond mining operations in this Colony, declared a dividend and informed the shareholders resident in this Colony, including the plaintiff, of such declaration, but, before payment, received notice from the Imperial revenue authorities that income tax was claimed upon the whole of the company's profits. The directors informed the plaintiff that they would resist the claim in the English Courts, and that in the mean time they would deduct the amount of the income tax from the dividend, but would refund the amount if the decision should be against the Crown. The company carried on its business of disposing of the diamonds in England, but the diamonds were delivered and paid for in this Colony. The question was not raised in the special case whether the Supreme Court could prevent the enforcement by the English Courts of the payment of income tax out of the dividend coming to shareholders resident in the Colony.

Held, *that pending a final judicial decision as to whether income tax is or is not legally claimable from the company it was justified in withholding from the plaintiff a proportionate share of the dividend.*

This was a special case stated between Margaret McGregor, Robert McGregor, and Henry Mathew Arderne, in their several capacities as executirs testamentary of the estate of the late Alexander McGregor, against the De Beers Consolidated Mines (Limited).

The statement of the case set forth that the plaintiffs are the executors testamentary of the estate of the late Alexander McGregor, who died on the 21st day of December, 1902. The deceased during his lifetime was domiciled, and resided for several years before his death in the Cape Colony, and had no business, residence, or agency in the United Kingdom, and was not personally liable to pay income tax in the United Kingdom. The defendants are the De Beers Consolidated Mines (Limited), a company registered and incorporated under the laws of this colony in this colony prior to the year 1892. The principal business of the company, which is the winning of diamonds from the soil, is carried on at Kimberley in this colony, where its head office is situated. The company has an office in London, principally for the transfer of shares. Several directors of the company reside in the United Kingdom, and the company has carried on certain business in London, and has entered into a contract in London, ratified by the Board of Directors at Kimberley, with a certain syndicate for the sale to them of the diamonds produced by the company, which are to be delivered and paid for in Kimberley. The dividends payable to the shareholders resident in this colony are paid by the company in this colony, and not in the United Kingdom. On the 30th June, 1902, the company duly declared in this colony a dividend of 10s. per share on its preference shares, and 12s. 6d. on its deferred shares, for the half-year ending June 30, and notice thereof was given to the deceased and other shareholders in the public press in this colony. On the 30th June the deceased was the legal holder of 4,857 preference shares and 5,164 deferred shares. On the 18th August, 1902, the defendants addressed certain letters to the deceased. Thereafter the defendants paid the deceased the sum of £5,302 9s. 11d., being £353 10s. 1d. less than the dividend declared, which the defendants have deducted as the income tax, and the deceased received the said sum under protest and without prejudice.

The plaintiffs contend: (a) That they are entitled to be paid the sum of £353

10s. 1d. (b) That whether the income tax is or is not legally claimable from the defendant company, it cannot be deducted from declared dividends payable to the deceased. (c) That if income tax can be legally claimed in the United Kingdom from the defendant company, such income tax cannot be charged specially against or deducted from dividends payable to the deceased while resident in this colony, and having no residence, business, or agency in the United Kingdom.

The defendant company contends: (a) That, pending a final judicial decision in England as to whether income tax is or is not legally claimable from the defendant company, it is justified in law and under powers conferred upon the directors in the trust deed in withholding from the plaintiffs payment of the said sum of £353 10s. 1d. (b) That if it should be finally judicially decided in England that income tax is payable by the defendant company, as claimed, such income tax can lawfully be charged specially against and deducted from dividends from time to time payable to the plaintiffs, whether on preference or deferred shares, notwithstanding that the deceased was resident in this colony, and that he had no residence nor carried on any business in the United Kingdom. Wherefore the parties pray for judgment upon their respective contentions, with the costs of this suit.

Sir H. Juta, K.C., for the plaintiffs; Mr. Schreiner, K.C. (with him Mr. Buchanan) for the defendants.

Two letters were put in, both from Mr. W. Pickering, secretary to De Beers. The first, dated Kimberley, August 18, 1902, was as follows: "I beg to hand you herewith dividend warrant for half-year ended 30th June, 1902, being at the rate of 10s. per share, less income tax referred to below, on the preference shares registered in your name in the company's books at that date, no acknowledgment of which is necessary. The company has received notice from the Imperial revenue authorities that income tax at 1s. 3d. in the £ is claimed in England upon the whole of the company's profits, notwithstanding that the company is domiciled in Cape Colony. Your directors will resist this claim, and, if necessary, take the case to the House of Lords. Meanwhile the company is compelled to deduct income tax at 1s. 3d. in the £ from all dividends on shares and interest payment on debentures and obligations. The amount of the tax deducted will be refunded if the Crown's claim is either abandoned or decided by the Courts to be unfounded."

The second letter contained a similar intimation with regard to the deferred shares.

Sir H. Juta, K.C. (for plaintiff). The main point in this case does not turn so much upon the present dividend as on the principles which should govern applications as to income tax. Our contention is that income tax was not claimable under the law. If a company has declared a dividend, each shareholder has a right to sue for his share. Here a dividend was declared without any qualification, and we have a right to sue for it. After declaring a dividend a company cannot go back on the financial position of private persons. If after June 30 an obligation should arise it would be dealt with the following year. We did not overlook the rights of the municipality. See *Lindley on Companies* (5 Edit., 437). No company could carry on business if after once declaring a dividend claimants might come in and demand that the assets should be realized. This obligation is as against the company. We have plenty of assets and under these circumstances how can we be the only persons liable? The company denies liability, and how then can they make a deduction when declaring a dividend? If a dividend has been declared how can a company hold back a portion of it? As to income tax the language of the Act is very clear. The British Government want us to pay income tax, but they cannot deduct that from what is due to us.

Mr. Schreiner, K.C. (for defendant): The dividend has nothing to do with the plaintiffs. On June 30, clause 4 of section 119 of the Articles of Association was adopted. All we ask the Court to do is to leave this case undetermined, or the jurisdiction of the English Courts will be interfered with. Suppose that after a dividend had been declared something had happened to absorb the De Beer's profits, it could not be said that the directors would be bound to pay the dividend declared. See *Company's Act* of 1892. There is nothing to show that a declaration of a dividend makes

a company liable. *Lindley on Companies* (p 109). A company is not bound to declare a dividend twice a year, and by saying that dividends will be paid as soon as possible, the company reserve the right to declare it at their discretion. Directors cannot make a profit out of nothing, nor are they bound to anticipate their profits. They cannot do so, for there may be no profits, and certainly they cannot pay dividends out of capital. Then, again, it is said that plaintiff was not liable to pay income tax. If J.B. resides in London he has to pay income tax, but a shareholder who resides here is not; and yet why should he be favoured to the disadvantage of his English brother? A very important point raised in this case is that it has been said that the declaration of a dividend obliges the directors to pay; but see section 140 of *Chadwick's and Eadie's Company Law* and *Watson's Executors* v. *Watson's Heirs* (8 Juta, 283). Why should we be bound to pay anything to McGregor's estate, if we can claim a refund?

Sir Henry Juta (in reply): If shareholders have no right to sue for their dividends, how are they to get them? Section 127 of the Articles of Association provides for the retention of certain dividends, but apart from these cases so provided for, the company have no right to retain anything. If profits are made up to June 30, and some capital is lost in August, this latter fact does not affect the question of dividend up to June 30. It would be quite a different matter if a debt had been contracted by the company before June 30. A balance-sheet cannot be delusive if a claim is presented after the balance-sheet has been drawn up; more particularly if the claim is disputed. There is nothing to show that these dividends would have to be paid out of capital. We all know that that cannot be done. But the fact that directors were aware or not aware of certain payments having been made, cannot effect the situation in the least.

De Villiers, C.J.: The claim of the Imperial Revenue authorities to income tax upon the dividends payable to a person domiciled in this colony by a company registered and carrying on its mining operations in this colony appears to be a somewhat extraordinary one, but, upon the case as stated by the parties, the question does not arise whether the claim is enforceable against shareholders in this colony. The company appears to carry on some business in London, where it has entered into a contract with a syndicate for the sale of the diamonds raised by the company in this colony, but the diamonds are delivered and paid for in this colony. The directors intend to resist the claim in the English courts of law, and until the matter has been finally decided, I wish to say nothing about the merits of the case. The directors were informed of the claim after they had declared a dividend, and had informed the shareholders, including the plaintiff, of such declaration. After receiving notice of the claim from the Imperial Revenue authorities, the directors informed the plaintiff that they would resist the claim, and that, in the meantime, they would be compelled to deduct the income tax from the dividends, but that the amount so deducted would be refunded if the Crown's claim should be either abandoned or decided by the Courts to be unfounded. The plaintiff objects to any such deduction, and claims his dividend in full, and the question to be determined is whether, pending a final judicial decision in England, the directors are justified in withholding from the plaintiff payment of a proportionate share of the dividend already declared. A further question has been raised as to the future powers of the directors, in case the decision should be adverse to the company, but it is not advisable for the Court to express any opinion upon such a hypothetical case. It may prove possible for this Court to protect shareholders residing in this colony against the enforcement of the English claim to income tax in respect of dividends earned and declared in this colony, but the case stated by the parties themselves does not indicate the mode in which such protection should or could be exercised.

For the purpose of the present case it must be assumed that the English Courts would have the power to enforce the payment of income tax upon the whole of the company's profits. Upon that assumption the income tax would be a direct charge upon all profits made by the company. The directors were not informed of the claim until after they has declared the dividend, but their declaration of a dividend did not prevent them, upon being informed of the claim, from withholding a portion of the divi-

dend in the interest of the whole body of shareholders. The directors of a company are no more than the agents of the shareholders, who are the partners in the concern, and the fact that a dividend has been once declared does not give the shareholders an indefeasible right to the payment, even if it be found that no profits have been made for distribution between the parties. It is true that according to *Lindley on Companies*, dividends which are actually declared and payable are recoverable by action, but he adds that the plaintiff must prove not only that the dividend has been declared, but also that it has become payable, and that he is entitled at law to the dividend. The learned author could not have intended to lay down the rule that a dividend once declared must be paid, whatever discovery the directors might make after such declaration. Supposing after a dividend has been declared it is found that, owing to some catastrophe of which they had no knowledge at the time of the declaration, the previous year's operations resulted in a loss instead of a profit, it would be impossible to hold that the directors would be bound to pay the dividend. Such a payment by the directors of the defendant company would be in direct conflict with its trust deed, which authorises the payment of dividends only out of profits. In the present case the income tax, upon the assumption already made, would be a direct charge on the profits, and it became the duty of the directors, upon being informed of the claim, to set aside temporarily a sufficient portion of the profits to meet the charge. As to what their ultimate duty will be the Court is not in a position to express any opinion, but for the present the judgment will be in favour of the defendants' contention that pending a final judicial decision in England as to whether income tax is or is not legally claimable from the company, it is justified in withholding from the plaintiff the sum claimed by him. The plaintiff will pay the costs of the action.

Maasdorp, J., and Kotze, J., concurred.

In reply to Mr. Schreiner, the Chief Justice added that judgment would be in terms of contention (a), plaintiff to pay the costs. It was really unnecessary for the decision to go beyond that.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendants' Attorneys: Scanlen and Syfret.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice KOTZE.]

ADMISSION. { 1903. June 15th.

Mr. Benjamin moved for the admission of Saul Hoffland as attorney and notary.

Application granted and oaths administered.

COLONIAL GOVERNMENT V. HILLS. { 1903. June 15th.

Contract — Motion — Action — Forfeiture.

The respondent as concessionary of certain lines of railway agreed with the applicant that he would complete the railway in two years. It was further provided that if the line was not completed within that time, unless the delay was proved to the satisfaction of the applicant to have been occasioned by certain specified causes, the agreement should cease and the applicant might enter upon the uncompleted line and the respondent should forfeit any security lodged by him with the applicant. The respondent having failed to complete the line, the applicant after three years applied to the Court, by motion, for an order, declaring that the agreement was at an end, and authorizing him to enter on the incompleted line.

Held, *that as there were no*

facts in dispute, the Court might, on motion, make such an order.

This was an application on motion, brought by the Commissioner of Public Works against Arnold Frank Hills, calling upon him to show cause why an order should not be granted declaring that the agreement entered into between the Colonial Government and the Thames Ironworks and Shipbuilding Co. had ceased and determined, and authorising the Government to take over the incomplete line of railway between Mossel Bay and Oudtshoorn, in so far as it had been constructed, and declaring the 10 per cent. retention money under the said agreement, and also under the agreements for the construction of the Oudtshoorn-Klipplaat and the Somerset East-King William's Town lines, dated July 4, 1900, together with the security lodged with the Cape Agent-General to be forfeited to the Colonial Government as, and for liquidated damages sustained by the said Government for the non-completion of the said line, in terms of Section 17 of the said contract of the 4th July, 1900. And further, to show cause why the £10,000 referred to in Clause 16 of the said agreement should not be declared forfeited, and also to show cause why the Colonial Government should not be authorised to take over all the material imported or purchased for the said railway.

The affidavit of the Commissioner of Public Works, sworn on July 4, 1900, set forth that a contract was entered into between the Colonial Government and the Thames Ironworks and Shipbuilding Co., Ltd., of London, whereby the company undertook on payment of a subsidy of £2,000 per mile of railway to construct a line from Mossel Bay, via George, to Oudtshoorn, in accordance with certain plans and sections attached to the contract. The contract was confirmed by Parliament, by Act 19 of 1900. On the 18th December, 1900, the Thames Ironworks Company, with the consent of the Colonial Government, ceded its rights under the contract to Arnold Frank Hills, who undertook the obligations of the company under the said contract. Clauses 16 and 17 of the said contract were as follows: Clause 16: "The Concessionary undertakes within two months from the date of approval of this agreement by Parliament to submit to the department detailed plans and specifications for a deviation from a point on the original line surveyed by order of Government, at or beyond George, proceding towards Oudtshoorn, via the Zwart River, or Kayman River Valley, either or both, and within fifteen months from the approval thereof by the engineer, undertakes to complete the cuttings and embankments, whether in earth or rock, with the following exceptions; (a) heavy rock cutting or high embankment (say over 40 feet in depth or 40 feet in height respectively), of which, at least, a proportion of two-thirds of the total cube must be completed. (b) Tunnels up to 500 yards in length shall be completed, and over that length to be at least two-thirds complete. The Concessionary further undertakes to complete within the said period of fifteen months, all culverts and bridges on the said section, excepting bridges of fifty feet and upwards, or large viaducts. And the Concessionary also undertakes, within eighteen months from the approval of this agreement by Parliament, to complete the section of the line from Mossel Bay to George, with the exception of platelayers' cottages and station buildings. Should the Concessionary fail to complete the sections within the periods mentioned, he shall forfeit £10,000, unless the delay is proved to the satisfaction of the Commissioner to have been caused by acts of God, war, insurrection, strikes, lock-outs, or combinations of workmen, or other unforeseen circumstances, beyond the control of the Concessionary, or from or on the part of the Railway Department." Clause 17: The Concessionary shall push the work forward with all possible speed, and complete it within two years of the approval by Parliament. In the event of non-completion within the time mentioned, unless the delay is proved to the satisfaction of the Commissioner of Public Works to have been caused by the Act of God, war, insurrection, rebellion, strikes, lock-outs, or combinations of workmen or other extraordinary or unforeseen circumstances beyond the control of the Concessionary, or from or on the part of the Railway Department, the security, viz., 10 per cent. retention money for the construction of the Oudtshoorn-Klipplaat and the Somer-

set East-King William's Town lines, and the security lodged with the Cape Agent-General shall be forfeited to the Colonial Government as and for liquidated damages sustained by the Government, and thereupon the agreement shall cease and determine, and it shall be lawful for the Government to take possession of such incomplete line as had been constructed by the Concessionary, and return the ascertained amount, less subsidy money and retention money to the Concessionary. The contract for the completion of the Mossel Bay-George section expired on the 19th April, 1902, but an extension of a month was granted, and the respondent had failed to complete the said section, which remains incomplete. On August 25, 1902, I wrote to the respondent, enquiring whether he had any intention of completing the line within the contract time, or within a reasonable extension, should the same be granted. On the same day a letter was written to respondent claiming forfeiture of the £10.000 provided for in clause 16 of the contract. The work done on the entire line represented about 28 per cent. of the total contract. On the 31st January, 1903, the respondent was conceded a further six months' extension. The extensions, in my opinion, were fair and reasonable. During the latter half of 1900 fair progress was made, but in 1901 the progress was most dilatory and unsatisfactory. The contractor's operations were singularly free from interference under Martial Law regulations until October last, but the delays thus caused were not such as would justify him in attributing the poor progress made during the war to this. The distance from Mossel Bay to Oudtshoorn was 75 miles, and the section from George to Oudtshoorn 43 miles. Up to the end of 1901 no construction work had been commenced on that section. In April, 1902, the works were practically closed down. Since June, 1902, no work whatever had been done on the line, and there was not even a man in charge. It was urgently necessary in the public interest that the incomplete line should be entered upon and taken possession of by the Government, as deterioration was constantly going on while it lay uncared for.

The affidavit of Thomas Smith McEwen, General Manager of the C.G.R., set forth that at an interview with Mr. Walker in January, 1901, he pointed out that the plans did not conform to the requirements of clauses 16 and 3 of the contract, inasmuch as the proposed deviation commenced on the Mossel Bay side of George, and that the plans showed a lengthening of the line in excess of what was allowed under clause 3. Deponent suggested a rack railway over the mountain, plans of which were not submitted till the 20th May, 1901. On the 1st July, 1901, the Engineer-in-Chief wrote to the contractor that if he desired to abandon the original line over Montagu Pass, it would be necessary for him to make formal application to the Government. No compliance with the Engineers's request took place. No plans were submitted until March, 1902, when it was found that a saving of two miles and not six would be effected by the survey of the respondent. The plans accordingly did not conform to the stipulation of the Government. At that date it was apparent that the contractor was not seriously pressing the work, and practically the work was closed down at the end of March or early in April. It is urgently necessary that the incomplete line should be taken over in the terms of Clause 17 of the contract, in order that steps may be taken to stop the deterioration and damage which are constantly accruing in consequence of its abandoned state, and also in consequence of the urgent necessity for completing the line in the public interest. There are large stores of material held by the Government, on which advances have been made under the contract to the extent of 40 per cent., and it is eminently desirable that these stores should be taken over at actual cost, and utilised in the construction of the railway.

The affidavit of William Molteno Bisset, attorney, Cape Town, stated that he represented the respondent in this colony. Respondent was at present in England. Deponent had perused the notice of motion. Respondent claimed that the matters in dispute and the differences in the contract should be referred to arbitration in terms of Clause 29 of the said contract. In the respondent's absence it was not possible to submit his contentions adequately to this Court. In view of the nature of the claims, deponent claimed

that the matter should not be settled by way of motion, but by an action. Deponent verily believed that it was the intention of the respondent to carry out the said contracts. He further urged that the matter should not be proceeded with at present, in view of the fact that the arbitrators' report in the action, Hills v. Colonial Government, was expected to be shortly presented to this honourable Court.

The affidavit of Thomas Mouat Cameron Walker set forth that deponent had been for some years manager of the Cape Central Railways. He admitted the formal paragraphs in the Commissioner's affidavit, but stated that the plans in terms of Clause 16 of the contract had neither been approved or disapproved of by the Engineer of the Colonial Government. At the request of the Railway Department, subsequent plans were submitted for the construction of a rack railway early in 1902, but the plans had neither been approved or disapproved of Correspondence bearing on the matter was put in, including a letter from Mr. Alex. Robb, conditionally agreeing, on behalf of the Government, to an increased subsidy in connection with the rack railway. The respondent had been prevented from completing the work owing to the difficulties created through the war, and the Railway Department withholding payments on matters that should have been referred to arbitration. The respondent contended that, upon settlement of the very large amount which, under the judgment of the Supreme Court, he believed would be found due to him in connection with the Somerset East-King William's Town line, and Oudtshoorn and Klipplaat contracts, he would be in a position to satisfactorily prosecute and carry through the contract.

The affidavit of Thomas Roy stated that the completion of the Mossel Bay-George section was greatly retarded and rendered impossible by the non-approval of the sections of the proposed bridge—about 19 miles from Mossel Bay, forming the key to the position—on the part of the Government's consulting engineers in London Further difficulties were caused by military restrictions as to the use of dynamite and a shortage of native labour.

The answering affidavit of Alan Grant Dalton, acting engineer-in-chief, stated that the consulting engineers had approved plans and all that was wanted was their assent to the details. He further said that the site of the bridge was twenty-four miles from Mossel Bay, while rails had been laid only as far as fifteen miles twenty-six chains. As to the shortage of native labour, he believed a large body of natives left on account of a deduction from their wages for passage money to East London.

Mr. Schreiner, K.C., for the applicant; Mr. Searle, K.C., for the respondent.

De Villiers, C.J., said he noticed that the affidavits of the applicants were silent on one point, and that was as to whether, if the Government completed the line, they would be prepared to pay actual cost of the materials already worked into the line, and supplied by the respondent.

Mr. Schreiner said that he was in a position to inform the Court that, as affecting this contract also, the Government would be prepared to pay actual cost as soon as determined.

[De Villiers, C.J.: In the contract the matter was not treated as a forfeiture, but as a payment in part. If it were found in the other case that a considerable amount was owing to the contractor, might not the Concessionary yet carry out the Mossel Bay-Oudtshoorn contract?]

There are numerous outstanding judgments and very heavy claims of debenture-holders, and one is rather at a loss to understand the affidavit, which says that the sum of money will be available to go on with the Mossel Bay-Oudtshoorn contract. There are judgments of the Court waiting to be satisfied, there are numerous creditors constantly before the Court pressing their claims, and almost proceeding to sequestration, and then there stand behind the quiet holders of debentures of hundreds and thousands of pounds, all of whose claims have been notified to the Government, and whose claims will be pressed immediately upon any sums of money being awarded by the referees. Assuming that the referees find that £200,000 are due to the respondent, are these people going to let Mr. Hills take that money and put it into the construction of the Mossel Bay railway? Since June, 1902, not a single thing has been done on this line, and there is not even a man on the line. Then, what becomes of all the talk about

the difficulties caused by war and the want of labour?

[De Villiers, C.J.: I suppose the Government's sole object is to get the line constructed, they have no interest in ousting the respondent, and if there is still a fair prospect of his going on with the works they would let him go on?]

I am afraid they despair of that. We have tried and tried, but we have seen that Mr. Hills has taken something upon himself that he is unequal to, and that he is unequal to the task of completing these contracts. It is now seven to eight months beyond the time for the completion of the line. Only 28 per cent. of the construction work has been done. In the absence of a suggestion of fraud, it is impossible to go behind the certificate of the Commissioner to the effect that he is satisfied that the time for the completion of the contract has expired. There was no agreement whatever between the parties about a rack railway. There was a contract according to plans and sections, and the respondent could not show any new contract over of a novation or a repudiation; he could not show any new contract over against the old. There were miles of material on which the Government had made advances simply hung up—sleepers and all sorts of material awaiting construction. Surely it is important in the interests of all whom it may concern that the inevitable should be recognised that the contractor could not do his work, that he had failed to complete his contract, and that the Government should take it over and carry out what he had been unable to do.

Mr. Searle (for respondent): Our first objection is that this matter should not have been brought before the Court at all, but should have been referred to arbitration, in terms of clause 29 of the contract. That is a very wide clause. As to reference to arbitration, see *Van der Spuy* v. *The Paarl Bank* (7 Juta,, 245) and *Davies* v. *The British Assurance Company* (3 Juta, 416). In the former of these cases, an applicant who had submitted to arbitration wished to consult certain bank books; the Ccurt, however, would not even decide the point as to whether he had a right to do so, but referred the whole matter to arbitration.

[De Villiers, C.J.: But can the matter in this case be referred to arbitration? Under the contract the Commissioner seems to have absolute power either to approve or not.]

I submit that under clause 29, in the event of any difference between the parties the matter must go to arbitration, and then, if either party objects to the award, it will be for such objecting party to show *mala fides* on the part of the arbitrators. This contract applies arbitration in the widest possible way, and it applies even with respect to clause 17 if we do not approve of the Commissioner's decision. Then we object to a case like this—a case of ejectment being decided on motion. The Court will not ordinarily decide such cases on motion. *Olivier's Trustee* v. *Olivier* (9 Juta, 208) and *Mills* v. *Jones* (9 Sheil, 543). This case is not at all similar to *Colonial Government* v. *Hills* (12 C.T.R., 338), as that was in respect of a Government line, while this is a private line. This is not a case for a motion, as it is most important that we should have the witnesses before us.

[Maasdorp, J.: But the respondent has done nothing for twelve months.]

Yes, and the reason was that the Government took up quite an untenable position by insisting on a very complicated system of measurements of the work done, and the result was that while we said that a large sum of money was owing to us, they wanted to bring us in as their debtors. It was in consequence of these disputes that a year was lost. We hope to go on with the line as soon as the arbitrators shall have given their report, but meanwhile we do not know our financial position. The affidavits clearly show that there has been delay on the part of the Government,—*e.g.*, the large bridge between Mossel Bay and George has never been approved of. Then in April we sent in plans, and all we could get from the Government was that they were receiving attention. To this day they have neither been approved or rejected. After all this delay on their part, it does not lie in the mouth of the Government to complain of our delay. The line is ours, and they want to come in under section 52 of the agreement of July 4, 1900, and take possession of our property. Let them bring an action for a declaration of rights. I could cite a

number of cases on forfeiture, but the question does not directly arise now.

Mr. Schreiner (in reply): I submit that the case of *The Colonial Government* v. *The Thames Iron Works* (9 Sheil, 170) was quite on all fours with this case, and there the Court decided on motion. The contract gives the Government the right to take possession in case of certain eventualities. If no extension of time had been given, *res ipsa loquitur*, and we could have come in and taken possession. No doubt, the Commissioner has power to extend the time, but the contractor must show that such time has been given him, and that he has confined himself within the limits of such extended time. Here admittedly he can do nothing of the kind. The time originally allowed him and the extension of time have both lapsed; consequently the contract with the Government has determined, and there is no case for arbitration, simply because there is nothing about which to arbitrate.

De Villiers, C.J.: Under the 17th clause of the contract the Concessionary undertakes to push forward the construction of the line with all possible speed, and to complete the same within two years of the date of the approval of this agreement by Parliament. In point of fact, three years have elapsed, and so far from the work being completed, it can hardly be said to have been begun. Then the clause continues: "In the event of the non-completion within the time hereinbefore mentioned, unless the delay is proved to the satisfaction of the Commissioner of Public Works to have been caused by an act of God, war, insurrection, strikes, lock-outs, or combinations of workmen, or through extraordinary or unforeseen circumstances beyond the control of the Concessionary, or from or on the part of the department," then certain results will follow. Among the results which will follow are these: "That that agreement between the Government and the said Concessionary shall cease and determine, and it shall be lawful for the Government to enter upon and take possession of such uncompleted line of railway as has been constructed by the said Concessionary." If these words are taken in their literal sense it would not have been necessary for the Government to come to the Court at all, because it would follow as a matter of course upon certain events taking place that the agreement ceases, and it would be lawful for the Government to enter upon and take possession of the line. But I consider that the Government acted quite properly when they decided not to take the matter into their own hands, but to get the formal sanction of the Court to the authority conferred upon them by Parliament. It is said that this application should not have been made by motion. The general principles laid down in the cases cited are well known, and have been acted upon, but where there are substantially no facts in dispute, and where, as in the present case, the powers already practically exist, and only the formal sanction of the Court is required for the exercise of that power, I think it would be carrying the practice to an extreme to insist upon an action being brought where it is clear what the result of that action would be. Now, before I say anything more about the 17th section, I wish to refer to the argument that the Government has no right to proceed at all either by motion or by action, and that the question in dispute ought to be referred to arbitration under clause 29. Well, it is clear what this clause means. If there are any sums or questions in dispute, they shall be referred to arbitrators; but it can surely not be held that the question whether a contract is in existence in terms of the Act and of the contract should be referred to arbitration. That would be entirely a question of law, going to the very root of the contract, and I do not think it can be regarded as a difference arising out of the contract. A reasonable interpretation must be given to this clause, and in my opinion it would be wholly unreasonable to say that the arbitrators should decide this question of law as to whether the Government may exercise the power of putting an end to the contract, and entering upon the railway upon certain events taking place. Now, undoubtedly, in the present case events have taken place upon which the Government may take over the railway. It is in the event of the non-completion within the time that the Government may take over that line, unless it is proved to the satisfaction of the Commissioner of Public Works to be due to certain causes. It surely cannot be said it has been proved to the satisfaction of the Commissioner of Public Works that these causes exist, when he expressly says that

he is satisfied that they do not exist. The applicant further asks for a declaration of forfeiture of these amounts, and also for a declaration that the Government has the right to take over the railway material which they hold on lien, and to appropriate that material. Now in regard to the forfeiture, I think the matter does not press, and that that should be made a matter of action to enforce forfeiture; and there is greater reason for this course because if the Government takes over this line the Government will be bound to pay for the actual cost of the uncompleted line. Therefore, as to this forfeiture, the Court will not include that in the order. In regard to the claim of the Government to use the material, I confess I see the greatest difficulty in such a course. That course was adopted in the action in the previous case, where the question of actual cost arose, and there it was found impossible to ascertain the actual cost without considering also the material which had been ordered by the company; and, inasmuch as the cost of that material was a charge upon the Government which the Government had to pay, it followed that, the Government paying the actual cost of that material, should have that material. But the question of actual cost has not yet arisen in the present case, and until that question arises I do not think the Court is in a position to give the Government power to keep possession of these materials, even if they hold these materials as security for moneys advanced by them. In my opinion, the Government is entitled to an order declaring that the agreement between the Government and the Concessionary has ceased and determined, and the Court will authorise the Government to enter upon and take possession of such uncompleted lines of railway as has been constructed by the said Concessionary. In doing so, we follow the precedent which has been established in the previous case. As to the costs, they must be paid by the respondent.

Maasdorp, J., and Kotzé, J., concurred.

[Applicant's Attorneys: Reid and Nephew; Respondent's Attorneys: Tredgold, McIntyre and Bisset.]

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

WOOD v. LOVEGROVE. 1903. June 15th, " 16th, " 17th.

Landlord and tenant — Lease — Ejectment—Damages.

This was an action brought by John Henry Wood, of Muizenberg, against Mrs. Lovegrove, boarding-house keeper, for rent, ejectment, and damages.

The declaration set forth that about October, 1902, the plaintiff leased certain property known as "The Towers," Muizenberg, to the defendant for £25 a month, and it was agreed that, should the rent not be paid at the first of the month, the plaintiff had the right to terminate the lease. The rent for November and December was not paid, and the plaintiff gave one month's notice, but the defendant refused to give up possession. Plaintiff claimed £125, being the amount of 5 months' rent, with interest thereon, and an order calling upon the defendant to quit the premises, with an alternative claim of £105, being the value of occupation, with an additional claim of £100 damages.

The plea admitted the formal allegations, but stated that in November the plaintiff agreed to build and furnish four additional rooms. The defendant entered the premises about the 1st November, 1902, but the plaintiff failed to finish and furnish the rooms, as agreed upon. The defendant claimed, in reconvention, the fulfilment of the lease, possession of the stables, and, by reason of the plaintiff's failure to complete the said rooms, £150 damages, and £50 for furniture, with costs of suit.

The replication set forth that the lease of occupation of "The Towers" was the same, with the exception of the rent, as that of "The Beacons," in which the defendant had previously been in occupation. The plaintiff denied that the hiring of the stable attached to the premises was part of the agreement. He admitted that the rooms were not furnished, but denied that that was embodied in the agreement.

The rejoinder was general.

An action had been brought in the early part of the year to recover the rent for November and December of last year,

but as it could not be listed for the February term, it was submitted that both cases should be taken together, as the evidence was practically the same.

Mr. Close (with him Mr. Bisset) for plaintiff; Mr. Benjamin for defendant.

Mr. Benjamin said that he had no objection to the consolidation of the cases, subject to his right to argue with regard to the extra costs which had been incurred by the elaborate pleadings.

John Henry Wood (plaintiff) stated he was the owner of the two houses known as "The Beacon" and "The Towers," Muizenberg. In March, 1902, the defendant entered into possession of "The Beacon" on a lease, which she refused to sign at the time. The only objection taken was the amount of the rent for the summer months. The rent was arranged to be payable on the first of each month for the preceding one. In September he sold the property, and he claimed that he was entitled to treat the lease as expiring at the end of six months, but in spite of the conditions, witness offered defendant a month's notice. Witness showed defendant "The Towers," but she did not care for it. Subsequently witness offered defendant an opportunity of purchasing the property at £4,500, and offered to provide all the money at the rate of 6 per cent. Defendant and her husband wanted him to add additional rooms, and witness thought it better to meet the defendant on her suggestion of leasing the property for eighteen months. Witness then agreed to put four rooms at the back of the premises, and it was finally agreed to close the negotiations, the defendant to pay 6 per cent. on the £4,500 and the rates, with the option of purchasing the property. The defendant asked for furniture in the shape of a bedstead, a few chairs, and a little matting, which witness agreed to provide. It was agreed that the lease of "The Beacon" should apply to "The Towers," and a lease of eighteen months was to be agreed upon on completion of the rooms. Defendant took up occupation in the middle of October, and witness told defendant that the rooms would be completed within a couple of months. The work was proceeded with as expeditiously as possible. The rooms were practically completed about the middle of December. There was some delay in delivering the bricks, which were actually brought hot from the kiln. The defendant showed witness a letter from a gentleman, and requested witness to have the rooms completed by the 13th December. Unfortunately wrong sashes were sent, and it was not till the 23rd December that the rooms were finished. Witness had trouble getting the rent, and one morning Mrs. Lovegrove came down to his office, and told witness that her husband had been very irritable of late, and had left without making any provision for the rent. Witness then said that he would not proceed any further with the furnishing, and that he was sick of the whole business. At Mrs. Lovegrove's request, witness's son wrote a letter in order to frighten the defendant's husband. In answer to a letter from witness's attorney, defendant replied that the plaintiff had constantly taken the workmen away, and that she had let the unfinished rooms to gentlemen. There was no agreement about the stables. The defendant's husband left Muizenburg before the agreement was concluded. Witness had never had any tender of rent from the defendant, or from anyone on her behalf

Cross-examined by Mr. Benjamin: There was a verbal agreement between the witness and the defendant. It was agreed that the defendant was to have a lease for eighteen months, and to pay at the rate of 6 per cent. on £4,500, the cost of the additional rooms and the taxes. When witness considered the agreement broken, he instructed his attorney to write, stating that the rent must be paid in advance. Witness agreed to furnish the four rooms, and the statement in the replication was not strictly accurate. He would be surprised if witnesses would state that the rooms were not fit for occupation.

James Collie, sanitary engineer, said that he was doing some work for the plaintiff in November last, and was subsequently ordered to give up a job to attend to the alterations at "The Towers," Muizenberg. He considered the work was progressing satisfactorily in face of such obstacles as they had to encounter. There was a sufficient staff at the work, but there was delay through want of bricks. The roof was put on in a thoroughly workmanlike fashion. £40 a month was a reasonable rent for "The Towers" during the summer months.

Cross-examined by Mr. Benjamin: He would not be surprised to hear that the rooms were damp, but he would certainly be surprised to hear that the doctor ordered a patient out of a room on account of the leaky roof.

John Millichip, carpenter, said that he was at "The Towers" most of the time the work was going on, and better progress could not have been made. The job was finished a couple of days before fore Christmas, but about the 10th December he noticed the defendant using one of the rooms. The order for the sashes was given in good time, but the wrong silze was sent, and that caused delay.

Cross-examined by Mr. Benjamin: The defendant kept pushing him on about the sashes. The defendant asked witness to send a telegram about the sashes in order to have the job finished.

Charles Wm. Deecker, editor of the "Seaside News," said he also dealt in the letting of houses, and was acquainted with the value of property at Muizenberg. For "The Towers" witness had got £35 a month during a certain part of the year. A fair value for the house (furnished) during the season would be £30 or £35 a month. The best part of the year was from December to February. Witness had been offered £40 a month for the house for three months from December.

Cross-examined by Mr. Benjamin: Witness did not know anything of the terms of the lease. He was told the rent was to be 6 per cent. on £4,500, at which figure there was to be an option of purchase.

Edmund James Wood, plaintiff's son, said that he was his father's attorney in the matter. The lease for "The Beacon" was drawn up in duplicate, and handed to the plaintiff. In January there was some attempt at a compromise, and a few alterations were made on the draft of the old lease.

This closed the evidence for the plaintiff.

Mr. Benjamin called the defendant, Alice Lovegrove, who said that she could not say whether the lease was handed back to the plaintiff. She objected to the clause in the lease which stipulated that if the rent was not paid promptly, the lessor reserved the right to terminate the lease. In the middle of September plaintiff came to witness, and told her that the lease of "The Beacon" would shortly terminate. About the first week in October, plaintiff mentioned that "The Beacon" was about to be sold, and asked witness to go and see "The Towers," another house of plaintiff's. There were only five bedrooms in "The Towers," and witness pointed out that it was unsuitable for a boarding house. The plaintiff said that he would do anything in reason by way of alterations. Subsequently in a conversation the plaintiff offered to sell "The Towers" to witness, and further offered to put up all the money, and agreed to take 6 per cent. Next day plaintiff suggested a lease of eighteen months, and was agreeable to rent the place at the rate of 6 per cent. on the purchase money, and the additional cost of the four rooms. There was nothing said about the "Beacon" lease, and plaintiff's terms were accepted as proposed. Witness entered on occupation of "The Towers" about the end of October. The plaintiff agreed to finish and furnish the additional rooms within a month. During the early part of November, witness showed plaintiff a letter, and he informed her that she would be quite safe in accepting the applicants, as the rooms would be finished long before the middle of December. The rooms were actually finished two days before the New Year, but they were not furnished at that time. Witness provided the furniture for the rooms. The furniture had been damaged by the rain. One of her boarders, Mr. Hannon, refused to allow his sons to remain in the rooms. Witness wrote to the plaintiff about the leakage, but he did not reply. The walls were saturated from top to bottom. At two o'clock in the morning of the 21st January all the occupants had to vacate the rooms on account of the rain, and the drawing room, passages, etc., were used as bedrooms that night. When the rain cleared off, witness's daughter occupied one of the rooms, and the doctor told witness to remove the girl at once. During the summer months the general tariff was ten shillings per day. Witness had sufficient applications to fill the rooms during the season. During December, January, and February she would have made about one-third clear profit out of a total turnover of £372. Witness never had possession of the stables, although they were promised to her within a fortnight. She could

have let the stables on at least a couple of occasions.

Cross-examined by Mr. Close: The matter of offering two months' rent by promissory notes of £25 each was purely an invention on the plaintiff's part. Before she had taken possession of the rooms she brought £25 to her attorney to cover the rent. She could not remember why her attorney tendered £24 10s. for the month of November, when she had not had occupation of the rooms. Although she had the furniture in hand, she claimed the amount she had paid for it, viz., £50. Witness lost fully £35 a month since November. Since the 22nd January witness had never been able to use the rooms. There might have been a lot of talk of a dry season, but the walls continued in a state of saturation. Her list of boarders was not correctly published in the "Seaside News." Most of the visitors were accommodated elsewhere, and merely dined at "The Towers."

By Kotzé, J.: The plaintiff promised a lease of eighteen months on occupation of "The Towers," but never sent any document to witness. Nothing was said about the rates.

James Peter Fenhoulet, medical doctor, practising at Muizenberg, said that in the last week of February he saw defendant's daughter in one of the new rooms. The walls were quite damp, and he ordered the patient to be at once removed.

Cross-examined by Mr. Close: The rooms were structurally completed, but the rain was freely dripping through the roof.

Isidore Hannon said that he saw the work of excavation, which was carried on through a clayey-boulder soil. On the 15th December the rooms were incomplete, and when he left on the 15th January the rooms were leaking. He had to take his sons out of the rooms, and was compelled to leave a month before his time. Witness offered to hire the stable.

Cross-examined by Mr. Close: The carpenter was incorrect when he stated that one of the windows was put in ten days before Christmas.

Fredk. Lovegrove, husband of the defendant, said that it was agreed with the plaintiff to accept "The Towers" on 6 per cent. on £4,500 and 6 per cent. on the cost of building and furnishing the new rooms. The lease was eventually fixed at eighteen months, in order to give the defendant two seasons. The plaintiff said that he would finish the rooms within a month. The water had a free inlet through the roofs of the rooms, and witness had seen as much as two inches of water on the floor.

Cross-examined by Mr. Close: No taxes were ever mentioned, and the plaintiff's statement was undoubtedly an invention.

Daniel Carl Macintosh, architect, said that he inspected the rooms, and found the roof to be of insufficient slope. On that account water came freely into the rooms. He would not, by an means, consider the rooms finished. There was not sufficient fall behind, and the water could get under the floors. The rooms were uninhabitable.

Cross-examined by Mr. Close: The roof should have been put on in iron, and not slates.

By Kotzé, J.: With the excavation the rooms could have been completed in two months.

James Bertram Bacon said that when Mr. Hannon came the rooms were unfinished. Witness occupied one of the rooms at the end of December. The leakage commenced about the middle of January, when he noticed moisture all round the rooms.

Counsel was then heard in argument on the facts.

Maasdorp, J.: It appears from the evidence in this case that the defendant was in October last a tenant of the plaintiff's premises at Muizenberg called The Beacons, and the plaintiff having sold that place, the parties entered into negotiations for the lease of another property of the plaintiff called The Towers, situated in the same neighbourhood. The issues raised in this case depend upon the result of those negotiations. Both parties contend that in the result they arrived at, an agreement whereby The Towers was let by the plaintiff to the defendant, although the plaintiff puts in an alternative claim for use and occupation, in case the Court should find that no contract was finally concluded. The plaintiff's case is that the property was hired by the defendant for eighteen months, commencing from the 1st of November last, the plaintiff was to add four rooms to the house within a reasonable time, the defendant to pay rent cal-

culated at 6 per cent. on the value of the house, which was taken as £4,500, and on the cost of the four rooms, together with the rates, said to be £30 a year; rent for each month to be paid on the first day of the following month, and in the event of the defendant failing to pay rent on the day it fell due, the plaintiff was to have the right to terminate the lease, and take possession of the property immediately. The defendant disputes the amount of the rent, in so far as the rates are concerned, she denies that she consented to the termination of the lease upon failure to pay the rent on the day it fell due, and says with respect to the four rooms, that it was agreed that they should be completed and furnished by the plaintiff by the middle of November. The parties seem to be agreed that for the purpose of computing the rent, the cost of the four rooms are to be taken as £400, and the only question open in this respect is whether it was agreed that £30 annual rates were to be paid by the defendant. Upon this point we have the evidence of the plaintiff on the one side, and that of the defendant and her husband on the other. It seemed to me that the two latter had a clearer recollection of what took place than the plaintiff, who seemed in doubt as to the finality of the agreement, and whose alternative claims in the declaration are further evidence of his uncertainty. Then again, we do not find any mention in the correspondence which followed immediately afterwards of an agreement to pay the rates. I come to the conclusion on the evidence that the rates did not form part of the rent. Then the Court has to decide whether it was agreed that the plaintiff could terminate the lease if the rent fell in arrear. The plaintiff stated that it was agreed that the lease of The Towers should be on the same terms as the lease of The Beacons, and he put in a draft lease of The Beacons containing the above-mentioned condition. But I think it was clearly proved that the defendant refused to consent to that condition when she hired The Beacons, and that plaintiff did not insist upon it. It is certain that under that lease the defendant, as a rule, paid the rent of each month during the course of the following month, and not on the first day. Consequently, the terms of the draft lease annexed to the plaintiff's replication do not establish this point in favour of the plaintiff. It seems to me the contract in respect of The Beacons was carried out so satisfactorily by both parties that it could not have been considered necessary to introduce a stringent condition into the second lease, which was given up in the first. Then, again, the defendant contends that under the agreement the four rooms which the plaintiff promised to build were to be completed within one month, but from her own letters it would appear that the time was not definitely fixed. It was taken that they would take about a month to build, and an architect, called as a witness by the defendant, said he was of opinion two months was a reasonable time within which to finish the rooms. On the whole, I think it was contemplated that the rooms should be finished by the middle of December. Having settled the terms of the agreement, it follows that the plaintiff is entitled to rent at the rate of £22 10s. per month, being 6 per cent. on £4,500 until the 15th of December, and at £24 10s. a month, from that time being 6 per cent. on that amount, together with £400, the cost of the four rooms. This time is fixed for the increased rent, although the defendant pleads that the rooms were not then yet completed, because it must be taken as an element in the calculation of profits lost to her, which she claims from the time when the rooms should have been completed and furnished. The plaintiff is entitled to his rent, but he cannot claim that the contract be terminated and the defendant ejected from the house. In our law the non-payment of rent for a period like that in the present case is not a ground of ejectment, unless it is expressly made so by the contract. Plaintiff is entitled to rent up to the end of March in the sum of £119 10s. Defendant claims in reconvention a sum of money as damges suffered by her through the loss of profit she might have earned if she had obtained the use of the four additional rooms on the 15th of December. She has made a calculation, giving the takings from eight lodgers for the four rooms at £120 a month, and the profits out of that she puts at one-third of the amount. Although there is no evidence of the plaintiff upon this point, I think we may fairly take it that this is too liberal an

estimate, and depends upon the rooms being constantly fully occupied, which is not very likely. If the profits are taken at a quarter of the takings, I think the allowance will be liberal. And that would for the three and a half months make £105. That the defendant is entitled to damages seems to me clear. She should, under the agreement, have had the use of four furnished rooms from the 15th of December. These rooms have not yet been finished so as to be habitable, and they have not been furnished, and the defendant has not had the benefit of them. I do not think it is necessary to consider the question of damages in respect of the stable. If the defendant had insisted upon getting possession of it, I have no doubt she would have had little difficulty in the matter. But I am of opinion that the stables were let with the house. It was contended that the claim for damages in respect of the four rooms for the months of January, February, and March was not specifically raised in the pleadings. But it would seem that the prospective damages mentioned in the first claim in reconvention has reference to these months, and upon the double set of pleadings in the consolidated actions, the parties come prepared to contest the claims covering those months. Judgment is given for plaintiff in convention for £119 10s., with costs in convention, and for plaintiff in reconvention for £105 and possession of the stable, with costs in reconvention. It will not be difficult to distinguish between the witnesses who gave evidence on the different claims. I do not think the plaintiff should have instituted the second case while the first was pending, and the costs of the pleadings in the second case must be paid by the plaintiff.

Kotzé, J.: The first question which arises is whether any binding contract of lease was entered into between the parties, and if so, what are its terms. Upon the evidence which has been submitted to us, I am of opinion that such a contract was effected by and between the parties, and that the defendant has correctly set out the terms thereof in her plea, with one slight exception, however, and that is that the four rooms had to be completed in about two months instead of one, as stated in the plea. The contract is that Mrs. Lovegrove, the defendant, agreed to hire the premises known as "The Towers," at Muizenberg, for a period of eighteen months, commencing from the 1st November, 1902, at a rental calculated at 6 per cent. on the sum of £4,500, which the plaintiff fixed as the purchase price of the premises, which amounts to £22 10s. per month. The plaintiff, at the same time, agreed as part of the contract to build and furnish four rooms to "The Towers," for which, when completed, the defendant was also to pay six per cent. on the cost, as and by way of rent. Although no definite evidence was given as to the precise amount of cost, the parties understood that it was to be taken at £400. This, then, would make the additional rent for the four rooms £2 per month, or a total monthly rental of £24 10s. in all. The four rooms were commenced immediately after this contract had been concluded, on the 9th October, 1902, and after the defendant had entered into possession of the premises leased. The rent for November was not paid by the defendant on the 1st December, and she intimated to the plaintiff that she was not able to do so, and that her husband had gone upcountry. Thereupon, the plaintiff caused his attorney to write to Mrs. Lovegrove on the 5th December that the rent was overdue, and that it was payable in advance, and that unless the rent was paid promptly on the first of each month as it fell due, the lease would be cancelled. This position it seems to me the plaintiff was not entitled to take up. It was no part of the contract that the rent should be paid in advance, nor was it stipulated and agreed between the parties that on non-payment of rent the lease should cease and determine. The letter to which I have referred gave rise to a somewhat voluminous correspondence between the parties, and although the plaintiff continued to maintain that he was entitled to terminate the lease, he, nevertheless, went on with the building of the four rooms. He, however, refused to provide furniture for these rooms, as he had undertaken to do. He states, in explanation of this, that he completed the rooms because, in his own interest, he could not leave work of that kind unfinished, and that he considered that as no rent had been paid he was not obliged to furnish the rooms, as he regarded the arrangement with Mrs. Lovegrove at an end. As I have already observed, the

plaintiff was mistaken in this view, and was obliged, moreover, to complete his portion of the contract. He was bound to have the rooms ready for occupation and furnished by the 15th December at the latest. This he failed to do. Mrs. Lovegrove was anxious to get into these rooms as soon as possible, and of this the plaintiff was fully aware, as she told him she had several applicants for rooms; it being just then the season, or busy time of the year, at Muizenberg. One of these applicants was Mr. Hanau, who went to stay with Mrs. Lovegrove, and he has testified that on the 15th day of December, the day when he arrived at "The Towers," there were no windows or doors in the rooms. The workmen did not leave the place until the end of December, and the roof, owing to a defect in construction, leaked so badly that on the 15th of January Mr. Hanau had to leave, for it was altogether impossible to continue the occupation of one of these four rooms. If this had not occurred, Mr. Hanau would have remained until the 15th February. Doctor Fennelly, a medical practitioner, has also told us that the rooms were so damp that they were uninhabitable, and that he ordered his patient to be immediately removed from her room. There is ample evidence as to the uncomfortable and uninhabitable condition of these rooms, which was due to leakage from the roof. Since the 22nd of January the defendant has not been able to let any of these rooms. Such are the main and material facts. The claim for rent for the months of November, December, January, February, and March cannot, of course, be disputed. Although the plaintiff is not entitled exactly to what he asks, there must be judgment in his favour in convention for rent for the five months at £22 10s., that is for £112 10s. plus £7, that is to say for £119 10s. As to the claim in reconvention for damages, I have arrived at the same conclusion as my brother Maasdorp, and agree that Mrs. Lovegrove is entitled to the sum of £105 as compensation. With regard to the stable, that, of course, went with the building, and is included in the lease of "The Towers." The defendant has allowed the plaintiff the temporary use of that, and I think it clear that if Mrs. Lovegrove had pressed for possession of it, the plaintiff would have vacated it. The additional claim of Mrs. Lovegrove that the plaintiff should be ordered specifically to sign and execute a proper contract of lease, as set out by her in the pleadings, I do not think it necessary to consider. The parties now know their legal position, and should regulate themselves accordingly. I will merely express the hope that they will amicably settle any further differences so as to avoid the necessity for any future litigation.

[Plaintiff's Attorney: E. J. Wood; Defendant's Attorney: C. Brady.]

SUPREME COURT

[Before the Chief Justice (the Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

MALCOMESS AND CO. v. CHETTY. { 1903. June 16th.

Mr. Benjamin, for the plaintiffs, applied that the matter be allowed to stand over for a further week, as negotiations were still pending.

Application granted.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

GENERAL MOTION.

Mr. Close moved, as an urgent motion, on behalf of Henry Howard, for an order restraining one James Moodie from further using a bioscope, the property of the applicant.

The petitioner's affidavit set forth that he left for Natal in May last, and had left the bioscope behind in Somerset-road. The said James Moodie had taken possession of it, and had since the 29th May last been giving exhibitions at the Odd-Fellows' Hall, Plein-street, and was representing himself under the name of Howard. The machine was valued at £200, and would be very easily damaged.

A rule *nisi* was granted calling upon the defendant to show cause on Friday why he should not be ordered to deliver the bioscope up to the applicant. A temporary interdict restraining the respondent from removing the property from Cape Town or disposing of it was also granted.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

HENDRICKS AND SOEKER V. ATKINS. 1903. June 17th. „ 20th. „ 22nd.

Architect—Delay in completion of contract—Final certificate.

Where delay was caused by the architect in not supplying necessary and proper details when asked by the contractors to do so, and where the building-owner caused further delay by not delivering certain iron-work, which he had undertaken to do.

Held, *that the building-owner could not claim liquidated damages provided for by the contract from the contractors by reason of the noncompletion of the building by the stipulated time.*

Held further, *that, by the terms of the contract between the building owner and the contractors, the former was not precluded by the architect's final certificate from instituting a claim for liquidated damages against the contractors.*

This was an action in which the plaintiffs claimed £188 11s. 3d., with interest from the 23rd August, 1902, alleged to be due upon an architect's certificate for certain buildings erected by the plaintiffs for the defendant. In reconvention, defendant claimed £250, liquidated damages for breach of contract and £60 loss of rent due to the plaintiffs' default.

The declaration set forth that a contract was entered into between the plaintiffs and defendant on the 9th October, 1900, whereby the plaintiffs undertook to erect certain premises for the sum of £4,200, to be payable in instalments upon the architect's certificate. The plaintiffs duly carried out their work. The defendant paid instalments from time to time, and on the 23rd August, 1902, after the final completion of the contract, a certificate was given that £188 11s. 3d. was due.

The defendant's plea admitted the contract, but denied that the plaintiffs duly carried out the contract, and said that the premises were not completed within the time specified in the contract. Tht amount of the plaintiffs' claim was admitted as portion of the contract, but by reason of the matter set forth in the claim in reconvention the plaintiffs were indebted to him in the sums of £250 by way of certain penalties provided for in the contract, and £60, being the amount of rent for three months, during which time the defendant was unable to occupy the premises. The premises were to be completed by the 1st May, 1901, and, if not within that time, or by a further date allowed by the architect, the plaintiff should pay to the defendant the sum of £10 a week as liquidated damages. The time was extended to the 12th June, 1901, but the plaintiffs had not completed the premises until the 4th December, 1901. It was agreed in the contract that the plaintiff should use proper materials and execute the work with good workmanship, but should any defects arise within three months of the completion of the premises, the plaintiffs had to be called upon to make good such defects. Defects did arise, and it was while these were being made good that defendant was deprived of the use of the buildings, and lost the rent now claimed.

The replication said that the certificate referring to the non-completion of the work was not granted until the final certificate had been granted. The delay was caused by the default. neglect, and omission of the defendant or his servants in failing to supply details with regard

to the foundations, and to certain iron columns, and by reason of the plague. This caused the work to be prolonged into the rainy weather, and by reason thereof the work was greatly delayed and frequently stopped. They denied that the work which had to be made good was due to any neglect on their part, and said it was due to the fact that certain work had been done on the instructions of the architect's assistant and defendant's agents, which required to be restored. They denied that they were liable for any sum.

The rejoinder was general.

Mr. Searle, K.C. (with him Mr. Rainsford) for plaintiff; Mr. Gardiner (with him Mr. Greer) for defendant.

In answer to questions raised by the Bench,

Mr. Searle said that their case was that this matter of penalties and extension of time was simply an afterthought. There was no arrangement between the parties as to an extension of time. The plaintiffs did not want an extension of time; they were delayed in the work by the late arrival of building materials from England which defendant had to supply, and the consequence was that the operations were thrown into the rainy months. Counsel quoted at some length from the clauses of the contract. He added that the plaintiffs were really in the position of defendants; their declaration was admitted, and the defendant had filed two claims.

[Maasdorp, J. (to Mr. Searle): Is it your contention that they should first lead evidence?]

Mr. Searle replied that he thought that should be done upon the pleadings.

Mr. Gardiner contested this view, and urged that it was for the plaintiff to show that the building had really been completed according to contract. Counsel questioned the right of his learned friend to lead evidence on the alleged delays in material arriving from England, seeing that it was not specifically mentioned.

Mr. Searle, replying to Maasdorp, J., said he was prepared to go on with the case. He added that he should like a ruling of Court on the question of material arriving from England.

Maasdorp, J., said that if necessary the plaintiffs could amend their pleadings so as to embrace this particular point.

Mr. Gardiner contended that the plaintiffs should be bound strictly to their pleadings, and pointed out that he might be embarrassed if this question were raised.

Maasdorp, J., said that if necessary, counsel would be allowed time to be instructed on that point.

Mr. Searle proceeded to call evidence.

Barry Hendriks, one of the plaintiffs, said he had been in business fifteen years in Cape Town. Witness and his partner entered into a contract for the erection of a building for defendant at the corner of Long-street and Bloem-street. They commenced work in December, 1900. They had to pull down an old building, and they had to make excavations, when they found clay, slate, and rock at the foundations. In places they had to remove rock from 6 to 9 inches deep. There was no rock shown in the specifications. There was delay on account of the excavations. The architect was Mr. M. Rosenberg. He had to supply detailed drawings. They were stopped because they could not get those details. He asked for details of the columns in the basement, and at the first floor to carry the four storeys of the building. The iron columns were being made by Messrs. Donald Bros. He could not get the columns made until he got the detailed drawings. He was first stopped a couple of weeks on this account. Then he was delayed by the ironfounder seven or eight weeks, as they could not get men owing to the plague. The columns were found to be too short, and another fortnight's delay occurred. There had been a mistake in the drawing. In January the building operations were interfered with by the plague. There was also heavy rain. The site of the building was flooded three times. The verandah was to be of iron work. An allowance was made in the contract because Mr. Atkins was to supply the ironwork from England. The verandah was fitted by Mr. Kemp. The job was nearly finished when the ironwork arrived. The work was finished in November, 1901. The verandah was delayed in arriving, and it had been ordered by the defendant in England. From time to time he got money from the architect, and there was no mention of extension of time or penalties. The alterations were on account of the plaster coming off the lath and plaster partitions. Witness pointed out to Mr. Smith that the work was not being pro-

perly done, but that gentleman said that the work must be done according to his instructions. He spent about £400 in putting the work right, which was completed in May, 1902. On the 8th July he received a final certificate for £25. He was told to leave out some portions of the work, and to put in other things in their place. The sum of £188 11s. 3d. represented extras. The dispute was for the difference between £188—which he agreed to accept—and the £23. On August 23 a final certificate was received for the £188 11s. 3d., which he put into the hands of his agents, Chiappini Bros., to claim payment, which he did not receive. Messrs. Moore, in reply to Messrs. Chiappini, set up a counter claim for certain penalties. As regards the claim of £60 made by Mr. Atkins because he could not let the house, it appeared that the buildings were originally intended to be used as shops and offices. He thought that some alterations had now been made in the buildings, and that the yard had been enlarged. The extra work was done after Mr. Rosenberg had gone away. This part of the work occupied about a month. During that period he had men working night and day.

By Maasdorp, J.: Even without the delay caused by the balconies, he could not have finished by May, but he did his best to do so.

Continuing, witness stated that he was interrupted by about sixty or seventy days' heavy rains.

Cross-examined by Mr. Gardner: He encountered rock bed in the course of excavations for the foundations. He knew he could charge extra for "rock," which was not allowed for in the specifications, but he did not wish to be so particular. He received a letter from Mr. Rosenberg informing him that unless he employed more bricklayers on the work, a penalty of £10 per week would be imposed. He did not at that time tell Mr. Rosenberg that he had encountered rock, because Mr. Rosenberg knew of it previously. He estimated that the work was delayed about three weeks by the rock. He was entitled to about £30 or £40 for this extra work, but he did not claim it. As regards the columns he had not received a detailed drawing of these until after he was ready to put them up. Then the columns had to be cast, which delayed him two weeks. The details he had received were incorrect, as the columns were too short, and had to be recast. He believed that the whole of the delay on account of the columns was caused by Mr. Rosenberg. It was about seven or eight weeks after he gave the details to the founder that he received the finished columns. The delay in the arrival of the verandah had prolonged the work, as he had to leave parts of the building unfinished, so as to fix up the verandah later on.

Maasdorp, J., pointed out that as the verandah had not been received by the witness until August, he could not be held responsible for not having finished that portion of the building before that time.

Continuing, under cross-examination, witness said that the men whom he had employed on the work caught the plague, and were absent from the building for about one month. He held that the plaster work was properly carried out. He reversed the lathings in accordance with the instructions of Mr. Smith, Mr. Rosenberg's man. He had offered Mr. Rosenberg £120 to get this portion of the work done by another builder, because he wished to get finished with the job, and to get his money.

Re-examined by Mr. Searle: The mistake in the length of the columns was due to the drawings. In his account he allowed a certain sum for rock, which he was permitted by Mr. Rosenberg to use, in lieu of concrete, of which he used less than specified. Had he got the details of the columns he would have put them in the hands of the founder at once.

Carl Kemp, of the firm of Carl Kemp and Co., engineers, Cape Town, stated that he fitted up the railings and cut the columns for the work in Long-street. He commenced the work on the 28th September, 1901. Witness had to cut the corner of the iron columns, and the plaintiff put them in position. Witness believed that all the work could be done in a month.

Cross-examined by Mr. Gardiner: The material might have been at his place fourteen days previous to the 28th September, but he certainly did not notice it.

Villom Caronimson said he was the foreman carpenter at the work, but the basement was finished when he took up the job, and at that period he was ready for the columns, but they had not arrived. The columns were too short at

first. The verandah was also delayed on account of the delay in bringing up the columns. That was the last work to complete the building. Witness first erected the metal partitions, but Mr. Smith insisted on him putting the smooth side out. The plaster fell off, and witness was called on next year to reverse the metal lathing. The work was much delayed on account of the heavy rains.

Cross-examined by Mr. Gardiner: Smith stopped him when he was arranging the iron lathing rough side out. The granite bases were not ready when the columns arrived.

Re-examined by Mr. Searle: He was only working on and off at the job.

Hadji Solly, foreman mason, in the employ of the plaintiffs, said that when he was on the job in Long-street they were delayed a fortnight through hard rock. The columns had to be altered by the founder. Delay was caused through the men catching the plague, and he had reason to believe the founder's men also caught the plague. It took a long time to fit up the ironwork, which we delivered in pieces. When Mr. Kemp started work on the 28th September, 1901, the only thing that remained to be done was the painting of the verandah. Originally, the metal lathing was put with the rough side out, but on Mr. Smith's instructions it was reversed. The plaster fell off because the flat side was put outside. The material was of the best, and was tested by Mr. Smith. There was no neglect on the plaintiff's part to push forward the job.

Cross-examined by Mr. Gardiner: About fifteen men were engaged for five weeks excavating the rock. It was not true that the building was built too high.

Henry Rowe, architect, said that in 1900 he was in Mr. Rosenberg's employ. A certain amount of rock was found in the excavations. From inquiries made at the Town House they had reason to believe that rock would not be encountered at the foundation. The draughtsman had not taken into consideration the thickness of the floors, and, consequently, the columns were supplied short in length. They were waiting quite two months for the columns, and the work was at a standstill for some time. And this detail had to be supplied, and a special piece had to be made. About the middle of August he understood that the ironwork had arrived, but the delivery was not commenced until the beginning of September. At the commencement of the job there was a heavy flood, and up to June there was a fair amount of rain. The chief delay arose from the want of the columns.

Cross-examined by Mr. Gardiner: He did not revisit the building in his official capacity. It was not because they merely came upon rock in the excavation that the concrete was omitted from the contract. He thought it was an architect's duty to supply details to the builder without waiting to be asked for them. The building was built to the proper height.

This closed the evidence for the plaintiff.

For the defence, Mr. Gardiner called

Max Rosenberg, who stated that he was engaged by defendant as an architect to prepare plans, specifications, and quantities for the property in Long-street. He visited the building about thrice a week until he left for England in June, 1901. He returned in October, 1901, and found the work going on very slowly. With one exception, the men were totally incompetent. The building was practically finished about the 4th December. He would not dispute the statement that there was rock in the excavations, but it was in very small quantity. There was not sufficient to cause delay for a fortnight. It was a practice if rock was found to make an allowance for it. It was a builder's duty to ask for the details. An architect might supply them if he were not busy. To the best of his belief, the columns were a correct fit. The plaintiff never said that it was witness's fault, but always blamed it on the founders. The basement stood out higher than was provided for in the drawings, and that threw out the verandah columns. The plaster was not up to specifications and quantity. The plaintiff had plasterers engaged doing carpenters' work. In the majority of cases the metal lathing was placed smooth side out. The plaintiff took the blame on himself, and witness did not remember him making any complaint about Mr. Smith. He gave the plaintiff six weeks' extension simply as a matter of leniency. The building might have been completed without the verandah, and witness would

have been quite satisfied to out it out of the contract.

Cross-examined by Mr. Searle: The verandah was practically completed when witness returned to South Africa about the end of October. The tenants came in on the 15th November. The building would have been considered complete without the verandah. Although he could not give an instance, he believed the Town Council had given a certificate of completion to a house where the verandah had not been erected, but the doors and windows were boarded up. He was the defendant's son-in-law. The Town Council were not informed that the plans were for residences. He could not say when the plans were handed over. If the plaintiffs built according to the level required by the City Engineer, it might explain the elevation of the granite bases and the misfitting columns. The principal cause of the alterations was the poor cement used by the plaintiffs. Witness believed they mixed a special sample for his representative, Mr. Smith.

Henry Atkins, manufacturer's agent, said that he employed Mr. Rosenberg as architect to prepare the plans for his buildings in Long-street. He was unable to use the premises from the 11th March to the 9th May while the alterations were going on. He could have had £30 a month for the premises. He lost more than £10 a week through the delay.

Cross-examined by Mr. Searle: He returned to South Africa on the 6th February, 1902, and shortly after that the Town Council threatened him with proceedings. The original plans were for offices, but tenants were immediately put in. On a letter from the Town Council, he gave his tenants notice to quit.

Cross-examined by Mr. Searle: He purchased the adjoining property on the 3rd February. The building was demolished at the end of April. The plaintiff had previously built a terrace of houses for defendant.

Re-examined by Mr. Gardiner: The Town Council withdrew their interdict proceedings on the 18th February. Had the plaster been all right he could have retained his tenants.

Louis Solomon, manager for the defendant, produced the bill of lading for certain columns and a verandah. They were entered for clearance on the 27th June. Forty-three out of fifty-two of the ironwork pieces were delivered by the 26th July, and the remaining nine by the 12th August.

Cross-examined by Mr. Searle: McKenzie's did not give any advice of the delivery. Witness could not produce any documentary proof of the delivery.

Mr. Searle, K.C. (for plaintiff): The real question in this case is as to the set-off; the question as to penalties was a mere afterthought. I am not prepared to contend that the granting of the final building certificate is a bar to claiming penalties, but it does raise a very strong presumption against such claim. Rosenberg's certificate shows that this building should have been finished by May 1. His memory seems to be very bad, but at last he did admit that he knew that the building material could not arrive till the end of July. Clause 18 of the contract shows that an extension of time was to be granted should any delay arise from causes not under the contractor's control, and there have been cases in which the Court has held that should delay in the completion of work arise from the default of the employer, he (the employer) could not recover damages. *Lex non cogit ad impossibilia.* It was impossible to complete the verandah till long after June 18. Rowe, Hendricks, and Charlie all say that the material was not delivered till September, and then it took time to fit up the verandah. Rowe says it took six weeks, and Rosenberg says four or five weeks.

[Kotzé, J.: What do you say about the warning to complete the building by May 12?]

The material had not left England by that time. Our witnesses are clear and positive as to their evidence, whereas Rosenberg is very uncertain. The architect did not give detailed drawings until two months after the work was started, and the columns were not received until two months thereafter. I must admit there was some delay on our part, but not for more than a month, and from that an allowance of 14 days for wet weather, etc., falls to be deducted.

[Maasdorp, J.: On what grounds are you entitled to an extension?]

There was rock on the ground, and the specifications said nothing about that. We did not make the ground. Then as

to the claim for £60 on the ground that the plaintiff had been kept out of beneficial occupation during April and part of May, that was owing chiefly to his own fault. The contract between these parties never contemplated indirect damage. I do not know any case in which damages have been given for being kept out of occupation while work was being done. The owner of the premises waived any claim he might possibly have had for damages by his own delay. See *Huntman and Scharder* v. *Dear* (3 E.D.C.,.36), particularly the second part of the headnote. That case is very similar to the present, but here the case for the builder is stronger. *Wells* v. *Army and Navy Co-operative Society* (86 L.T.R., 764) shows how reluctant English Courts are to enforce penalties as liquidated damages. See also *Dodd* v. *Churton* (76 L.T.R., 438), cited in judgment in the the preceding case.

Mr. Gardiner (for defendant): By the 18th section of the contract the onus is on the builder to show the cause of delay. Admittedly there was a delay. The building was not completed till December 4th. The Town Council certificate does not show that the building had been completed, but only that it was fit for human habitation. It is true that some tenants entered the upper portion of the building on November 15, but there is no proof that the lower portion was occupied till December.

[Maasdorp, J.: Then you had the use of a portion of your property?]

Yes; but we claim liquidated damages for the whole building.]

[Kotzé, J.: When was the building to have been finished?]

In May.

[Kotzé, J.: Then if you have waived your right, how can you sue?]

We have not waived our right. The plaintiff gives three reasons for his delay, viz.: (1) That in the specifications no mention was made of the rock; (2) that the delay in executing the contract arose from the fact that material was not timeously delivered; (3) that specific details of plans of certain pillars were not supplied in due time. As to the second point, if the work can be carried on independently of the arrival of material, the builder must proceed with his work. The case of *Huntman and Scharder* v. *Dear* (3, E.D.C., 36) is not in point, as no builder's certificate was there required. As a matter of fact the builder did not stop work on account of the non-arrival of the material for the verandah. In questions of negligence, we must always look to the proximate cause of the delay. Here Rowe's evidence shows that in January the builders had made no request for material, and that fact is sufficient evidence that they were not prepared to go on with the work. If they were waiting for material, they should have called our attention to the fact. They were warned in April that the penalty clause would be enforced. It was not for us to put down the material on the ground until asked. It might very likely have been damaged. If the builders were waiting for material, Atkins might have got it out by mail boat. The non-arrival of the balcony has nothing to do with this case. I submit that the penalty should run from June 15. As to the third point raised on behalf of the plaintiff, nothing is said in the contract about our supplying details as to the columns. The builder should have asked Rosenberg for them. There is some conflict of evidence as to whether he did ask or not, but Rosenberg is quite clear that if he had been asked, they could have been supplied within four days. The letter of April 12th shows that the columns were not yet ready; why, then, did Hendricks not reply to that letter, if the architects were to blame?

[Kotze, J.: Some allowance must be made for delay in respect of the

Yes, but I submit that the Court can apportion the time due to this delay; surely the whole penalty clause cannot be dropped on account of it. The only questions now are (1) how much delay was there, and (2) who was to blame?

Mr. Searle in reply.

Judgment was reserved, pending the hearing of *Atkins* v. *Delponte* on Monday in which the plaintiff is suing for rent of the rooms from 15th January to the 28th February.

Postea (June 22nd).

Maasdorp, J.: The plaintiffs in this case claim the sum of £188 11s. 3d. for work done and materials supplied in connection with a building constructed by them for the defendant, under a contract entered into by the parties on the 9th day of October, 1900. The defendant admits that this sum is payable to the plaintiffs as the balance

of the price under the contract, but pleads that the plaintiffs are indebted to him in the sum of £250, as liquidated damages, arising from the failure of the plaintiffs to complete the building in the stipulated time, and £60 damages sustained by him by reason of the defective condition in which the building was delivered. The plaintiffs undertook by their agreement to begin the construction of the building immediately after the 1st of December, 1900, to proceed regularly with the work, and complete it by the 1st day of May, 1901. It is admitted that the work was not completed till the 4th of December, 1901. The defendant says that for this delay he is entitled to damages, by virtue of the 18th clause of the contract, which is to the following effect: "If the contractor fails to complete the works by the date named in clause 17, or within any extended time allowed by the architect under these presents, and the architect shall certify in writing that the works could reasonably have been completed by the said date, or within the said extended time, the contractor shall pay and allow to the employer the sum of £10 sterling per week as liquidated and agreed damages for every week beyond the said date or extended time, as the case may be, during which the work shall remain unfinished, except as provided by clause 17, and such damages may be deducted by the employer from any moneys due to the contractor, subject, however, to delays arising from fire, general strikes or combinations of workmen, or other causes over which the contractor could not in any possibility have control." The main issues in this case depend upon the construction of this clause, and its application to the facts proved in evidence. On the 23rd August, 1902, the architect gave the contractors his final certificate, certifying that £188 11s. 3d. was due to them on account of the work executed in and materials supplied for the building. And on the 28th of August he gave the employer the following certificate: "In terms of clause 18 of your contract, I herewith certify that, in my opinon, the works could have reasonably been completed by the 1st day of May, 1901, and I consider that if six weeks are added for rainy days and extra work (which cannot be legally expected or demanded by the contractors), your position in enforcing penalty for the remaining excess of the contract time will, in my opinion, be a fair and reasonable one." Upon this certificate, the defendant claims to be entitled to £10 a week from the 12th of June, 1901, to the 4th of December. There is no imputation upon the pleadings of fraud or improper conduct on the part of the architect, and his good faith in granting the certificate is not challenged. But the plaintiffs state in their replication that this certificate was not granted until the final certificate had been granted to them. And they add that the delay was not caused through any act or omission of theirs, but through the failure of the architect to supply them with certain details which were indispensable for the work, and delay on the defendant's part in furnishing the materials for the balcony, which he had undertaken to supply, and without which the building could not be completed. The plaintiffs contend that if they prove in terms of clause 18 of the contract that the delay in completing the building arose from causes over which they could not in any possibility have control, they would be exonerated from liability for the damage stipulated in that clause. The question arose whether upon the true construction of this clause the exceptions mentioned in the latter part of it are not matters which the architect had to consider in allowing extended time, and in granting his certificate, and must therefore be considered as disposed of by his certificate, so as to preclude the builders from availing themselves of the exceptions. But it seems to me the natural meaning of the words is too clear to admit of that construction. It is provided that if the architect shall certify that the work could have been completed within a certain time, the builders shall pay for their delay, subject to the exceptions mentioned. The architect is not an arbitrator to dispose of the matters connected with the exceptions, and his certificate has nothing to do with them. The plaintiffs also raise the wider question, and contend that in no case can the defendant take advantage of his own wrong, and claim damages for delays caused through his own fault in spite of the stipulations in clause 18. I am of opinion that, notwithstanding the architect's certificate, the question is now open for the Court to decide, whether the delays were caused by causes over which the builders had no control, or by the fault

of the defendant himself. It appears that for the central support of the building certain cast iron columns were to be erected, for which the architect was to furnish details. I am satisfied upon the evidence that without these details, which the architect alone could supply, the columns could not be made. Mr. Rosenberg, the architect, admits that he has hardly any recollection of the circumstances attending the giving of the details. We must, therefore, rely upon the evidence adduced by the plaintiffs. From that it appears that the columns were required soon after the basement was completed, which took place two months after the work was commenced, and that if the details had been given when asked for the columns would then have been ready. Instead of that the details were only furnished after the basement was finished, two months were required for making them, and a fortnight more was lost through a mistake made by the architect in his details. The work was in this way delayed for two months and a half. I am not prepared to say that the architect must in this matter be regarded as the agent of the employer, in such a way as to make the employer responsible for the delay caused by his neglect. But I think this cause of delay was certainly one beyond the control of the contractors. Mr. Rowe,the architect, who was called by the plaintiffs, and who was in the service of Rosenberg, while the building was in progress, said that the contractors several times asked for the details, and that unless these were furnished by the architect the building could not proceed. This delay of two months and a half would have prevented the plaintiffs from completing the building by the 1st of May, but there is a far more serious difficulty in their way. An important feature of the work was a balcony to be constructed round two sides of the building. The materials for it were to be supplied by the defendant, and without them, the work could not be completed. It is quite clear that the materials were not supplied till towards the end of August. Mr. Rowe was of opinion that it would reasonably take about six weeks to put up the balcony. That would have given the builders till the middle of October to finish. I come to the conclusion that the delay in the completion of the work was, until the middle of October, undoubtedly due to the conduct of the defendant himself, and was in respect of a matter beyond the control of the plaintiffs. The building was taken by the parties as finished on the 4th of December, but it appears that on the 13th of November part of it was taken posession of and occupied by the defendant, and I say at once that, in my opinion, the defendant cannot claim the liquidated damages, which were stipulated, as compensation to him for being kept out of possession after he enters the building, even though he obtains only partial occupation. After that, only a month, from the middle of October to the middle of November, remains to be accounted for. It seems to me that even if there were authority for saying that in law the builder's liability for delay would revive when the delay caused by the employer ceases, however considerable it might have been, even then I should have hesitated to give relief for this trifling period. But the authorities cited seem to be all the other way, and to lay down that where the delay was partly due to the fault of the employer himself, he cannot recover under the penalty clause. I need refer only to the cases of *Hansen and Schrader* v. *Deare* (3 E.D.C., 36), *Holme* v. *Guppy* (3 M. and W., 387), *Russell* v. *The Viscount Sa da Bandeira* (32 L.J.C.P., 68). In the two former there was no stipulation in the contract referring the question of penalties to the architect; but in the last it was agreed that if the work was not completed in time by reason of any cause not under the control of the builder, proved to the satisfaction of a person named in the contract, the penalty should not be enforced for the time mentioned in his certificate. The work in that case was delayed through the fault of the employer, and although the person mentioned gave no certificate, the employer was held not to be entitled to the penalties. It seems tolerably certain that the contractors would in no case have finished the work within the stipulated time, but it is quite impossible to decide how much of the delay they are responsible for. In the view I take of this case, it is unnecessary to decide what would have been the effect of the penalty clause if the delay had been occasioned by extra work, rainy weather, or the plague. As to the defendant's claim for £60 damages, I think we must take it upon the evidence that the builders were to blame

for the defective work, and were bound to rectify it, but I am not satisfied, in view of the difference that existed between the Town Council and the defendant, that the rooms, if properly finished, would have been available for tenants during the months of March, April, and May of 1902. And consequently no damages have been proved by the defendant. Judgment must be given for the plaintiffs for £188 11s. 3d., with costs on the claim in convention, and for the defendants in reconvention, with costs, on the claim in reconvention.

Kotzé, J., after reviewing the leading facts, proceeded to say: I will, in the light of the facts which I have already stated, first of all deal with the claim of £250, as and for liquidated damages, under clause 18 of the contract. The first delay of two and a half months was clearly caused by the architect, who did not supply the details as to length and weight of the cast-iron columns, and when, after several requests made by the plaintiffs, details were eventually supplied, they were found to be incorrect as to the length, so that the columns had to be lengthened, or, rather, added to, in order to obtain the necessary length. I put aside the fact of the extra eight weeks' delay caused by the ironfounder, for that cannot be attributed to the architect, nor can the contractor or builder derive any benefit therefrom. It being the duty of the architect to supply details, when asked by the contractor, it follows that if he does not supply details, or gives wrong details, which cause delay, this is a delay over which the contractor has no control. It is the fault or neglect of the architect, and, if there is nothing in the contract between the building owner and the contractor leading to a contrary conclusion, the default of the architect should be held to be that of the building owner, who cannot, under such circumstances, be allowed to take advantage of the clause in the contract entitling him to either liquidated damages or a penalty for delay in completion of the building. I do not attach any importance to the letter of the 12th April, 1901, written by the architect to the plaintiffs, reminding them that the work had to be finished by the 1st May, 1901, and calling attention to clause 18 of the contract, which provides for the payment of liquidated damages if the building was not completed by that day. The architect, when he wrote this letter, was well aware that there had been a delay of two and a half months caused by his own conduct, and that through his default the plaintiffs could not reasonably be expected to complete the building by the 1st May. He was, moreover, also aware that, according to the specifications, the verandahs were an important, if not an essential, portion of the building. These verandahs are very carefully described in the specifications, and he knew that the ironwork in connection with the verandahs would not be delivered before the 1st May, nor within anything like a reasonable time thereafter. He says that the verandah work could have been omitted by him, as he had the right under clause 9 of the contract to direct any alteration, omission, or addition, with regard to the work, and that without the verandahs the building would still have been a complete building. Assuming for a moment that he is right in this view, then he did not, as a matter of fact, direct that the verandahs should be omitted. On the contrary, the plaintiffs, who had contracted to build and complete a certain building according to certain plans and specifications, which contain and include the verandah work, were kept waiting, with the knowledge of the architect, for the iron in connection therewith. Doubtless the knowledge that the ironwork would not arrive within a reasonable time may have caused the plaintiffs, who had already been thrown over the time limit of the 1st May, 1901, by the default of the architect, not to proceed with so much despatch as they might otherwise have done, but there is nothing to show that, when the ironwork for the verandahs did arrive, and was actually delivered about the end of September, they were not ready at once to commence and complete the verandahs. The certificate of 28th August, 1902, given by the architect to the defendant, in which he certified that the work could reasonably have been completed by the 1st May, 1901, seems, therefore, to me to be quite worthless. It entirely ignores the two and a half months' delay caused by his own neglect in not supplying details for the iron columns when requested by the contractors, and the still longer delay caused by the non-delivery of the ironwork for the verandahs. This last delay is due to the defendant him-

self, who, it is common cause between the parties, had to supply and deliver the ironwork to the plaintiffs. The defendant clearly, therefore, cannot seek to derive the benefit of a stipulation under the contract, in the event of non-performance by the plaintiffs, where, by his own act, he is the cause of such non-performance. "It has been often laid down (says Lopes, L. J.) that where there is a provision that a contractor shall pay penalties for delay, no penalty can be recovered where the delay has been occasioned by the act of the person endeavouring to enforce the penalties." (*Dodd* v. *Churton*, 1, Q.B., 1897, p. 568.) Although the giving by the architect of the final certificate on the 23rd August, 1902, by which the sum of £188 11s. 3d. is stated to be due to the plaintiffs, does not take any account of the claim for liquidated damages for delay, now set up by the defendant, I do not think that, regard being had to the terms of the contract, and the position of the architect thereunder, the defendant is precluded upon that ground from making such a claim. He is, however, in my opinion, debarred from doing so by reason of the double default of the architect and of himself.

As to the second claim in reconvention for £60, as damages by reason of the improper and unskilful manner in which the lath and plaster work had been executed by the plaintiffs, I have already, in stating the facts, intimated that this portion of the work had not been done in a skilful and workmanlike manner. The defendant claims this amount of £60, by reason, as he alleges, of his having lost two months' rent through certain tenants having to leave the premises while the repairing of the plaster work was being done. This repairing covered the period from March 11 to May 9, 1902. It was said on behalf of the plaintiffs that all that they were bound to do by the contract was to repair the work at their own cost, and that they could not be held liable beyond that for any damages. I cannot adopt this view. It seems to me that, if through negligent or unskilful workmanship, the plaster had given way and damaged a valuable picture or other work of art, the plaintiffs would have been liable for the damage so caused. In the same way, if the repairs to the bad plastering necessitated the removal of the tenants, the defendant would be entitled to compensation for the loss of the rent which he has suffered thereby. But I am not prepared to say that the repairing ner in which the plaster-work had been executed caused the removal of the tenants. It is by no means clear that the reason for this removal was not due to the objection taken by the Town Council, and the consequent notice to qut given them by the defendant. The onus of this issue lies on him, and I am not satisfied that he has made good his claim. I am, therefore, of opinion that there should be judgment for the plaintiffs for the sum of £188 11s. 3d., and that both the claims in reconvention should be dismissed. The plaintiffs are entitled to the costs of this action.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset; Defendant's Attorneys: W. E. Moore and Son.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.).]

ESTATE THOMAS V. KERR AND ANOTHER. — 1903. June 18th. " 20th. " 26th. July 13th.

Lease — Cancellation — Nonpayment of rent for two years— Equitable relief against forfeiture.

The lessee of certain mining rights for a period of twenty years having failed to pay rent for three consecutive years, the lessor gave him notice that if the rent was not paid within twenty-one days an action would be brought against him for cancellation of the lease. The lesseee had, long before such notice, sublet his rights, as he could do under the agreement of lease, but had not given notice of the sublease to the lessor. After the notice he neglected to pay the rent, be-

lieving, as he did, that the sublessees were liable and would pay, whereupon the action was instituted against him, of which he forthwith informed the sublessees, who immediately tendered payment to the lessor of the arrears of rent and costs. The tender not being accepted, the sublessees were allowed to intervene as co-defendants, and repeated their tender in the plea.

Held, *that the Court was not bound by any positive rule of law to decree a cancellation of the lease on failure by the lessee to comply with the notice, and that, as there was nothing in the conduct of the lessee to indicate an intention to abandon or repudiate the lease or to defy the rights of the lessor, it was competent for the Court, under all the circumstances disclosed in the case, to relieve the lessee against the consequences of his neglect.*

This was an action instituted by the executors testamentary in the estate of the late James Thomas against John Kerr and the Fairview Coal Mining Company in respect of certain rent and leases.

The case was originally against the defendant Kerr, who sued by leave of the Court upon edictal citation. The plaintiffs were executors testamentary of the estate of the late Mr. Thomas, who died in 1900, and the defendant originally was John Kerr, who was formerly of Molteno, and at the time of the action of Bulawayo. The other defendant, the Fairview Coal Mining Company, claimed to be entitled as sub-lessee or assignee of the rights from other persons, who themselves were sub-lessees for Kerr of his rights under the lease in question. In May, 1899, Thomas, as lessor, and the defendant Kerr, as lessee, entered into an agreement, the former letting and the latter hiring certain coal prospecting rights on the farm Spion Kop, in the division of Albert, for a period of 18 months, with the right of taking up a lease for twenty years, the rent to be £5 a month, payable monthly. Subsequently Kerr entered into an agreement for the hire of the said ground for a period of twenty years at the said rental.

The plaintiffs' declaration said that the defendant had repeatedly broken the agreement, and had been in default by non-payment of rent due from December, 1899, to December, 1902, and that the sum of £180 sterling was due.

The defendants' plea said that the Fairview Coal Mining Company had been joined as defendant with Kerr, and admitted that there was due and in arrear a sum of £180, reckoned from the 1st December, 1899, to the 1st December, 1902. They said that by the terms of the lease granted to the firstnamed defendant it was provided that the lessee should have the right to sub-let his rights therein. Thereafter, on or about the 3rd April, 1901, the firstnamed defendant subleased one-half of his share and interest in the said lease to certain persons named Aitkins, Brown, Bell, and Atkinson, and he sub-leased his remaining rights to others. On or about the 9th April, 1901, the sub-lessees sub-leased or assigned their rights and interests in the lease to the Fairview Company. On the 8th November, 1902, plaintiff gave notice to the firstnamed defendant of the rent due and owing, and threatened to sue for cancellation of the lease on failure of defendant to pay the rent within 21 days. In January, 1903, as soon as the matter came to the knowledge of the second-named defendants, they tendered to the plaintiff to pay the rent then due, together with any costs that might have been incurred, and they now repeated this tender. Subject to the tender aforesaid, they prayed that the said claim should be dismissed, with costs.

The plaintiffs, in their replication, put the statements in the defendants' plea to proof, and they asked for judgment for £180, as against the firstnamed defendant Kerr, and for an order declaring that the said agreement and lease were cancelled, and directing ejectment from the said farm as against both defendants.

Mr. Schreiner, K.C. (with him Mr. Russell) for the plaintiff; Mr. Benjamin

(with him Mr. Gardiner) for the defendant.

Mr. Schreiner said that he put it to the Court that really the plea did not disclose a defence to the case, and that the onus would rest upon his learned friend to show how it did. Kerr had taken no steps to pay the rent until after the action was instituted, and then the Fairview Company came in and tendered the rent. Plaintiffs would have been ready to accept the rent if it had been tendered within the stipulated period. He submitted that the onus rested with the intervening defendants to prove that they had any case at all.

Mr. Schreiner called

John Batterson, one of the executors of the estate of the late James Thomas, who stated that the latter at his death was aged 77 years. Before the death of Thomas witness held his power of attorney to manage his affairs. He had never received any notice of the assignment or sub-letting of the lease to the company. He had never seen any documents showing what rights Kerr had parted with to Fraser and Co., or to the Fairview Mining Co. Rent was last paid in November, 1899, and since then no payments had been made. Kerr never paid the rent; it was always received from Brown or Aitken. He took it that these payments were made on behalf of Kerr. On August 30, 1902, a letter was written by his agents, asking Brown, as the person who made the last payment, to whom application should be made for the rent of the farm? In reply Brown said that the mining rights should belong to the Fairview Mining Co., although it was difficult to definitely say who should pay. Witness took steps to sue for the rent from the Fairview Company, and subsequently received a letter offering to pay up to date, and to make all future payments. He did not entertain the company's proposal, and determined to pursue the action.

Cross-examined by Mr. Benjamin: So far as he was aware, no steps were taken to communicate with the Fairview Company's secretary in London. He thought that it would have been quite possible to carry on mining on the Spion Kop Farm even during the war.

Mr. Schreiner pointed out that that question did enter into the plea.

Continuing, witness said that indirectly he had heard that others were interested with Kerr in the farm, but he had received no notice to that effect. He would know of it if Mr. Thomas had received such a notice.

Re-examined by Mr. Schreiner, witness said that the late Mr. Thomas was illiterate, and he (witness) conducted all his correspondence for him.

Mr. Benjamin called

Joshua Samuel Hitchcock Atkinson, who stated that he and T. W. Aitkens, W. Brown, and J. W. Bell were interested in the farm. Certain "heads of agreement" were entered into between them. These provided that all Kerr's coal property should come into the syndicate, and that the syndicate should enjoy the benefit. Kerr was to have a four-eighths share in the syndicate. The capital of the company was to be £8,000. Kerr was to have one half, and each of the other members ⅛th. There was a provision likewise that each of the other members besides Kerr should contribute £1,000, making £3,000, out of which £1,500 was to be applied to working capital, the remaining £2,500 to go to Kerr. Kerr assigned one half his share to William Fraser and Co. At present witness held the power of attorney of William Fraser and Co., Ltd., and as such held an agreement which provided that Kerr should give up his share for £4,500. In 1901 William Fraser and Co. and the others ceded their rights to the Fairview Coal Mining Co., Ltd., which practically belonged to the same parties. So far as he knew, the company never received any intimation from the executors of the late Mr. Thomas that unless rent were paid the company would be ejected, until the letter was sent to Kerr at Bulawayo. He first received intimation of this letter by telegram. He replied to the letter on January 5, and offered, on behalf of the company, to pay the rent with costs of action, and to make all future payments. He wrote to Mr. Thomas at the end of 1895 or early in 1896, and asked that the rent should be reduced until such time as the company were in a position to produce coal. He never sent Mr. Thomas the "heads of agreement," as he was not at the time in South Africa. The Fairview Mines, upon which he had arranged extended lease, did not include Spion Kop. He had offered to sell Spion Kop for £5,000; he scarcely thought it

would be worth £7,000. At the present moment the mine and the shaft were full of water. Since 1891 no work had been done on this farm. In 1895 he put a man to bore on Spion Kop.

Cross-examined by Mr. Schreiner, witness said he looked at the question in this way, that so far as the Fairview Syndicate were concerned, they were joint owners with Kerr. With regard to the agreement, it vested Kerr with the right to sub-let.

This concluded the evidence, and counsel were then heard in argument.

In reply to the Court, Mr. Benjamin said that the position he took up was that until judgment for the amount of the rent had been given, the lessee could tender payment. It would have been sufficient if tender had been made by Kerr at the time the other defendant made the tender.

Mr. Schreiner argued that the case could not be treated as though Kerr had made the tender. The second defendant made the tender before the case was joined as defendant. Counsel further contended that the forfeiture could not be saved by tender up to the time of judgment.

De Villiers, C. J., intimated that he would like to read the papers again, and consider the authorities before giving judgment.

Postea (June 20th).

De Villiers, C. J., stated that in regard to this case some questions of very great importance were raised, and as the case was before himself sitting alone, he thought it would be well to hear re-arguments, more especially in regard to certain points. The Court would, therefore, order that the case be re-argued, and as Friday next would be a clear day, it would be set down for that day. His Lordship added that the Registrar called his attention to the fact that the lease that was put in was £40 under-stamped.

Mr. Benjamin said he intended to call his lordship's attention to that when he put in the lease, but he regretted that he overlooked the point. Counsel added that he believed the assignments were not stamped.

The Chief Justice said that these matters would be considered at the rehearing on Friday next.

Postea (June 26th).

Mr. Schreiner said that the action was for the recovery of £180 rent, for the cancellation of a lease, and for an order of ejectment, with costs. The action was really instituted against the defendant Kerr, who was the lessee under the lease. The Fairview Mining Company subsequently intervened by consent. The lessor, Thomas, who died in 1900, entered into an agreement in May, 1899, with Kerr, and by that lease Kerr obtained the sole right of prospecting free of charge on the farm Spion Kop for eighteen months for coal. It was provided that after the eighteen months the lessee might, if he chose, obtain a lease for a period of twenty years, reckoned from the 1st June, 1900. It was agreed that the lessee would have the sole right of entering into a lease for prospecting for coal for a term of twenty years from June 1, 1900, and he should, in consideration, pay to the said lessor £5 per month, payable monthly. In point of fact, a document seemed to have been executed between the parties, the lessee simply continued on under this document, and it was to be construed as an executed lease, which would have been executed for a period of twenty years. The lease proceeded to set forth that the lessee would have the right of a piece of ground of the extent of 300 yards by 300 yards, and the lessor agreed to enlarge the piece of ground if at any time it was found to be too small. Clause 4 of the lease gave the lessee the right to erect buildings, and the right to construct a tramway or railway in connection with the mine, and take it to the road. The lease further provided that the lessee should pay all rents and taxes on any buildings erected on the mine. Clause 9 set forth that the lessee shall have the right to purchase the farm during the term of twenty years, or during the subsistence of these presents for the sum of £4.000 sterling.

[De Villiers, C. J., said he was surprised that the option was not raised in the pleadings.]

Mr. Benjamin asked leave to amend his pleadings to read, "on the 27th February they tendered to purchase the property for the sum of £4,000," and to add a claim in reconvention for an order of transfer.

The amendment was allowed, and, proceeding, Mr. Schreiner said that the plaintiffs did not admit the offer of

£4,000. Clause 11 gave the right of subletting, and clause 12 stipulated that the mine should remain as security for rent to the said lessor. It was stated that if the lessee should wish to purchase the said farm he should have the option. The prospecting for eighteen months was common cause on the pleadings, as also was the non-payment of the rent for three years. It would appear that one Mr. Brown, referred to in the pleadings, was one of the sub-lessees of a portion of the interest of Kerr, and appeared to represent the sub-lessees generally in the payments of rent. Down to December, 1899, he made payments of rent to Thomas, or his representative. The last payment was made by Atkinson, who was another sub-lessee, who took rights from Kerr under some syndicate arrangement. On the 9th April these two groups of sub-lessees sub-leased the farm with their interest and rights in the lease to the Fairfield Mining Company, who came before the Court as the sub-lessees. The evidence showed that Brown paid the rent. The plea went on to say that in November, 1902, the plaintiff gave notice to the first defendant, Kerr, and threatened to sue for a cancellation of the lease. On the 5th January, 1903, notice was given to the second-named defendants and they tendered to pay the rent and pay the costs, which offer the plaintiff refused to entertain. In November, 1902, they wrote giving notice to Kerr that the lease would be cancelled. The Fairview Mining Company wrote suggesting the cancellation of the lease, and the drawing up of a new lease to them. Kerr paid no attention to a letter in November, 1902, giving him twenty-one days to pay the rent with interest, or that otherwise they would institute proceedings for the recovery of the same and for the cancellation of the lease. In January, Kerr seemed to awaken to the inconvenience of an action, and wrote to Atkinson that the company must take the matter in hand. The company wrote on 5th January that they were prepared to pay the rent with costs, and would regularly pay the rent in future as assignees under the lease, which offer was refused by the plaintiff. After that the Fairview Company wrote a letter, in which they proposed to exercise the option of purchase, and tendered £4,000 as purchase price, and the rent that was due to the executors of the estate of Thomas. That offer was not accepted. So far as Kerr was concerned, the case would have gone by default, and it was only by the Fairview Coal Mining Company interposing and claiming that they had a right to interpose that the case became important. The documents on which the Fairview Company relied must, therefore, be carefully considered. It would appear that Mr. Kerr never executed any sub-lease at all; broadly speaking, he thought that was so. So that the plea wholly broke down on the documents not being substantiated in any way. The first document was that of 1891 as to certain heads of agreement These heads of agreement were put in as the very foundation of the company's right, and were put in by Mr. Atkinson No doubt they were recognised by Kerr, although no subsequent agreement was executed by Bell, who drew up the heads of agreement. From beginning to end, in these heads of agreement there was no reference to the lease from Thomas at all. Kerr was to cede his "mineral rights in certain properties in the Stormberg and adjacent territory," as set forth in the prospectus recently issued by the Aberdeen Coal Estates Co., Ltd. There was no schedule attached to these heads of agreement, and there was no reference whatever to any interest in the lease of Thomas. This document proceeded to constitute a syndicate with a capital of £8,000. The parties agreed to form themselves into a syndicate, to be called the Aberdeen Coal Estates Company, and Kerr was to have four-eighths, that was £4,000, and Atkinson and the other three one-eighth each, that was another £4,000. Kerr was a £4,000 syndicate partner. All these syndicators were to work together for the common good of the Aberdeen Coal Estates Co., and Kerr was to be managing director or general manager of the company. The next document was dated the 4th August, 1893, two years later, in which they found that Kerr entered into a contract with William Fraser and Co., Ltd., Ipswich, England, to whom he was indebted in a certain sum. Kerr sold his share in the Aberdeen Estates Co. to William Fraser and Co. for £4,500 sterling, but counsel contended that that document was neither a sublease nor a complete assignment, but simply a pledge for £4,500 for the debt

owing by Kerr, and that Kerr, on the payment of the debt and interest, had the right to have his interest in the syndicate interest ceded back to him. Then they had a document of the 9th April, 1901, but counsel contended that they could not go into that as it was long after the default had been made in regard to payment of rent. As to the tender, he was quite prepared to say that so far as the tender was concerned, in view of the fact that Kerr, on the 5th January, asked the Fairview Company to attend to it, and in view of the tender that was made, the company were in the same position as if Kerr, on the 5th January, had made the tender himself. But he submitted that the rights of a party who wished to come in under the word "lessee" as to their option to purchase should be very carefully and strictly construed.

[De Villiers, C. J.: Practically all the parties are involved in the suit, and I put it to counsel what was to prevent Kerr coming now before judgment was given, and proposing to exercise the option?]

The letter of the option was not written for Kerr, nor did it purport to have been written for Kerr. It was simply for the company, and they proposed to exercise the option.

[De Villiers, C. J.: What is to prevent Kerr from saying now, "I accept it, and make the tender"? Should not that tender by them be considered an offer on behalf of Kerr?]

There is nothing to show that the Fairview Company had any right to purchase for £4,000; and Atkinson's letter of December, 1895, shows that there was no assignment to the Fairview Company. There is no evidence to show that we ever contracted with anybody save Carr; and what is the nature of our contract with him? It is a lease, and failure to pay rent for two years would vitiate that lease, unless specially provided for in terms thereof. There are cases which show that security for rent may be demanded if the lessee does not bring sufficient moveables on the property to serve as security.

[De Villiers, C.J.: Our difficulty is: does not the lease stand good, and with it the option of purchase until the lease is cancelled by the Court?]

I submit not. See *Johns* v. *Colonial Government* (8 Sheil, 290). The principles which apply to a private lease are the same as those which apply to a public lease; and a mining lease is on the same footing as a lease of land. The whole current of authorities is in favour of assimilating a mining lease to a lease of land and to establish the right of the lessor to cancel the lease on default in payment of rent for two years. See *Digest* (19, 2, 54, and 56) and *Gronewegen's* note on paragraph 56. He does not say that if a man pays his rent *post denunciationem* he cannot be turned out. A mere lessee has never been put on the same footing with a possessor or an *emphyteuta*.

[Kotzé, J.: But see *Codex* (4, 66, 2).]

I had not noticed the passage, but my whole point is that a lessee cannot, like an *emphyteuta*, come in and tender his rent *post litis contestationem*.

[De Villiers, C.J.: The law is as strict on an *emphytueta* as on a lessee.]

I submit not; the *emphyteuta* has a *jus in rem*, and resembles a quitrent tenant rather than a lessee. No doubt, if a landlord asks for ejectment, the tenant may set up the defence of a lease, but he must show that he has fulfilled his contract.

[Kotzé, J.: Cannot he escape eviction by paying his rent?]

Not *post denunciationem*, if he is two years in arrear. *Codex* (4, 65, 27) only shows that a landlord may not take the law into his own hands and evict his tenant, lest the public peace should thereby be broken.

[Kotzé, J.: *Grotius* (2, 40, 19) and *Gronewegen on Codex* (4, 66, 2) both say that the *emphyteuta* may come in at the last moment and pay his rent.]

Yes, the *emphyteuta*, but not the lessee.

[De Villiers, C.J.: If the parties are before the Court, surely the Court may exercise the same discretion as to a tender of rent which it will exercise in respect of any other tender?]

Gronewegen carefully distinguishes between the position of the lessee and that of the *emphyteuta*, and *Grotius* (3, 19, 11) lays down the general rule that a lessor may eject his lessee if the rent is two years in arrear. If a landlord has made a *pactum de non petendo*, no doubt the Court would refuse to harshly enforce the landlord's right. To return to *Voet*. In (19-2-16) he gives the landlord the right of entry

in the event of the lessee being two years in arrear with his rent. In (19-2-18) he says nothing about two years, and in that passage is clearly not adverting to the case of a lessee two years in arrear. See also *Huber* (3-9-1 and 2) referred to the case of *Johns* v. *Colonial Government* (8 Shiel, 290). He certainly says that it is necessary to go to the Court in order to eject a lessee; but the *right* of the landlord does not depend upon the sanction of the Court, the Court merely aids him to exercise his right.

[Maasdorp, J.: Coren goes upon the general principle that the judge should always incline against forfeiture.]

We gave the company ample notice, and asked them in August, 1902, whether they would continue to pay the rent. They could not tell us, and would do nothing till they got notice of the cancellation of the lease.

[Kotzé, J.: See *Grotius* (2, 40, 19, note 28).]

Either the *emphyteuta* who is two years in arrear has not the right to come at any time and tender his rent, in which case *cadit quaestio*: or if he has this right, he must have it in consequence of the peculiarities of his tenure. Another point to which I wish to draw attention is that the Company has now lain by a long time without improving the property; and this being so, I submit that the Court will not exercise its discretion in the Company's favour. The case cited in Coren would seem to have been a case of ignorance of obligations. *Grotius* (2, 40, 19, note 28) refers to the *emphyteuta*, but a lessee is not in the same position as a quit-rent holder. The *emphyteuta*, or quit-rent holder, can make tender of his rent at any time.

[De Villiers, C.J.: Coren draws no distinction between an *emphyteuta* and a lessee.]

If a lessee is in default in payment of rent for two years and a demand for the rent is made by the lessor and not satisfied forthwith, then by common law the lease is forfeited. Take the case of an ordinary contract providing that a lease shall be forfeited if the rent is not paid within 15 days after it falls due; what then would be the position of the lessor should the lessee thereafter tender his rent?

[De Villiers, C.J.: The lessee would be bound by his contract.]

See *Schorer's note* (No. 236 to *Grotius*, 2, 40, 19). Also *Consult. Holl.* (Vol. 2, No 5). In that case the tender was made a few days after the time had expired, and relief was granted; but that was a case of a quit-rent holder and not of a lessee. As to the *denunciatio*. I do not say that the cancellation of the lease took place on November 30, 1901 (at the end of the two years), but at the time a reasonable opportunity for payment had been given after the *denunciatio*. As to the exercise of the option of purchase, if the lease was at an end (as I have contended it was), the option had expired; if it was not at an end, the option is still in force.

[De Villiers, C.J.: Surely you cannot contend that there could be a cancellation of the lease without an order of Court?]

I do not say there could be a decreed cancellation, but there would be a right to demand cancellation, and the order of Court, when made, would relate back to the date when this right vested. Only the lessee could exercise this option, and hence he could not exercise it if he had ceased to be a lessee. As to the forfeiture relating back, see *Kersterman* (p. 122, No. 183). Non-payment of rent is equivalent to abandonment.

[De Villiers, C.J.: Not unless there is an intention to abandon.]

The wire to Atkinson from Kerr shows that Kerr intended to abandon, but he thought that by doing so he could escape from his obligations. The Company also clearly intended to abandon. As to the cancellation of the lease, see *Brooks* v. *Bond and Another* (1 Kotzé's S.A.R. Rep. 5); *Green* v. *Griffiths* (4 Juta, 346); *Parkin* v. *Lippert* (12 Juta, 179); *Van Leeuwen* (Vol. 2, p. 155.; Kotzé's Tr., 4, 21, 7). As to the option, no doubt every contract must be construed so as to give effect to what is reasonably understood between the parties, but it is not reasonable to suppose that after two years' default in the payment of rent, and after the property had been practically abandoned, that the Company should still be able to exercise their option. See *Town Council of Port Elizabeth* v. *Ring* (13 C.T.R. 451).

Mr. Benjamin (for defendants): I will assume, for the sake of argument, that a mining lease is *ejusdem generis* with one of house and land; but I shall contend that these mining leases are in point of

fact *sui generis*. Taking then the first supposition, I would say that at any time up to judgment of forfeiture being delivered, arrear rent may be paid. *Johns* v. *Colonial Government* (8 Sheil, 290).

[Maasdorp, J.: That case only says that an opportunity for payment must be given: and you have had your opportunity.]

I will come to that point directly. I admit that the Fairfield Company are in the enjoyment of the property, but as soon as they heard that forfeiture was claimed they tendered the arrears of rent, and I submit that the Court, looking at all the circumstances of the case, will exercise its equitable jurisdiction in our favour. Kerr was never willing to forfeit the lease, but when he knew that the matter was mooted, he very naturally communicated with the beneficiares under the lease. The case of *Johns* v. *Colonial Government* shows that in a matter of this kind the Court has equitable jurisdiction In this respect Scots' law and our own law are very similar. *Erskin's Principles of Law* (p. 149, latest edition). I submit that a distinction should be drawn between forfeitures provided for by conventional agreements and those which follow in common law. In the latter the Court has equitable jurisdiction, but not in the former. *Schorer* on *Grotius* (Note 236), and this distinction explains the decision in *Brookes* v. *Bond* (1 Kotzé, 5). There there was an express convention. See *Lyser Medit.* (No. 220, Section 2). But I would further submit that these mining leases are *sui generis*. *Neebe* v. *Registrar of Mining Rights* (1 Transvaal S.C. Rep., 65).

[Kotzé, J.: That was a claim licence.]

Yes, that case is not quite on all fours with the present, but it was there pointed out that these mining leases are *sui generis*. Under a mining lease the lessee can take away portions of the soil: he has the *jus abutendi*, an ordinary leasee has not Hence the incidents of an ordinary lease do not apply to a mining lease, and among these incidents is forfeiture for non-payment of rent. When *Voet* speaks of forfeiture of a lease he alludes specifically to lands and houses. I submit that this Court will not harshly enforce forfeitures at common law in any case. The lease still subsists, because its forfeiture has not been adjudaed by the Court, and if the lease subsists, so does the option. There is no authority to show that forfeiture dates back to the time when the two years during which the rent was in arrears expired, or when some notice which had been given expired.

Mr. Schreiner was heard in reply.

Cur. Adv. Vult.

Postea (July 13th).

[De Villiers, C. J.: This action was originally instituted against the defendant Kerr alone, as the lessee of the coal mines on the farm Spionkop, with the right of occupying a portion of the surface for the due exercise of his mining rights. The action was for three years' rent, and for a cancellation of the lease, and ejectment from the premises, on the ground that the lease had been terminated by reason of non-payment of rent for upwards of two years. The lease was for a period of twenty years, with an option of purchase for £4,000 during the interval, and the rent payable was at the rate of £5 per month. Under the agreement of lease, the lessee had the right to sublet, and he accordingly sublet his rights, which were ultimately assigned to the Fairview Coal Mining Company. It does not appear that the lessor was aware of the sublease or subsequent assignment, although the rent was regularly paid to him on behalf of the assignees until the month of December, 1899. From that date, however, no rent was paid to him, or to the plaintiffs, as his executors, after his death. On the 8th of November, 1902, the plaintiffs, by letter addressed to Kerr, who was then living at Bulawayo, demanded from him payment of £175, being arrear rents payable from 1st of December, 1899, and at the same time gave him notice that, unless the amount was paid within twenty-one days, legal proceedings would be taken for the cancellation of the lease. As he did not pay the amount within the time allowed, a citation was issued against him on the 24th of December, 1902. He thereupon gave notice of the citation to the company, and on the 5th of January, 1902, the company offered to pay the arrears of rent and costs, and undertook to make regular payments of the rents accruing due in future. The plaintiffs refused the offer, and proceeded with their action. The company was thereafter allowed to intervene as co-defendant, and by the plea filed on behalf of both defendants, the

company has again tendered payment of arrears of rent and costs. The question to be determined is whether the Court is bound by a positive rule of law to decree a cancellation of the lease on the ground that the rent in arrear was not paid or tendered before the expiration of the notice, or whether, in the exercise of its equitable jurisdiction, it is competent for the Court, under the circumstances of this case, to relieve the defendants from the penalty which, under the Roman law, attached to the non-payment of rent for a continuous period of two years.

That the penalty of forfeiture attached, under the Roman law, to the non-payment of rent by the lessee of a farm does not admit of any doubt, and for the purposes of our decision the lease in the present case may be regarded as if it had been a lease of the farm "Spionkop." The passage in the Digest (19, 2, 54§1), which established the existence of the rule is clear and precise in its terms. It sets forth the response of Paulus in answer to the question whether the lessor of a farm who is bound under a penalty not to eject the lessee before the expiration of the term may without incurring the penalty, eject the lessee on non-payment of the rent for two consecutive years. The answer was that, although nothing had been expressly said in the penal stipulation in regard to the payment of rent, the undertaking not to eject the lessee must be held to have been conditional upon his paying the rent This power of eviction the lessor could exercise without the intervention of a Court of Justice. The Dutch law, while accepting the general principle that non-payment of rent for two years justified the ejectment of the lessee, introduced the important qualification that he can only be ejected by the decree of a Court of Law. Groenewegen, in his note to the passage in the Digest, mentions this qualification, and he adds, in effect, that in his time the decisions of the Courts, when called upon to adjudicate between lessor and lessee, were by no means uniform. It does not, however, appear from any of the reported cases that the question was ever distinctly raised whether the Courts had the power to relieve a lessee from the penalty of forfeiture where he offers before final judgment, or, as in the present case, before *litis contestatio*, to pay the arrears of rent and costs. Under the Canon Law, which was instrumental in removing the harsher features of many rules of the Roman law, it would appear that the power could be exercised of relieving lessees from the consequences of their neglect for two years in the payment of rent. Certainly in the case of long leases of ecclesiastical property under emphyteutical tenure, this power was exercised, notwithstanding the rule of the Roman Law giving an absolute right to the *dominus* to put an end to the *emphyteusis* on failure by the *emphyteuta* to pay the quitrent for a period of three years. It is clear from the Code (4, 66, 2) that the Roman law was as emphatic on this point as it was in regard to the right of the lessor on non-payment of rent for two years, and yet it is found that in several states of Europe the Courts followed, in varying degrees, the lead of the Canon law on the subject. In Saxony, for instance, according to Leyser (Meditations, 103), the Courts relieved the *emphyteuta* against forfeiture if the non-payment of rent was not attributable to fraud, or at least gross negligence on his part, and in a subsequent passage (Medit.' 220) he places leases on the same footing in this respect as emphyteutical holdings. In Scotland the Courts seem to have gone a good deal further in regard to emphyteutical rights. According to Green's "Encyclopædia of Scotch Law (Forfeiture)" "a feu right may be lost by failure to pay the feu duty to the superior for two years in succession. The forfeiture, however, does not operate in virtue of the failure to pay, but requires a declaration of irritancy to make it effectual, and forfeiture may be saved at any time before decree is extracted." It becomes important, then, to inquire into the practice of the Dutch Courts in regard to the forfeiture of quitrent leases on non-payment for three years of the annual quitrent. Groenewegen, in his note on the passage in the Code already cited, says that his previous remark as to the necessity of a decree before a lessee can be ejected equally applies, according to Dutch and French practice, to the case of an *emphyteuta* not paying quitrent for three years. He proceeds thus: "Add (to what I have said) that the *emphyteuta* who before decree of forfeiture is pronounced, tenders the arrears of rent may at the present day be readily relieved from the penalty of forfeiture by the aid of a restitution. In support of this statement he cites a passage from the Canon law in the chapter relating to Letting and Hiring. He adds that it had been so decided by the Su-

preme Court of Holland in a case reported by Coren (Observ. 22), to which I shall presently revert. The learned author also cites Grotius (Introd. 2, 40, 19) who treats the matter with his usual brevity and conciseness, and says that the *emphyteuta* in the case of the actual tender of the money is released from forfeiture. Van Leeuwen (Cens. for 1, 2, 16, 11) says that the default may be most readily purged by means of a speedy tender to the *dominus* or otherwise before decree is pronounced. The views of Voet (6, 3, 36), are to a somewhat similar effect, but he adds that relief is granted against the consequences of negligence whenever there does not appear to be contumacy or contempt towards the *dominus*. All the writers to whom I have referred cite the case reported by Coren, and it is well, therefore, to state the facts of that case, and the grounds of the decision. The plaintiff had received a grant from the Emperor of the right to receive quitrent on certain lands leased to one Van Barri, and he sued the defendants, as the successors in title of Van Barri for a decree of forfeiture on the ground of non-payment for three years of the quitrent. The defendants, by their plea, denied that the tenure under which they held was one of *emphyteusis*, and they prayed that, in so far as it should be necessary, they might be relieved against the consequences of their negligence. I take it that they also tendered payment of the arrears of quitrent, but this does not appear quite clearly from the report. The Court gave judgment for the amount of the arrears, with interest at 10 per cent., but refused to grant the decree of forfeiture. Against this refusal the plaintiff appealed to the Supreme Court. Strangely enough, the judges of that Court appear to have come to the conclusion that it was not a case of *emphyteusis* at all, but assuming that it was an *emphyteusis*, they held that, under the circumstances of the case, the defendants had been properly relieved against forfeiture by the Court below. One of the circumstances relied upon by the Supreme Court was that the defendants were women, and that, as they could not transact business properly for themselves, they should not be made to suffer for the omission of their agent to pay the annual quitrent, but it is difficult to ascertain the true *ratio decidendi* of that case. The importance of the decision, however, consists in this, that the Supreme Court claimed the right to exercise a judicial discretion upon the question, whether it should decree a forfeiture of the quitrent lease. All the grounds of the decision would have applied with equal force to the case of a lessee for a long term who might be in arrear for two years. Stress was laid on the fact that there was no wilful contempt of the landlord's rights, and upon a maxim quoted from Clarus that where a penalty is sought to be enforced the leaning of the judge should be against a forfeiture.

The question now raised in regard to leases has never been directly decided by this Court, nor, so far as I can ascertain, by any other South African Court. The plaintiff's counsel, in the course of his full, lucid, and able argument, relied upon certain *dicta* contained in the judgment in *Johns* v. *Colonial Government* (15 S.C.R.), but these *dicta* read by the light of the facts of that case, do not support the plaintiff's contention that the Court is bound to decree a cancellation of a lease after the lessee has failed to comply with a notice calling upon him to pay the arrears of rent within a reasonable time. In that case the Government had, without a decree of the Court, declared a lease for 99 years of mineral lands to be cancelled by reason of the lessee's having failed to do any mining work. The lessee thereafter tendered the rent, and instituted an action against the Government to have it declared that the lease was still in force, and the Government then relied upon the non-payment of rent for more than two years as a justification for cancelling the lease. The Court, however, held that the Government had no power without the intervention of a court of justice, to cancel the lease, and that that was a sufficient ground for holding that the lease was still in force. The Court, however, went further, and finding that no notice of cancellation had been given to the lessee, expressed the opinion, on the authority of Huber (Hed. Rechtse., 3, 9, 1 and 2) that, in the absence of such a notice, the Court would not have ordered a cancellation if an action for that purpose had been instituted by the Government. Huber's observations apply to the law of Vriesland, where the departure from the practice and principles of Roman law was less marked than in the other provinces of the Netherlands, and if, according to him, an "opzogging,"

a notifiation putting an end to the lease was necessary, it would *a fortiori* have been necessary in the other provinces. But there is nothing in the remarks that fell from the Court to justify the inference that, under our law, where such a notification has been given, the Court is bound to give effect to it without regard to the circumstances under which the failure to pay rent occurred.

The remark has often been made that this Court is a Court of equity as well as of law, and the remark is perfectly just, although not in exactly the same sense in which it would apply to the practice of the Courts in England. In this country there has never been a separation between the two modes of administering remedial justice, but the power of the Court to exercise an equitable jurisdiction in so far as it is not inconsistent with the fixed principles of the Dutch law has been repeatedly recognised. Where the Court has to elect between the rigid application of a rule of the old law to a case not clearly contemplated by that law, and the application of an equitable principle which does not defeat the old law but prevents any injustice from its rigid application, the Court would be quite justified in choosing the latter alternative. The present appears to be such a case. The Roman law allowed a lessor to put an end to a lease, without the intervention of a Court of justice, on failure by the lessee to pay rent for two years. The Dutch law modified the rule of the Roman law, and required an order of Court for the cancellation of the lease, but it made no distinct provision as to the province of the Court where the lessee before the decree tenders payment of all arrears of inter · and costs. Where such a tender is made, and there is nothing to show that the failure to pay rent was intended as a repudiation of the contract, this Court is not, in my opinion, bound to decree a cancellation, but may relieve the lessee against the consequences of his neglect. The law confers on the lessor certain special rights, by means of which he may ensure the punctual payment of his rents. He enjoys a tacit mortgage for the rent on things brought on to the land and on fruits growing thereon, and this right the Court will always assist the vigilant creditor in protecting by the process of attachment (see *Graaff* v. *Pretorius* (12 Juta, 104), and even before the rent has fallen due, the Court will protect him, by ordering the lessee to give security if there is danger of the tacit mortgage being lost by reason of the lessee's departure or other just cause of apprehension (see Voet, 19, 2, 22). The object of the law which allowed the ejectment of the lessee on failure to pay rent for two consecutive years was to provide the lessor with still further security, and that object is fully attained where the lessee is prepared to pay all arrears of rent, interest, and costs. Of course, the conduct of a lessee may have been such as to amount to a virtual abandonment or repudiation of the lease, and in such a case it would not be equitable for the Court to relieve the lessee against the consequence of his wilful defiance of the lessor's rights. But in the absence of any special circumstanes of this nature I am of opinion that it would be an abuse of the old law, and not a just application of it to cancel a lease and eject the lessee, who is prepared to purge his default by placing the lessor in the same position as if the rent had been paid to him when it was originally due. In the present case the tender was made by the company after the notice given by the plaintiffs to Kerr had expired, and the plea raises the special defence that, as the plaintiffs were aware of the enblease and assignment, notice ought to have been given to the company, and that, in the absence of such a notice, the plaintiffs are not entitled to a decree of cancellation as again the company. This was really the only defence relied upon by the defendants' counsel at the first hearing, and it is wholly untenable. There is no evidence that the lessor or the plaintiffs were aware of any sub-lease or assignment, and they certainly never accepted the company as lessee in lieu of Kerr, the original lessee. There was consequently no obligation on the plaintiffs to give notice of their claim for cancellation to the company, and the case must be decided as if due notice had been given to all parties concerned. The plea does allege that a tender of rent and costs was made by the company, and that tender is repeated in the plea. The tender was refused not on the ground that it was made by the company instead of by Kerr, but on the ground that it was made too late. Under our law a payment may be effectually made by a third person even on behalf of an unwilling debtor. (*Voet*, 46,

3, 1.) The payment should, of course, be made in the name, and on behalf of the real debtor, but it is obvious that even if the company had stated in its letter that the tender was made on behalf of Kerr, it would not have been accepted. The case must therefore be treated as if the tender had been made by the lessee himself after the notice to him had expired. His failure to pay the rent as it accrued due and after he had received the notice, was occasioned by his belief that all his rights and obligations had been transferred to the company, and not by any desire on his part to repudiate the lease. He ought to have given notice of the sub-lease to the lessor, but his neglect was probably occasioned by his assuming that the requisite notice would be given by the sub-lessees. Be this as it may, he has, in my opinion, a sufficient interest in this case to take advantage of the tender made by the company, and to ask the Court to relieve him against the consequences of his failure to pay. The judgment of the Court will, therefore, be for the plaintiff for the amount of rent due, viz., £180, with interest from and with costs up to January 5, 1902, but there will be no order for cancellation of the lease or for ejectment. Costs incurred after January 5, 1902, must be paid by the plaintiffs.

Subsequently, De Villiers, C. J., said that the Court intended raising the question of the stamps. It would appear that the stamps on certain of the documents were not of the required value. Under ordinary circumstances the Court would have imposed a penalty for the non-stamping of these documents. Considering, however, that the Civil Commissioner himself was somewhat to blame for the short payments, the Court would impose no penalty, but no effect could be given to these documents before the proper stamps had been affixed. There would be no issue of judgment until this had been done.

Kotzé, J.: The plaintiffs claim judgment for £180, being rent due under a written contract of lease, the cancellation of the lease, and the ejectment of the second defendant. By a written contract the late James Thomas granted to the first defendant, John Kerr, for the period of twenty years, commencing from the 1st June, 1890, at a monthly rental of £5, the following rights over the farm Spioenkop, viz., the right to mine for coal and work coal mines, to erect buildings, graze cattle, and construct and use tramway or railways from the mines to the main Colonial line of railway. The said John Kerr, who is described in the contract as the lessee, is also given the right to purchase the farm "at any time during the said term of twenty years or during the subsistence of these presents," for the sum of £4,000. The lessee has further the right to sublet his rights and interests under the contract, and in 1891 he did so sublet his rights and interests, which are now held by the second defendant, the Fairview Coal Mining Company. From the 1st December, 1899, no rent has been paid to the plaintiffs, so that on the 30th November, 1902, the rent was three years in arrear. On the 8th November of that year the plaintiffs called upon the first defendant for payment of the rent then due, and notified that on his failing to pay within 21 days legal proceedings would be instituted for a cancellation of the lease. It does not appear whether James Kerr, who is domiciled in Rhodesia, received this letter. On the 24th December the citation was issued and the plaintiffs' intendit filed. Thereupon the defendant Kerr, on the 30th December, 1902, telegraphed to one of the sub-lessees that an action had been instituted against him for payment of rent and cancellation of the lease, and intimating that as he had ceded and parted with all his interests an endeavour should be made to stop further proceedings. The second defendant, the Fairview Coal Mining Company, Limited, as soon as the matter was brought to its notice, tendered payment of the rent due, together with costs incurred, but the plaintiffs would not accept this tender. The second defendant, on February 27, 1903, also offered to purchase, and tendered to pay the purchase price of £4,000, mentioned in the lease, but this offer the plaintiffs likewise refused to accept. The second defendant by his plea again tenders the rent due, and offers to purchase the farm. In reconvention the second defendant claims transfer of the farm Spioenkop on payment by him of the £4,000.

Regard being had to the fact that by the contract of lease John Kerr, as lessee, has only the right to sublet and not to cede and assign his entire right, and that it also appears from one of the letters put in that the late James Thomas, as lessor, would not consent to release John

Kerr from his responsibility under the lease, it seems to me that the Court should now deal with this case as if Kerr alone were before it. It has been said on behalf of the defendant that in this case we have not in strictness to do with a contract of lease, inasmuch as the *jus abutendi*, as well as the *jus utendi*, is granted to Kerr, who is given the right to mine and remove the coal from the farm. But the insertion of conditions of this kind, like the right given to a lessee to cut and remove wood, or use up the soil in the making of bricks, does not, as it were, create a separate class of contract. The contract in the present case, which occurs daily in practice, remains in its essential features one of lease, and must be so regarded by the Court. The important question then arises whether the plaintiffs can insist upon a cancellation of the lease by reason of the non-payment of rent for more than two years. On their behalf it was contended that as the rent was in arrear for three years, and the lessee had been called upon to pay this rent within three weeks on pain of cancellation, his neglect to do so *ipso facto* terminated the contract, and the Court has no discretion in the matter, but is bound to cancel the lease. On the other hand, it was argued for the defendant that the Court can at any time before judgment grant relief upon tender of the rent due. The question of the jurisdiction of the Court to relieve a lessee, who is sued for the cancellation of his lease, against the forfeiture thereof, has now been raised, I believe, for the first time, for I do not know of any reported case directly bearing on the point. Our Roman-Dutch authorities all lay down that among the different grounds, which entitle a lessor to terminate a lease before the expiration of the time agreed upon, is the non-payment of rent by the lessee for a period of two years. In support of this statement reference is made by them to two passages in the Corpus Juris, viz., Dig., 19, 2, l. 54, s. 1, and l. 56. Although the commentators have been much exercised as to the precise meaning of the time limit occurring in these *leges*, as will appear from Cocceijus (Jus. Civ. Controvers, 19, 2, Q. 18), and Gluck (Pandekten, S. 1,052), they are all agreed that by the Roman law a lease could be cancelled after the rent was two years in arrear, and that the lessor had the right under such circumstances to expel and evict the lessee. In like manner the grant of *emphyteutis* could be terminated if the rent (canon) had not been paid for three years, where the property was secular, and for two years where it was ecclesiastical. (Cod., 4, 66, 2.) The Roman law allowed no *purgatio morae* either to the *conductor* or the *emphyteuta*, enabling him to escape the penalty of eviction or forfeiture. (Perez, in Cod., 4, 66, n. 20; Gluck, d. sec., 1,052.) According to the Canon law, however, both the emphyteuta and the lessee (*Conductor*) could evade eviction by declaring themselves ready and willing to pay the rent in arrear before the matter had assumed the shape of a formal law suit, and in this respect, says Gluck, the equity of the Canon law is preferred. In the same way the acceptance of rent from the lessee, after being two years in arrear, would, by the Canon law, deprive the lessor of his right to eviction

There can be no doubt that the equitable spirit of the Canon law influenced Dutch jurisprudence so far as the contract of *emphyteutis* or *erfpacht* is concerned, which is defined by Grotius (2, 40, 2) as the hereditary usufruct of another's immovable property subject to the payment of a yearly rent or canon. It is, therefore, what we should call a perpetual quit-rent tenure. By the law of Holland such a quit rent grant or *erfpacht* could be forfeited if the rent was three years in arrear, but the *emphyteuta* or grantee, says Grotius, can readily escape forfeiture or purge his default by making payment shortly afterwards, or, if he excuses himself on the ground of ignorance, or actually tenders the money, and the right to forfeiture is barred if the grantor or owner has by his conduct waived it, as where he accepts rent which has become due subsequently, or even rent which was due before without any mention of his right to forfeiture. If, however, it can reasonably be inferred that the nonpayment of rent proceeds *ex contemptu vel contumacia* of the *dominus directus* (Coren Obs. 22), no relief will be granted. There are several early decisions of the Dutch Courts dealing with the matter, commencing as far back as four centuries ago. These decisions lay down that, where the grant contains an unequivocal condition that if the rent is not paid on the stipulated day it shall be forfeited, the Court will

decree a forfeiture, but not where no such forfeiture clause exists (Sententien van der Hoogen, Prov. Raad Decis., 37, 53, 54, 83. Van Leeuwen, Com . (2, 10, 2.) Van Zutphen, Neerl Pract. (Sub., *voce* Hueringhe, N., 24). The reason appears to be that where the penalty is conventional, that is imposed by the parties themselves, and not by the law, the Court will not unmake a contract which has been deliberately entered into, and accordingly no relief will be granted (Voet, 6, 3, 36.) But, where no special agreement as to forfeiture exists, it is not generally, as Glick observes, in the nature of consensual contracts to sue for cancellation on the ground of mere delay, but only for performance. No decision of the Courts of Holland, nor any approved text writer, has been cited distinctly laying down that in the case of a lease, where a lessee, who is two years in arrear with his rent, tenders payment within a reasonable time thereafter, the Court is bound to cancel the lease at suit of the lessor, and cannot relieve the lessee against a forfeiture. So far as I have been able to consult the authorities, I have certainly not been able to discover any trace in support of such a proposition. *Johns* v. *the Colonial Government* (15 S.C., 245) was cited at the bar as an authority in point, but on examination I find that the decision does not go so far as that. A reference to the report of the case shows that the Government had granted certain mining leases to Johns for 99 years at a given yearly rental, payable in advance. The rent being in arrear, the Government, without instituting legal proceedings for cancellation, of its own accord terminated and cancelled the lease. Johns thereupon brought his action to have it declared that this cancellation was void and the leases still of force. The Court, citing a passage from Huber's Hedendaagsche Rechtsgeleerdheid, held that as a lease could not be cancelled without a judicial decree to that effect, so a notification must first be given by the lessor that if the rent in arrear be not paid, legal steps for cancellation will be taken. Accordingly, as the Government had not brought an action for cancellation, and no opportunity had been afforded Johns to prevent the forfeiture, the Court declared the leases improperly cancelled and still of force. Here the case stops. It is no authority to show that if a lessee, who is in arrear, is called upon to pay the rent on pain of forfeiture, and fails to do so before action brought, the Court in the absence of any forfeiture clause in the lease is precluded from inquiring into the particular circumstances of the case, and is bound, without more ado, to decree a cancellation. Groenewegen, indeed, after stating in l. 54, s.1, and l. 56, Dig. 19, 2, that a lessee, who has not paid his rent for two years, can be evicted by judical decree, says, (in Cod., 4 66, 2), that the same rule applies to an *emphyteuta* who is three years in arrear, and observes that an *emphyteuta* offering the rent before judicial sentence can at the present day easily escape the penalty of forfeiture by means of *restitutio in integrum*. It does not, however, follow that we must necessarily infer from this that only the *emphyteuta* and not also the lessee can be relieved against forfeiture. Groenewegen, therefore, can likewise not be regarded as an authority precisely in point. He relies entirely on the text of the Digest, and quotes no Roman Dutch decison or other authority to show that a lessee cannot, on tender of the arrear rent, escape the penalty of cancellation of the lease. The reason why the Roman law permitted the lessor to evict the lessee is not quite clear. It is suggested by Cocceijus (19, 2, Q. 18) that in the matter of rent the same reasoning should apply to both the contract of lease and *emphyteusis*, and that no greater indulgence should in this respect be allowed to the temporary lessee than to the perpetual *emphyteuta*. Others, again, such as Brunneman, Vinnius, and Van Leeuwen, observe that in the case of *emphyteusis* the rent represents the *dominium* and is paid *pro recognitione dominü*, whereas in the case of a lease the rent is paid for the fruits and other uses of the land. Consequently, Leyser, in his *Medidationes ad Pandectas* (Sp. 103), says that, as the rent is an acknowledgment by the *emphyteuta* of the *dominus directus*, its non-payment is considered equivalent to a denial of his right and an attempt by the *emphyteuta* to set up a right of his own, which is equivalent to *dolus* on his part. But whatever differences there may be between an ordinary lease and *emphyteusis* or perpetual lease, there appears to me to be no sound distinction in principle between them so far as the question of forfeiture for non-payment of rent is concerned. I can see no reason why,

in the absence of express judicial decision to the contrary, these two kinds of contract should not in this respect be placed on the same footing. It seems right that this should be so, especially if we bear in mind that *emphyteusis*, while generally perpetual, may be only for a term of years, and that, by our law, a lease of land, although usually for a term of years, may be for ever. Again, a lease of land for ten years or more (*in longum tempus*) is considered tantamount to alienation, and becomes a contract of *erfpacht*, transferring *utile dominium* on the lessee. (Van Zutphen, Neerl. pract. *sub voce erfpacht*, 9; Utrecht. Consult., Vol. 2, cons. 75, and authorities there cited.) Moreover, courts of justice will always, where possible, lean against forfeiture. We find this illustrated in our own law from very early times. Indeed, its broad equitable spirit is one of the most noteworthy characteristics of Roman-Dutch law. It has, however, not gone the length of the English Courts of Equity in this respect, which, disregarding the free and deliberate stipulation of the parties as to forfeiture of a lease on non-payment of rent, have considered such a clause as a mere security for the due payment of the rent. It is, indeed, true that by our law a lessor has several remedies for his protection. He may not merely bring an action for recovery of rent due, but has, in addition, a legal hypothec, on *omnia illata et invecta*, and may even claim security from the lessee, but that is no reason for holding that when a contract of lease contains a clear forfeiture clause, the Court is to construe it as a mere matter of security, and take upon itself the task of declaring that such a forfeiture clause does not mean what the plain language imports, and so make a contract different from that which the parties have themselves voluntarily adopted. The case of the *emphyteutical* lease mentioned by Van Leeuwen, Com. 2, 10, 2, and more fully reported in Coren, (obs. 22), has a special bearing on the point now under consideration. There the Supreme Court of Holland, Zeeland, and West Friesland, in the year 1623, granted relief against a claim for forfeiture by reason of non-payment of rent for three years on, among others, several equitable grounds. It was held that the defendants might well have understood the grant to be not *emphyteusis*, but one of *census*, a kind of tenure not subject to forfeiture for non-payment of rent, and thus the default of the defendants might be excused on the ground of ignorance, and that, where such can in any way fairly be done, the Court should always hold against a forfeiture. Nor was there anything to show that the rent had not been paid *ex contemptu vel contumacia*, for the defendants, being women, had left the payment of the rent in the hands of their agent, who always in his yearly accounts had entered the rent as having been duly paid by him. This case, which is cited with approval by all the text writers, is of importance, for it shows that, in the absence of a condition of forfeiture for non-payment of rent occurring in the grant or contract, the Court will carefully inquire into the circumstances of the particular case, and, if satisfied that there is nothing improper in the conduct of the *emphyteuta*, will grant him relief. We have here, therefore, a sound practical rule, which the Court should not hesitate to adopt and apply in like manner to the case of a lessee. Such being the conclusion at which I have arrived, it remains for me to apply the rule which I have stated to the facts of the present case. The plaintiffs did not immediately, after the rent was two years in arrear, intimate to John Kerr, the lessee, that they would institute proceedings for cancellation of the lease. They allowed the rent to run on for a third year, and at the end of that period, by letter, of the 8th November, 1902, called on him to pay the rent within 21 days from that date, intimating that on his failure to do so an action for cancellation would be instituted. It does not appear whether Kerr, who lives in Rhodesia, beyond the jurisdiction of this Court, received that letter or not, and as the plaintiffs claim a forfeiture, and rely on this letter to place the defendant *in mora*, I think the Court should have been furnished with clear proof either as to the receipt of this letter by Kerr, or of circumstances from which it could have been satisfactorily inferred that the letter must have been received by him. Kerr, as lessee, had for several years ceased to pay the rent, which was satisfied by the sub-lessees, and received by the late James Thomas. The telegram of December 30, 1902, sent by Kerr to one of the sub-lessees, shows that he was both surprised and annoyed when the citation was

served upon him. The citation, which issued on December 24, was presumably the first intimation he received of the position taken up by the plaintiffs. Kerr was evidently under the impression that payment of the rent was being continued by the sub-lessees. It cannot, therefore, be said that the non-payment of the rent arises *ex contemptu vel contumacia* on the part of Kerr, or that he has been guilty of improper conduct in the matter. I am accordingly of opinion that while there must be judgment for the plaintiffs for the sum of £180, arrear rent, with costs up to date of tender, no cancellation of the lease and consequent eviction of the lessee should be decreed.

Maasdorp, J., concurred.

[Plaintiff's attorneys: Fairbridge, Arderne, and Lawton; defendant's attorneys: Van Zyl and Buissinné.]

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

NHLUKANISO v. MAKUMENI. { 1903. June 18th.

Mr. Buchanan, moved as a matter of urgency, for a temporary interdict restraining the respondent from parting with certain cattle, and for an order to have them handed over to some disinterested person pending an action.

The applicant's affidavit set forth that in 1897, at Gastron, Orange River Colony, he entrusted to one Tafeni, of Herschell, certain two heifers to be handed over to Gonogonue, a brother of his. Tafeni did not hand the heifers over to Gonogonne, In the presence of Tafeni he exchanged one of the eight cattle for a mare, which was at present in the possession of Tafeni. Tafeni refused to deliver the cattle, declaring that they did not belong to the applicant. In March, 1903, he commenced an action against Tafeni for the restitution of the cattle, or to pay their value, viz., £75. On May 16 he found that Tafeni had parted with the cattle to Makumeni, and deponent believed that if the respondent were not restrained from parting with the cattle they would be done away with should applicant get judgment in the action.

An interdict was granted restraining respondent from parting with the cattle and the mare, pending the result of action instituted against Tafeni—with leave to Tafeni or respondent to move to set aside the interdict.

MITCHELL v. TRAMWAY CO. { 1903. June 18th. „ 19th.

Negligence—Collision on road.

This was an action brought by Archibald Mitchell, of Observatory, against the Cape Town Tramway Co., to recover £150 damages for injuries done to plaintiff's horse.

The declaration set forth that plaintiff was a livery-stable keeper, residing at Observatory-road. About 10th October, 1902, while a horse, the property of the plaintiff, was been driven along the Main-road, at Mowbray, a tramcar, the property of the defendants, was carelessly and negligently driven, and collided with the horse, which was severely cut and bruised. The defendant had expended £51 4s. 6d. on the horse, which he valued at £150 previous to the accident. The injuries had rendered the horse practically useless.

The plea admitted the formal allegations, but denied that the acoident was due to the careless driving of their servant, and attributed it to want of skill on the part of the lady who was driving the horse at the time.

Mr. Benjamin (with him Mr. Upington) for the plaintiff; Mr. Searle, K.C. (with him Mr. Russell), for the defendant.

Mr. Benjamin called,

Archibald Mitchell, the plaintiff, who stated that he was a horse and cattle dealer at Station-road, Observatory. He remembered lending one of his horses to a Miss Black, who was a perfect horsewoman, and had often ridden his horses. The injured horse was an Irish hunter, which he bought from a dealer for £50. At the time of the purchase the horse was in bad condition, but he thought that he would improve. He had the horse for about six months, during which he fed it well. When the accident occurred the horse was in splendid condition, and he valued it at £150. When the horse was brought back to his stable after the accident, one of its legs—the near hind leg—was bruised, and there was a cut on the hock. The animal was under the treatment of a veterinary surgeon for about two months, and for nearly three months the horse was kept

in slings. He paid the doctor £23 10s. for attendance. The charge for the keep of the horse came to 6s. 6d. per day for seven months, while he also had to pay a man to specially attend to the animal 5s. per day for a fortnight. The animal was now value for about £40 or £50, and he had an offer of £40, provided he would give a guarantee that the injured leg would not give way. He had worked the horse since its recovery, but it often broke down, and he thought it would never be completely sound. The horse was a most docile animal, quiet and well-mannered. He had taken him often in crowded thoroughfares—down to the Docks three or four times a day.

Cross-examined by Mr. Searle: The horse did not now look quite sound; it was swelled on the hock. Its value was not now half what it had been. The horse was standing in his own stable, and 6s. 6d. was what he charged other people for baiting. He used the animal for his own private purposes. If a tram were immediately behind him, the horse would not curvet or prance. The doctor may have been in attendance for only one month, as was shown on the doctor's account.

Re-examined by Mr. Benjamin: His usual charge for baiting horses was 6s. 6d. per day. At the time of the accident the horse was under order for a client.

[By Maasdorp, J.: He had been driving the horse the day previous to the accident.]

John T. Boase, called, stated he was a M.R.C.V.S., and had been practising in Cape Town for about seven years. The horse was suffering from a larcerated wound on the near hind leg. The injury was not serious, but was prolonged.

Cross-examined by Mr. Searle: Part of his account had been paid. He did not consider his charge high, as the horse needed a lot of attention. After about one month the animal had recovered.

Re-examined by Mr. Benjamin: The animal now appeared to be fairly sound. It was possible that there might be a permanent injury, but it was not probable.

Charles Eaton, manager for Mr. Palmer, at Observatory, said that he was in plaintiff's employ at the time of the accident. He was riding with Miss Black at the time of the accident. Miss Black was one of the best horsewomen he had ever ridden with. The horse was of a quiet disposition. At the time of the accident they were just beside the Presbyterian Church at Mowbray. The tram was going towards Mowbray, in the same direction as witness. The left side of the road was being excavated for gas pipes, and was closed to traffic. Previous to the accident they were riding on the tram line. There were Scotch carts coming towards them, some of which were on witness's right. When he saw the tram it was stopped at the junction between the upper and lower main roads. As the tram approached he heard the bell, and witness got out on to the sidepath between the two carts. The road was quite straight, but very narrow at that particular spot. The driver of the tram could plainly see the congestion in front of him. Witness went to the lady's assistance.

By Mr. Searle: He had not been asked anything about the accident, but he saw the whole affair. There was not room for the lady to get through, as she was riding a bigger horse. She took the line to get ahead, but got jammed by a cart coming in the opposite direction. Witness saw the car strike the horse. The tram was slowing down at the time. The horse was actually forced against a gas pipe after the car had collided with it. The tram dragged the horse along fully 21 feet. The lady remained on the horse all the time. The collision with the car did not actually cause any injuries, but the horse was forced against a pipe which was lying on the top of the excavation. He did not see the horse prancing before the accident. There was no room to get on in front between the Scotch carts.

Re-examined by Mr. Benjamin: They did not wait purposely till the tram ran them down.

[By Kotzé J.: The excavations extended to a further fifty or sixty yards in front.]

Archibald Mitchell, recalled, stated that he had measured the road, and found the width at the spot from the rail to the curb to be twelve feet.

Mr. Upington called,

Joseph Lightfoot, photographer, Mowbray, who said that at the time of the accident he had just come on to the

Main-road from the cricket field. The tram was travelling at the rate of ten miles an hour. He saw the tram collide with the lady's horse. The tram carried the horse along about seven yards. Just before the accident occurred the motorman applied the brakes. Had he applied the brakes sooner he could have pulled up his tram.

Cross-examined by Mr. Searle: Witness was between seven and ten yards off the scene of the accident. He saw the last witness nod to the driver of the tram, and then spur on his horse between two Scotch carts. The lady's horse was not making any particular "fuss." When the last witness got through, the lady's horse swerved towards the gas pipe. The statement produced by the inspector was not quite correct, as witness gave him to understand that the horse and not the tram was going on slowly towards Mowbray. The tram, which apparently could have been stopped, ran into the horse and jammed it against the gas pipe.

Re-examined by Mr. Upington: It was quite clear that the lady was in difficulties, owing to the congestion. When the horse swerved, had the motorman applied his brake, the accident would not have occurred, Eaton had to rush through between the Scotch carts, and that brought him on to the side path. The tram drove the horse up against the gas pipe.

[By Maasdorp, J.: There were two Scotch carts immediately in front and others following on some distance up the road.]

[By Kotzé, J.: When the tram was forty yards off, it was travelling at the rate of ten miles an hour. The excavations ran for about another twenty yards from the scene of the accident.]

James Walter Ashley, said that he was about twenty yards from the scene of the accident when it occurred. The horses were travelling slowly. As a rule, the trams did not travel slowly over the excavated parts. Directly after the accident the traffic became congested. The tram was travelling at an excessive rate of speed.

Cross-examined by Mr. Searle: He was about twenty yards from the footpath, and was behind the gum trees. It was true that he told the inspector that he had not seen sufficient of the accident. Witness told the inspector that it was a shame the way the trams travelled along, and the inspector agreed with him that the drivers were "no class," but added that he had to take what he got.

[By Kotzé, J.: The tram was travelling at about fourteen miles an hour before the brake was applied. The excavations continued about sixty yards further up the road.]

Mr. Benjamin closed his case.

Mr. Searle called,

Ernest Rivers Harvey, surveyor to the Tramway Co., who said that he made the plan produced in court. Several witnesses pointed out to him the scene of the accident. The width at the actual spot was 14 ft. 6 inches from the line to the curb.

Cross-examined by Mr. Benjamin: He included the gutter in the 14 feet 6 inches.

Eli Pickington, motorman, said he had been in the employ of the Cape Town Tramway Company for two years. He never had any serious accidents during that time. He was driving the tram that ran into the plaintiff's horse. The car travelled at about four miles an hour over the excavation. When he was passing the gasometer, he first noticed the riders in front. The gentleman was on the tram line, a little in front of the lady, who was on the mountain side of the road. Witness rang the gong, and slackened down on reaching the excavations. The riders got off the line, but as he was 7 feet off, the lady's horse swerved across the line. There were no Scotch carts in witness's view at the time. He applied the brake and reversed, and the car only went a further 5 feet. The horse was pushed against the iron pipe. There was plenty of room for the riders to get out of the way. The horse swerved suddenly on to the line, and witness could not do anything to prevent the accident.

Cross-examined by Mr. Benjamin: If the rails were dry, a tram travelling at the rate of ten miles an hour could be stopped within 20 feet. The lady was riding on the right of the gentleman, but subsequently swerved on to the line. The lady was about 5 feet from the rails when witness rang the bell. When the tram collided with the horse, the animal swerved right across the line, and although the lady seemed quite calm, she apparently lost control of the horse. The horses were galloping slowly. They

would be covering about four miles an hour.

Re-examined by Mr. Searle: The riders had been changing positions, and when he noticed them first they were galloping and stopping alternately.

[By Kotzé, J.: There were not Scotch carts there at the time. There was nothing in front of the horse to frighten him.]

Andrew Galloway, in the employ of the Gas Company at the time, said that he was working alongside the spot at the time of the accident. The soil was very soft, and the motormen had to be cautioned to drive slowly. The tram was travelling at the rate of four or five miles an hour. When he saw them, the lady was nearest the tram lines. From 150 yards off he heard the gong ringing. The gentleman drew to the front. When the tram touched the horse, the animal sprang backwards towards the gas pipe. Witness was about 3 yards from the scene of the accident. The tram was driven along cautiously.

Cross-examined by Mr. Upington: He had been two months in the employ of the Gas Company at the time. The accident occurred about 52 feet beyond the open excavation. He saw no Scotch carts. He did not see the gentleman on the sidepath. After the car struck the horse, the animal backed across on to the mound of earth on the left side of the road. They had had two falls of earth the previous week through the vibration of the trams.

Re-examined by Mr. Searle: The lady must have lost control over the horse, otherwise it would have plunged forward.

[By Maasdorp, J.: When witness saw them first the lady and gentleman were on the right side of the road.]

William Kerr, a passenger by the tram, said that he was sitting on the top front seat when he noticed the riders about fifty yards ahead of the car. The tram was travelling at an ordinary rate. Both the riders were on the right side of the road, the gentleman riding on the right side of the lady, whose horse was restive and prancing. The lady's horse pranced across the rails. He did not think there was any carelessness on the part of the motorman. The lady jumped off within a minute of the accident. Immediately after the accident the Scotch carts appeared, but they did not cause the lady to take the horse across the line.

Cross-examined by Mr. Benjamin: His attention was specially concentrated on the riders. Witness could not say whether the gentleman rode on to the footpath. The lady was failing to manage the horse.

Re-examined by Mr. Searle: The horse suddenly backed across the line.

[By Maasdorp, J.: There was nothing to prevent the lady taking the horse off the rails.]

William Alfred Humphreys, assistant manager of the gas works at Mowbray, stated that he was in charge of the works on the road. He arrived on the scene immediately after the accident, and saw blood and hair on the pipe lying on the top of the mound. He pointed out the spot to the surveyor. A man was kept on the spot to see that the rails were kept clear of earth, etc. The trams were only allowed to pass at a slow rate, and the men were specially warned on the point.

[By Kotzé, J.: The men were warned to go slow; that would be about two or three miles per hour.]

Cross-examined by Mr. Benjamin: If a car did once go over the spot quickly, he could not say it would cause any damage.

Carl Trimmer stated that he was travelling on the car to which the accident occurred. He saw the carts, and the lady and gentleman riding. The lady was on the side of the tram, and when the motorman rank his bell, he saw the lady's horse first go off the track, and then it began to back across the line towards the gas pipes. He thought that the horse was shying. The tram was going quite slowly, and had nearly stopped when it struck the horse. He saw nothing blocking the way on the right-hand side. The motorman could not have avoided the accident, which was due to the horse backing.

Cross-examined by Mr. Upington: He was sitting on the right-hand side in the front. The horse came over from the right-hand side. The tram was about twenty yards away when the horse backed. The tram had nearly stopped when the horse reached the line.

James William Crowhurst stated he was a M.R.C.V.S. He examined the horse after the accident, and saw a scar on its leg, but there was no apparent damage to the animal. He had the horse trotted, but saw no weakness in it. From

what he could see, the horse was as valuable as before except for the scar, which, as it was sure to get smaller, would probably make a difference of only about £10 in its value.

Cross-examined by Mr. Benjamin: He did not think that the result of the accident would have any ulterior effect upon the horse. He should look upon a stiffness in the animal after driving it as being rather suspicious. He thought Mr. Mitchell could have, without risk, given the guarantee which was asked for by the person who had offered to buy the horse. If the horse did go lame it would be risky to guarantee it. He would value the horse at about £90 or £100. It was a good-class animal. If the horse suffered from a slight lameness after two days' use Mr. Mitche.. might expect £45 to £60. He would give £60 for the horse as it stood on the day he saw it.

Re-examined by Mr. Searle: The injury was severe, but not dangerous. The only effect he thought the accident had was the scar.

Donald McDonald stated he was superintendent of the tramway system. The motorman of the car which struck the horse was in the employment of the Tramway Company since January 6, 1901, and bore an excellent character. Had the tram, if it were travelling at 10 miles per hour, struck the horse, there would not be much of either lady or horse left. Both of them would have been killed.

Mr. Searle closed his case, and counsel were heard in argument on the facts.

Maasdorp, J.: The plaintiff in this case sues the defendant for the recovery of £150 as damages sustained by him through an injury done to his horse by the negligence of the defendants' servants. The defendant pleads that the injury done to the horse was the result of negligence on the part of the person who was in charge of the horse. Now we have in this case the usual conflict of evidence which one would expect when an accident of this kind happens, and it is a conflict which does not arise from any bad faith on the part of any of the witnesses, but simply from the different impressions taken by persons who watch occurrences which rapidly take place. When an accident, such as the present, happens, it is natural that the parties themselves should be satisfied that they had done everything that was necessary, and that it was their duty to do to avoid an accident, and that they were not guilty of negligence. And then, as we know, when inquiries are made of the bystanders as to their opinion of the conduct of the parties, each party selects those witnesses on whom an impression has been made favourable to his case, and, as I said, there is room for difference of opinion. Under the circumstances, we have witnesses called into court who contradict one another, and they do it all in very good faith. I think we ought to bear in mind, in considering the circumstances of this case, that when the Legislature granted permission for the construction of this line, special provision was made that the road along which this line was constructed should be, along the general course, of the width of 30 feet. That shows that it was the impression of those who had to bear in mind what the traffic usually was upon this road, that it would require at least 30 feet to carry that traffic, if a tram line like this was constructed. We find, that at the time this accident occurred one-third of this line was occupied by works necessary for laying down gas pipes. The result of this was that the road was contracted to about two-thirds of the width which was thought requisite by those who had authorised the construction of the line. I mention that, because it seems to me that, in these circumstances, when a large amount of traffic was confined at the time to this narrow space, all parties who used this road should have used special care that this greater pressure should not result in injury or accident. It is clear that the space occupied by the line is not granted for the sole use of the Tramway Company. Notwithstanding the construction of the line, the general public have a perfect right to use this space for ordinary traffic, but it is provided that no one should go upon the line or take any animal upon the line in such a way as to wilfully obstruct the passage of the cars. If he does so, he commits an offence which is punishable under the Act, and it is also provided that if anyone should be on the line, notice should be given to him by the motorman by signal that he should move off the line, and upon such notice being given, any passenger upon the line is bound to move off as soon as practicable. It follows, therefore, that when this lady and her com-

panion were making use of this tramway line on the day in question that they could not be regarded as trespassers. They had a perfect right to be there, subject to the conditions that upon signal being given them, they should as soon as practicable move off that line. Now the question arises: did they do their best to move off the line as soon as practicable, and the answer to that question would throw some light upon the issue as to negligence. It does not follow that if any passenger should neglect to move off the line as soon as practicable, that those responsible for the car would be justified in driving the car in such a way as to injure such a person. But I merely mention that duty of a passenger on the line for the purpose of testing the conduct of the parties in reference to their negligence. It is admitted by the witnesses for the plaintiff, that Mr. Eaton and the lady were riding upon this line some distance in advance of the car, and upon a signal being given by the motorman they quickened their pace with the intention of avoiding the car and getting out of its way. The account they gave of their movements was, that upon receiving this notice and upon conceiving the intention of getting out of the way of the car, they found on the right of them the road was occupied by a number of carts, and that it was impossible for them to move off the road in that direction. They consequently moved forward, but they found that the car was approaching too rapidly, whereupon. Mr. Eaton made a dash out of the road between two carts and got on to the sidepath. The lady could not follow him because the carts were obstructing her, and, consequently, she moved along the road until the car moved up against her. It is well to bear in mind what happened at the time the car jammed the leg of the horse against the gas pipe. All the witnesses agree that when the horse was standing there fixed up, it was in a perfectly quiet condition. It was not restless, and did not seem nervous and frightened, that the lady continued to sit upon it and that she was evidently very calm, and nothing in her conduct showed that the horse was beyond control immediately before. Now, in these circumstances, I am inclined to accept the evidence for the defence that Mr. Eaton and this lady tried to get out of the way of the car as soon as practicable, that they made an effort to do so, that they moved on more rapidly than they were doing a short time before, and moved at the rate of five miles an hour. If we take that to be so, then if the car was following her at a very slow pace it must follow that the car could easily have been checked before it actually pushed up against the horse. If this is the conclusion we come to, that it was impossible for the lady to get out of the road, that she was using every effort to do so, and that the car was a sufficient distance behind in which to be checked, when the motorman ought to have observed she could not get out of the road, then we must come to the conclusion that the injury was caused through the negligence of the servant of the defendants. But I do not think it is absolutely necessary in this case to find that the witnesses for the defence have given us an incorrect account of the occurrence. I think, on the whole, it amounts to this, that they also saw the lady ride upon one of the rails, that the car was following her, that for some distance she pursued her way upon the line, and that at one spot she got off the line and very soon got on to it again. Now, the reasons given by the witnesses for the defence for the action of the horse is, that the horse, for some little while as it was coming along, had been beyond the control of the lady, and being beyond her control it curvetted and pranced, and remained on the line for some time, and that when she managed to get it off it returned, and got on to the line again. I will take Mr. Harris's evidence, because it is said that Mr. Harris, being a disinterested witness, would give us a correct account. This is the impression his evidence made on me. That when the lady was riding along the line the horse got restive, that she could not manage it very well, and that for some time she struggled with it; and after it had gone some fifty yards or more the accident happened, because the horse got beyond her control. If we take that to be the state of the case, it would still lead to the conclusion that the defendants are not absolved from negligence. Mr. Harris says that he could see that an accident was likely to happen, because of the way the lady was riding the horse. Now, there is no doubt that this was a quiet horse, and there is no doubt also from what the

witnesses state that the lady was a good and a very courageous rider. If a person rides a quiet horse in this way along a public thoroughfare, and it suddenly becomes frightened and restless, and beyond control, the person who is riding such horse is not guilty of negligence in the management of that horse. The action of the horse must be regarded as an accident which could not have been anticipated. Here we have consequently a quiet horse suddenly frightened by the tram, and said by the witnesses to be then beyond control. The question then arises, could the motorman, if he had been careful, and used proper diligence, have avoided the accident. If he had observed the action of the horse in the same way as Mr. Harris, he must have come to the conclusion that there was a person ahead of him who was riding a horse which was at that moment beyond control, and he should certainly have stopped his tram before he came up. I think that was the duty of the motorman, and under all the circumstances, I come to the conclusion he had an opportunity of stopping his car, because he says himself he was going at the rate of four miles an hour, and he could stop his car within four or five feet. If we refer to the evidence of Kerr and Zimmer, we find one of them says that when the lady, with this unmanageable horse got back on the line, she was then some seven yards from the car, and the other says some 20 yards away from the car. If, consequently, the motorman had used due diligence, he could have stopped the car before he got up to her. It was his duty to do so, and he was negligent in not doing so. Whether the negligence arose from travelling too fast, or whether it arose from stopping too slowly, makes no difference. In the result he was guilty of negligence. Even if we take the witnesses for the defence, the injury to the horse was not caused through any negligence on the part of the rider, but through negligence on the part of the motorman, who was the servant of the defendant company. Under the circumstances, the defendant is liable to pay the plaintiff damages suffered through the injury. It was proved that the plaintiff had to pay the veterinary surgeon £23 3s. for attending to the horse and curing it, and then he was at the expense of keeping a useless animal, which he might have used or sold and the cost of keeping it is stated to amount to some considerable sum. I think he has put that sum at too high a figure, and a less amount will meet the case. On the whole, we come to the conclusion that the horse has deteriorated in value to the extent of £10, and the damages should be assessed at £50. We cannot estimate the damages too nicely in a case like this kind. We might take the cost of the horse while it was useless about £17. Giving £23 for the doctor's services, £10 for the deterioration in value, and £17 for the cost of keeping a useless horse, would bring the damages up to £50. I think the plaintiff should have judgment for £50, with costs.

Kotzé, J., concurred.

[Plaintiff's Attorneys. Silberbauer, Wahl and Fuller; Defendant's Attorneys: Reid and Nephew.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

MCKENZIE V. HARBOUR BOARD. { 1903. June 19th.

Bailee of goods—Landing agent—Proof of loss—Invoice.

In an action against a landing agent for the alleged loss of certain articles from a case landed by the defendant, the plaintiff failed to produce the person who packed the case nor did he produce the invoice relating to the goods, but he produced a pencil memorandum made by his own clerk at the time when the case was opened in the presence of the defendants' claim's clerk, such memorandum not being signed or initialled by the latter. The claims clerk stated that he never saw the memorandum,

and that, as the invoice was not produced at the opening, he could not make a note of the articles alleged to be missing.

Held, *that there was not sufficient proof of the loss of the articles.*

This was an action brought by McKenzie and Co. (Limited), of Cape Town, against the Table Bay Harbour Board, to recover two sums of £33 5s. and £5, loss and damages to certain goods landed by the said Board, to be delivered to the plaintiff as consignee.

The declaration set forth that the plaintiff company was a duly registered company, carrying on business in Cape Town, and the defendant was the Table Bay Harbour Board. In March, 1902, there were delivered from the Union-Castle steamer Kinfauns Castle 23 packages of merchandise, in good order and condition. The defendant received the said packages for the purposes of delivery to the plaintiff. Defendant, in breach of his duty, delivered only 22 of the said packages, and thereupon the plaintiff issued a summons for the delivery of the missing package or damages. Thereafter the missing case was delivered to the plaintiff, but not in the condition in which the defendant received it, some of the contents having been abstracted and others damaged, whereby the plaintiff suffered damage to the amount of £5, value of abstracted articles and £33 5s. damage to the contents. Plaintiff had prepared a list of the damaged and lost articles, which comprised sewing cotton, suit of clothes, electro-plate, boots and clothing, cigars, etc.

The defendant's plea admitted the formal paragraphs of the declaration. It denied that there was any breach of duty on the part of the defendant in connection with the delivery. The defendant said that the case, in the condition in which he received it from the ship, was lawfully handed over to the Customs officials at the Docks, and that the said cases remained in the care, custody, and control of the said officials for a period, during which the defendant had no control by law over the said officials. The said officials took charge of the said packages, which were subsequently handed over to the defendant, who delivered them to the plaintiff in the same order and condition as they were received in from the Customs officials. The plaintiff signed a clean receipt for the packages, and accepted notice from the defendant of repudiation of liability. The defendant duly and lawfuly delivered to the Customs officials the packages as he received them on or at the steamship Kinfauns Castle. Subject to the above, the defendant denied the remaining paragraphs of the declaration, and said that if any of the said goods were lost or stolen, they were not so lost or stolen when in the defendant's custody or control, and that the defendant was not therefore liable for the said claim.

The plaintiff's replication said he admitted that the case was taken to the searcher's office. He said that the opening and sealing of the case was done by the defendant for the plaintiff. He refused to accept the case when first tendered, and pointed out a list of articles damaged and missing. He afterwards accepted the case, subject to the articles on such list being replaced, or the values paid. The plaintiff denied that the defendant repudiated liability at the time for the missing articles, but said that, on the other hand, he actually admitted liability.

The rejoinder was general.

Mr. Buchanan (with him Mr. Alexander), for plaintiff; Mr. Searle, K.C. (with him Mr. Close), for defendant.

Mr. Buchanan said the point at issue seemed to be that the Harbour Board agreed that, as their agents, they received this package in good order or condition, but said that they were not liable for any damage, firstly, because they parted with possession and control of it to the Customs Department for the time; and, secondly, they said the plaintiff gave a clean receipt for the case, with notice that any damage therein should be immediately notified, and so he took it that the defendant meant they were now estopped from making any claim for damage.

[D Villiers, C.J. I understood their case to be that the damage was done by the Customs authorities.]

Mr. Buchanan: That seems to be their first contention—that the damage was done by the Customs authorities, and then they go on also to say that we gave a

clean receipt when we took the goods later on.

Mr. Close: We make it a little more general than that; we say the damage was done, if any, while the package was in the searcher's office, under the control of the Customs.

Mr. Buchanan called

Warren Bradford Sexton, one of the directors of McKenzie and Co., who stated that in March, 1902, he received a bill of lading for some goods consigned to him by Wheatley and Co., London. He passed his delivery and clearing orders to the Harbour Board on March 13. He first saw this particular package on a wagon in front of the company's store between March 20 and 22. He knew that it had gone to the searcher's office. The package showed signs of having been tampered with, and witness sent over for a Harbour Board clerk to come and examine the case. The messenger came back with the message, to return the case to the Docks. It was a common practice for clerks to come to make such examinations. On April 8, the case was re-delivered to the company. The Harbour Board seals were intact. A few days later a clerk, Mr. Simpson, came to examine the case. A storeman broke the seals in Simpson's and witness's presence. Witness had a manifest of the goods which the case should contain. The goods in the case were checked with the invoice, and Mr. Simpson and witness agreed as to the articles missing. Witness's claim for £33 5s. was based on the invoice price, with duty and other charges incurred. Mr. Simpson remarked that the goods must have been taken while in the dock. Witness later saw Mr. Graves, who was in charge of the Claims Adjustment Department. Mr. Graves gave witness to understand that if he sent in his claim it would be paid. It was the custom that when a case was sent to the searcher's office for examination, it was brought up and off-loaded into the examination store, where it was entered up by the Customs officials. The case remained in the searcher's office until the consignee's agent came and had it opened by the Harbour Board men, who were paid for this work. The articles were checked by the examining officer. The consignee's clerk signed the book as having taken over the charge of the case. The Harbour Board held that delivery to the searcher's office constituted a second delivery, and charged extra for these services accordingly.

Cross-examined by Mr. Close: It appeared from the pro tem. order that case No. 310, the case in question, had been ordered to the searcher's office for examination by the Customs. On examination of the case it was found that there was a discrepancy, according to the declaration, and the case was delivered about March 20, short four packages, which were detained by the Customs. Although Mr. Simpson might say that he was incorrect, witness adhered to his statement that the manifest had been produced at the examination on the occasion of the second delivery. It was incorrect to say that he claimed for the full value of the case, while he alleged to be claiming for only part of it. Witness always kept a clerk at the searcher's office. He knew that under regulation 24, the Harbour Board refused all responsibility for goods in the King's warehouse, or the searcher's office. He did not know what had become of the original invoice, as it had been mislaid, and he had not received a copy of it from London.

Re-examined by Mr. Buchanan: As a rule the Customs detained the whole of a case of goods if there were any discrepancy.

By De Villiers, C.J.: He did not think that the damage could have occurred while the case was in the possession of the Customs. On the 20th March the case went back to the Harbour Board. If there had been any discrepancy when the examination was held it would have been noticed either by the Harbour Board or the plaintiff's own clerk. The case passed into the hands of the Harbour Board, and they signed a receipt for it.

In re-examination, witness stated that rent was sometimes charged for goods in the searcher's office. He had since received claims from several persons for the missing articles. A Mrs. Sauer had claimed £12 10s. for plate. He never received the plate, only two dozen spoons being left in the package. Mr. Devereux claimed £8.

By De Villiers, C.J.: He also received claims from Mr. Fry for £5 for machinery; from Walters, for 10s., for sewing cotton; from Sutherland, for £5 5s., for a suit of clothes; and a claim of £2 for cigars. The charges for duty and other charges incurred here came to

about 33 1-3 per cent. of the invoice value. There was little left in the case of any value.

[De Villiers, C.J. (to witness): It is a great pity that the invoice is gone. It is just the thing we want. What have you done with it?]

Witness replied that he had been totally unable to trace it. It was a very unfortunate thing for them in proving their case.

A storeman in the employ of Messrs. McKenzie and Co. stated that about March 20 the case was brought to the store. It appeared damaged, and he called Mr. Sexton, who sent him to the Harbour Board office. He did not know which clerk he saw. He could not say definitely if the clerk was in Court. The clerk told him to return the case to the Docks.

Cross-examined by Mr. Close: He distinctly remembered the number of that particular case, although he could not recollect the number of any case he had previously taken in.

George H. Guest, baggage clerk in the employ of the Harbour Board, said that in March, 1902, he was the clearing clerk employed by McKenzie. Witness cleared through the searching office all goods that came there for his firm. The Harbour Board brought the goods there and removed them on witness's instructions. It was necessary to produce the invoices when the searching took place. Witness could not particularly remember case No. 310. He remembered inquiries being made. If the articles in the case were not in accord with the invoice when the searching took place a note would be made of it. Witness was the only man employed by McKenzie in the searching office at that time.

Cross-examined by Mr. Close: Witness could not remember whether any articles were taken out of the case before it was closed at the searching office. When the case was opened the articles therein corresponded with the invoice; witness could not say whether they corresponded or not when the case went off.

Mr. Buchanan closed his case.

Mr. Close called

William Thomas Anthony, who said he was a Customs examining officer at the Docks in March, 1902. When a case of goods arrived, per the Harbour Board wagon, at the searchers' office, the Customs searchers dealt with McKenzie's men, or whoever the consignee might be. A bill of entry was always produced, and it was necessary that the articles on the documents should correspond with the articles in the case, and that the value given should be in the searcher's opinion correct. When the articles did not correspond, those upon which duty was paid, were usually sent to the importer for convenience, and the others were retained. If the box of cigars had been in the case it might have been passed by, the duty on it being added to other items. So long as the duty on all articles in the case was covered in this way, goods not shown in the documents would be passed.

By Mr. Buchanan: The building in which the searching took place belonged to the Harbour Board. The Board brought the goods there, and unpacked them for search. Witness's only concern was to satisfy himself that the correct duty had been paid. It was the business of the Harbour Board to remove the goods after they had been examined.

By the Court: If goods were short according to the invoice, and duty had been paid on them, witness would make a note of it in case the importer applied for a refund. If articles were short upon which no duty was paid, witness would not take a note of it.

Re-examined: Nothing could be done to the case by the importer while it lay in the searching office.

William Edward Morrell, claims clerk at the Table Bay Harbour Board, stated that boys were kept at the searchers' office for the opening of cases, but only under the direction of the importer. After the examination the case was nailed up under the supervision of the importer or his agent.

Cross-examined by Mr. Buchanan: The consignee was charged 6d. per package for the services of the boys in the searchers' office. Once packages were delivered to the searchers' office they were under the charge of the Custom's officials until they had been examined.

George Marrell Simpson, examining officer, under the Harbour Board, stated that at the examination of the case referred to by Mr. Sexton, he did not see any invoice produced. He made a rough list of the articles in the case, which he had now mislaid.

[De Villiers, C.J.: Supposing you found some articles were missing, would you not have drawn up a formal docu-

ment signed by Sexton and yourself? Surely you would not make out a list in that slipshod way?]

Witness replied that he would have made a note of the missing goods and sent in a report to his superiors.

Cross-examined by Mr. Buchanan: Even after the lapse of a year he was quite clear that he had not seen any invoice at the examination. He sent in a written report to the Harbour Board, but he could not say if that report could be found. He did not think he saw any document in Mr. Sexton's hands at all. He could not be certain if he had asked Mr. Sexton for the invoice. He made a list of the goods in the case, because he had no invoice by which to ascertain what was missing.

By De Villiers, C.J.: The seals ought to have been put on the case when returned from McKenzie's store, but he could not say if this was actually done.

Further cross-examined, witness said that it was apparent that some articles were taken from the case.

Re-examined by Mr. Close: It would be difficult to say whether the state of the case was due to the Customs examination or to the abstraction of some articles.

Walter Grave, chief claims clerk, in the employ of the Harbour Board, in March, 1902, said he instructed Mr. Simpson to make an examination of this case. After witness was informed that McKenzies had returned the case. Witness had some difficulty in tracing it. It had apparently not been delivered to any responsible employee of the Harbour Board, but had been placed on the dumping ground, whither witness had it traced. Mr. Simpson made a written report to witness. This had been mislaid, and could not now be found.

[De Villiers, C.J., directed that a further search should be made for this report during the lunch interval.]

Continuing, witness said Mr. Sexton told him that it was difficult to state the exact value of the goods, as the papers had not arrived from England. Witness asked Sexton for a detailed list of the goods missing. Witness never agreed to fix a value on the articles. Witness never received a detailed list.

Mr. Close closed his case, and after Mr. Buchanan had been heard in argument, the Chief Justice intimated that it would be unnecessary to hear the argument for the defence.

[De Villiers, C. J.: The plaintiff claims damages from the defendants on the ground of short delivery of articles which the plaintiff alleged were in a certain case at the Docks when they were delivered to the defendants and were removed from the case while the case was in the possession of the defendants. The defendents do not admit that these articles were in that case, and it lies upon the plaintiff to prove that at the time when the case came into the defendant's possession these articles were in the case The best evidence of that fact would be the production of the person who put them into the case. There has been ample time—a year has elapsed—more than a year—and there have been ample opportunities to have a commission to examine the person in England who put the articles into the case. Nothing of the kind was done, and to-day, when we come to trial, not only is there no evidence that the articles alleged to be missing were put into the case, but the next best evidence is wholly wanting, viz., the invoice. But then it is stated that as the Customs authorities made no entry of short delivery all the articles must have been in the case at the time when Customs duty was paid, and that as the defendants handled the case after it left the Customs, the articles must have been taken while the case was in their possession. But if at the Customs there was the same negligence as there was on the part of the plaintiff and the defendant it is extremely likely the Customs authorities would not have done what it is assumed they would have done. A clerk from the Customs admits there is not extreme strictness there, and that such a matter as cigars, a small number in respect of which duty would be paid, would not appear as cigars, but would be added to some other item. In that way the Customs would get what they were entitled to, but it would not be necessary for the purpose of statistics to have it down very strictly. Well, of course, with such a loose practice, anything done by the Customs will not necessarily prove that these articles were there, when they passed the Customs. The Customs clerk also admits that if there was short delivery and Customs

duty was not paid, it would not necessarily appear. Of course, the Customs would take good care that goods imported which did not appear on the invoice would be noted down, so that the duty would be paid on them. Then, in regard to what took place when the claims' clerk was present and the seals were broken and the boxes were opened, there is a direct conflict of testimony between Mr. Sexton and Mr. Simpson. According to Mr. Sexton, who made out this memo of what was missing he showed it to Mr. Simpson, the claims' clerk, and the claims clerk took down what he said. Now, I find there is a formal notice given by the claims clerk that the seals are not to be broken until the arrival of the claims clerk. One would expect that Mackenzie and Co. would then draw up a formal document stating what was missing, according to the invoice, and have asked the claims clerk to sign that document as a proof of what had taken place. Nothing of the kind was done. According to the claims clerk, the bill of lading was not produced. There is no proof that the goods were missing, and the Court surely cannot take this memo as proof conclusive. The defendants have also been equally careless. They did not seem to take much pains in the matter. A report is sent by the claims clerk, and that report is also missing. It lies upon the plaintiff to prove his case; although there is probably equal negligence on both sides. He has had ample time to produce the best evidence. He has not produced the next best evidence, and he relies on this pencil document, not initialled by anyone on behalf of the defendant. If that document had been verified by the signature of the defendants' claims clerk there would have been an admission on their part, which would have dispensed with the necessity of more formal proof. In the absence, however, of clear proof of the loss of the articles, the Court would not be justified in giving judgment against the defendants, and there must consequently be absolution from the instance, with costs.

[Plaintiff's attorneys, Silberbauer, Wahl and Fuller; Defendant's attorneys, Reid and Nephew.]

MOTION.

SUSVEILA V. GARDINER AND EASTON.

Mr. Benjamin moved, as a matter of urgency, for the appointment of a commissioner to take the evidence of Mr. Ernest Storni, Consul for the Argentine Republic, in the case Susveila v. Gardiner and Easton. Mr. Storni was leaving for Johannesburg to-morrow night.

Application granted, Mr. J. E. R. de Villiers being appointed as the commissioner.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Honourable Mr. Justice MAASDORP, and the Honourable Mr. Justice KOTZE].

HEYNES, MATHEW AND CO. V. BLACK AND CO. { 1903. June 20th.

Lights—Servitude—Party-wall—Interdict.

This was an application to have made absolute a rule *nisi* restraining the respondents from building on certain ground in Buitenkant-street, Cape Town, in such manner as to obstruct certain lights in the applicants' premises.

The affidavit of Mr. Mathew stated that petitioners were chemists and druggists carrying on a wholesale business in Cape Town and elsewhere, and in connection with the said business they acquired a three-storied store in Buitenkant-street. Abutting on two sides was ground owned by the respondents. In the respondents' title deeds a certain servitude was registered providing for lights on the south-east side of the store now owned by applicants. For many years there had been window openings in the wall overlooking the land of Joseph Black and Co., whereby light was furnished to the applicants' store. Joseph Black and Co. had pulled down their old premises, and were rebuilding, and applicants had received notice from respondents' solicitors that it was their intention to take steps to close the lights, which applicants said were protected by the said servitude. If the

windows were so closed, applicants' stores would be deprived of light, and they would be seriously prejudiced, hence they prayed that respondents should be interdicted from obstructing the lights aforesaid.

Several affidavits on behalf of the respondents admitted the servitude, but stated that the windows in the south-east wall were considerably less than 8 feet from the ground level, and were thus contrary to the conditions of the servitude. It was also stated that the windows in the said wall were considerably enlarged in 1884, and a number of additional windows had been put in since the said year. It was denied that there had been a threat to interefere with any lights that were protected by the servitude. The objection of the respondents to the lights was that, owing to the nature of applicants' business, there was serious danger to the respondents' property. The wall separating respondents' property on the north-east side from applicants' was a party wall. Other deponents spoke to the increase of lights in the wall by the applicants' predecessor in title, Wm. C. Cooper.

The replying affidavit of Mr. Mathew stated that the respondents had built up all the windows, with the exception of two, on the Albertus-street side. The windows now blocked by the respondents had been in existence about five years. As to the allegation that the windows were not of the required height from the ground level, deponent could only assume that the ground level had been raised since the windows were put in.

Mr. Schreiner, K.C., for the applicants; Mr. Searle, K.C., for the respondents.

Mr. Searle called their lordships' attention to the case of *St. Leger* v. *The City Council* (5 Sheil, 264).

De Villiers, C.J., however, pointed out that the cases to his mind were not on all fours.

Mr. Searle, K.C.: The case raises a very important question. The only case I have in point is *St. Leger* v. *Town Council of Cape Town* (5 Sheil, 264), where Voet (8, 2, 11) is referred to. This wall was to be a party wall, and that would have been meaningless if windows could be opened in it. See the servitude in the old title. We are entitled to build against these party walls, but must not obstruct existing lights.

[De Villiers, C.J.: Does the deed say "light" or "lights"?]

"Lights"; if it had been "light" it would have been very different.

[Maasdorp, J.: You did not object to the party wall, or to the windows?]

No; the wall was erected between 1877 and 1884.

[Kotzé, J.: Are you not estopped by your acquiescence?]

No; a negative servitude cannot be lost by mere acquiescence.

[De Villiers, C.J.: What was the object of that party wall?]

There is nothing on the record to show, but if this is a party wall, we can put a reasonable weight against it.

[De Villiers, C.J.: You can build against it, provided you do not interfere with their rights.]

If they may put windows all over the wall, all our rights in the party wall go.

[Kotzé, J.: May you not have waived your rights by conduct?]

No, this is no question of acquiescence.

[De Villiers, C.J.: Might it not be better to submit the matter to arbitration?]

That would be desirable, and if the parties cannot agree, I would suggest that the matter should be decided by action.

Mr. Schreiner, K.C. (for applicants): Under Section 20 of the Arbitration Act the Court has power to appoint an arbitrator. As to costs, we, and our predecessors in title, have been in possession since 1834. They ought not to write to us stating that they mean to take the law into their own hands. We are *spoliati*. They have come on our wall and blocked up our windows.

[Maasdorp, J.: A party wall?]

We do not admit that. The character of a party wall may be lost by prescription. The case of *Edmeades* v. *Scheepers* (1 Juta, 334) shows that a right may be lost by lying by.

Mr. Searle, K.C. (in reply): I cannot admit that we have not used the party wall; it has been used quite recently. They did not put it clearly that this was not a party wall. I submit that we have a fair case, and I would ask that the question of costs be allowed to stand over.

De Villiers, C.J., pointed out to counsel that the matter seemed one for arrangement between the parties themselves.

Mr. Searle agreed that it would be best to try to come to a friendly settlement. If the parties could not come to some arrangement, then the matter could be decided by the Court.

De Villiers, C.J.: It is impossible with the information before the Court to decide the rights of the parties to the property. The Court directs that an interdict be granted pending an action, but the Court suggests that, instead of fighting it out to the bitter end, the parties should come to a settlement.

Mr. Schreiner suggested that an arbitrator be appointed by the Court.

De Villiers, C.J., thought it would be better if the parties could come to a mutal arrangement. An interdict would be granted pending an action, costs of the case to stand over.

Mr. Schreiner submitted that as regards the costs, as the respondents had summarily set about blocking up the windows, they should bear the costs which were occasioned by their taking the law into their own hands.

De Villiers, C.J.: But if the Court subsequently finds that they are entitled to do what they have done?

Respondents have put the blocking obstruction before the windows.

De Villiers, C.J., pointed out that there had been no trespass. The respondents had only built against a party wall.

I question whether it is a party wall. I maintain that by prescriptive right it has ceased to be such.

Mr. Searle said that respondents had used part of the wall, and he submitted that the question was one which should stand over, as it might be found that the respondents were right. If respondents were made to pay the costs, it might be used as a lever against them that they had no case at all.

De Villiers, C.J.: The case is not perfectly clear, and it is because of that that an interdict has been granted. The fact that the wall was a party wall may have an important bearing on the result, and it is well that the question of costs should stand over.

[Applicant's Attorneys: Van Zyl and Buissinné; Respondent's Attorneys: McIntyre and Bisset.]

NEL V. ESTATE NEL. { 1903. June 20th.

Joint will—Construction—Adiation.

By their joint will N. and his wife, married in community, before proceeding to the appointment of heirs, directed that on the death of the survivor the landed property should be put up to public auction between their three sons, and that the proceeds should belong to the estate of the survivor. Proceeding to the election of heirs, they nominated the children as heirs of the first dying subject to a usufruct in favour of the survivor of the entire joint estate, "and directed that upon the death of the survivor the joint estate shall be equally divided among the children." N. died first, and his wife remained in possession of the joint estate in terms of the will. By agreement between her and the three sons the landed property was sold during her life time.

Held, *that on her death the proceeds formed part of the joint estate and should be divided equally among the children.*

This was a special case stated arising out of a contemplated action to be brought by Johannes Abraham Nel against Elias Albertus Nel, sole executor testamentary of the estate of the late Susanna Francina Nel (born Louw), for a declaration of Court as to his rights under the said will.

The statement of the case set forth that the plaintiff was a farmer residing at Achterplaats, in the division of Calvinia, and the defendant was also a farmer, residing at Reitfontein, in the said division. The late Susanna Francina Nel (born Louw) was married to Jacobus Gideon Nel, of

Reitfontein, in community of property, and in September, 1868, the said spouses executed, in Dutch, a mutual will. By the said will it was provided *inter alia* that all landed properties of whatever nature possessed or to be possessed by the testators, should be put up to auction after the death of the survivor, between their three sons, Jacobus Johannes Gideon, Johannes Abraham (the plaintiff), and Elias Albertus (the defendant), and that the sum or sums of money for which the said landed properties should be sold should belong to the estate of the survivor. The testators also declared in the said will that they appointed the children of the said marriage as their sole and universal heirs, and as such to all property to be relinquished by the first dying on demise, movable as well as immovable, on condition that the survivor should during his or her lifetime remain in the sole and entire possession and control of the joint estate and enjoy the usufruct and profits thereof, the said estate to be equally divided amongst the said children upon the death of the survivor. On or about January 17, 1873, the testator died, leaving the said mutual will of full force and effect, and leaving both movable and immovable property, and thereafter the testatrix, who, together with eight children of the marriage, survived the testator, proceeded as executrix under the said will to administer and distribute the said joint estate, and on or about March 21, 1874, she filed with the Master of the Supreme Court an account of such administration and distribution. Endorsed upon a copy of the said account was the following declaration in Dutch, signed by the said eight children of the marriage: "We, the undersigned heirs in the estate of the late Jacobus Gideon Nel, declare to have examined and found correct the annexed account, as also to have received from the executrix in this estate the shares of inheritance due to us, for which we hereby discharge her from all further claim and responsibility." The testatrix duly received and enjoyed the share awarded to her in the distribution of the said joint estate, and having paid the shares awarded to the eight children, remained in the full and undisturbed possession, enjoyment and control of the remainder of the said estate until such time as her possession thereof was affected by the events and in the manner hereinafter referred to. On or about December 29, 1877, the testatrix being unable to keep in proper order or repair the farms and buildings thereon, which constituted the landed properties in the said estate, agreed with her three sons that, instead of waiting until after her death, the said properties should be sold to the highest bidder of the three sons on the said 29th day of December, 1877. The said properties were accordingly put up to auction on the said date, and were duly sold to the defendant for the sum of £1,535, the said sale being ratified on or about April 1, 1878, by the three sons. On or about September 22, 1880, the said properties were duly transferred to the defendant, who, on the same date, passed a deed of hypothecation in favour of the testatrix upon the said properties for the amount of the said purchase price. On or about December 10, 1886, the testatrix made, in Dutch, another will, whereby she revoked all previous testamentary acts, gave and bequeathed to the defendant the sum of £800, and, further, nominated all her said children as her sole and universal heirs, and appointed the defendant as her executor. Thereafter, on or about February 18, 1899, the testatrix executed, in Dutch, a codicil to the said last-mentioned will, whereby, in addition to the said sum of £800, she bequeathed as a free gift to the defendant, a further sum equal to the amount of interest which he might be owing to her at the time of her death upon the said deed of hypothecation, or on any other bond or bonds. On or about January 21, 1902, the testatrix died, leaving her said eight children surviving her, and leaving effects to the value of £1,598 10s., as shown in the inventory framed by the defendant. The sum of £1,535 secured by the said deed of hypothecation was included in the said inventory, being portion of the sum of £1,585 described therein as "cash outstanding." The testatrix was fully aware when she executed the said will and codicil thereto, and also at the time of her death, that if payment were made to the defendant after her death, of the bequests in question, such payment would have to come almost entirely out of the proceeds of the sale of the said properties. The questions which the parties were desirous of having determined were whether under the circum-

stances the said will and codicil were valid and effectual in so far as the bequests therein made to the defendant were concerned, and whether the defendant in his capacity as executor of the testatrix was entitled to give effect to such bequests out of the proceeds of the said properties.

The plaintiff's contention was that the testatrix had no right or power by the execution of the testamentary acts referred to, to revoke or alter in any respect the joint disposition of the said joint estate as it was provided for in the said mutual will: that the said will and codicil constituted such an alteration, as aforesaid, and were, therefore, null and of no force or effect in so far as the bequests to the defendant therein contained were concerned; and that the defendant in his capacity as executor of the testatrix was bound to distribute the proceeds of the said properties without making any deduction therefrom in respect of the said bequests contained in the said will and codicil, and that the plaintiff as one of the heirs, was entitled in the said distribution to his full one-eighth share of such proceeds without any deduction as aforesaid.

The defendant contended that the proceeds of the sale of the landed properties were by the joint will directed to belong to the estate of the survivor and not to the joint estate; that the survivor was entitled by her last will and codicil to dispose at her pleasure of the proceeds of the said landed properties; and that the bequests made by the survivor in her said will and codicil were valid and effectual against the proceeds of the said landed properties.

The parties, therefore, prayed for judgment upon their respective contentions, with costs out of the estate of the testatrix.

Mr. Burton (for plaintiff): The documents referred to show that in this case the points which the Court is asked to decide lie within a very small compass. See the will as to the disposal of the property and the election of heirs. The question is whether, the landed property having been disposed of in the lifetime of the survivor, she was entitled to dispose of the proceeds. The plaintiff holds that there was a massing of the joint estate under the mutual will. The survivor accepted benefits under the will and the plaintiff says that therefore she could not dispose of any part of the joint estate.

[De Villiers, C.J.: Was the money paid out to the heirs?]

Yes; but the survivor remained in full possession of the landed property for some four years, and thereby accepted benefits under the will. The accounts do not deal with the landed property, and she had no right to deal with it save in terms of the will. She, however, makes a free gift of whatever interest was owing on the mortgage bond, which represented the landed property.

Mr. Schreiner, K.C. (for defendant) I call attention to the fact that the pre legacies of the farm are inconsistent with the subsequent language of the testatrix used in making the general bequest. In such a case, preference must be given to the pre-legacies, and because they are specific in detail effect must be given to them. The purchase price of the farm never formed part of the joint estate. The intention of the testators was clearly to provide for the survivor, and the price of the ground did not come into her estate till her death. The will ordered that the land should be sold on the death of the survivor, and the money was to go into her estate; and hence she could dispose of it by will. Something has been made of the supposed adiation of the survivor, but there was no adiation. She never took the usufruct of the property, and she divided the estate among the children. The plaintiff signed a document which shows that he resigned all right to the money for which the property was sold.

[De Villiers, C.J.: The whole question turns upon the construction of the will.]

Surely the legal point as to adiation must be considered?

[Maasdorp, J.: Why did the survivor remain in possession?]

The will said she was to do so.

[Maasdorp, J.: Then she adiated.]

She remained in possession of land which had been taken out of the joint estate. The case of *Watson* v. *Burchell* (9 Juta, 2) does not go so far as to say that by taking half the joint estate a spouse is debarred from accepting a prelegacy. The heirs fully discharged the survivor from all further claims, and therefore they could not impeach her will. The children acquiesced in our construction of the will, and yet the plaintiff now wishes to impeach that will.

De Villiers, C.J.: It is impossible to say that the will was very clearly worded. We find in this will, as in so many of the Dutch wills that come before the Court for construction, that the testators have used very vague and ambiguous language, and it becomes the duty of the Court, upon consideration of the whole will and the terms used in different parts of the will, to decide what the testators really meant. In the present case there is, first of all, the clause which is referred to as the pre-legacy clause, in which the testators express the desire "that all landed properties now possessed by us, or which may yet be possessed by us, whether farms, houses, or of whatever nature, shall be put up to public auction after the death of the survivor between our three sons in such manner as the executor or executrix of the estate of the survivor shall deem fit, and the sum or sums of money for which the said landed property shall be sold shall belong to the estate of the survivor of us." Then comes the further clause by which the testators appoint the heirs. They appoint as heirs the children, and then there is this provision: "It is our express wish and desire that the survivor of us shall have the power and right to keep the entire joint estate under his or her sole and entire direction and administration, and to remain in full and undisturbed possession thereof, and in the enjoyment of usufruct," and so on, and "upon the death of the survivor of us, the joint estate shall be equally divided amongst our aforesaid children, who shall then be living." The joint estate here referred to is the joint estate which has just been mentioned, the "entire joint estate." Included in that joint estate was undoubtedly all the landed property, and it would include the estate also of the survivor, which formed part of that joint estate, and therefore the mere fact that the proceeds of the farm were to be given to the estate of the survivor would not prevent the operation of the further clause that the whole of the joint estate, including, of course, the estate of the survivor, should be distributed as directed. Then it is said that the children during her lifetime received their share of the paternal inheritance, and that the plaintiff, who was one of them, is now foreclosed from putting forward this claim, but the receipt which has been put in is only a receipt in respect of the account in the administration upon which the sums coming to the children appear. In that account the farms do not appear at all, and inasmuch as these farms were to be kept by the survivor, and only to be sold after the death of the survivor, it is impossible to hold that, because the children expressed their acquiescence in that account, they are to be foreclosed from saying: "Now that the survivor is dead, and the money is to be distributed, we are entitled to claim what the will gives us." It is unnecessary to enter into the question of adiation, because if the will is to receive the construction which might and ought to be put upon it, it appears to me that the survivor has acted under the will, she has had the whole of the farms in her possession during her lifetime, and she has, therefore, had the full benefit of the will. But counsel for the defendant also relies upon the terms of the agreement signed by the three brothers on the 1st day of April, 1878. By that document the previous will is recognised; it is recognised as binding upon all parties. It does not appear whether the testatrix herself was a party to it, but I suppose she must have been aware of the document of 1878, where the joint will is recognised as binding. In that document they say: "We approve and ratify the same on condition that the said purchase price shall be secured by first mortgage on the said properties, and that the money shall be paid into the estate of our said mother upon the death of our said mother." There was a condition made, but it must have been made in their favour. It would only be a condition in their own favour if ultimately, when the distribution of the survivor's estate comes to be made, the survivor's estate is treated as part of the joint estate, and the money is paid out. For these reasons, I am of opinion that although something might be said in behalf of the defendant, the reasonable construction of the will is that which the plaintiff contends for, and judgment, therefore, must be for the plaintiff. Judgment will be in terms of the plaintiff's contentions, with costs out of the joint estate.

[Plaintiff's Attorney: Jno. Ayliff; Defendant's Attorney: S. J. Mostert.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

TRIAL CAUSES.

WOLTERS V. GOODMAN. { 1903. June 22nd.

Brokerage.

This was an action brought by F. C. Wolters, who is a licensed broker carrying on business in Cape Town, to recover £87 10s., with interest *a tempore morae*, as brokerage upon the sale of a house on behalf of the defendant, also of Cape Town.

The declaration stated that on or about the 17th October, 1902, the defendant employed the plaintiff as broker, and instructed him to negotiate the sale of a certain property for £3,500. The defendant, in consideration thereof, agreed to pay to the plaintiff, in the event of the said house and ground being sold, the customary and usual brokerage, 2½ per cent. on the purchase price, and the plaintiff entered upon the employment, advertising the property widely, and expending time and labour. Thereafter, the plaintiff, in the course of his said employment, introduced one Lewis as purchaser of the property to the defendant, and subsequently in November, 1902, and in consequence of the said advertisements, introduction, and labour, the said property was sold to the said Lewis for £3,500. Plaintiff thereupon became, and was now, entitled to the sum of £87 10s. as brokerage in respect of the sale, which sum was a reasonable remuneration. The defendant refused to pay this sum. The plaintiff prayed for judgment for £87 10s., with interest *a tempore morae* and costs of suit.

The defendant's plea admitted the formal allegations. The property in question, he said, belonged to his wife, to whom he was married without community of property. An arrangement was entered into between the plaintiff and other brokers if any one of them effected the sale, such broker was to be paid the usual brokerage of 2½ per cent. He said he had no knowledge of, and he did not admit plaintiff's allegations as to his entering upon the employment and advertising and so forth. It was not customary to pay brokers any remuneration if no sale were effected by them, and no such agreement was made between the parties. The defendant admitted that the said property was, on the 26th November, 1902, sold to one Lewis for £3,500, but he denied that the said sale was effected directly or indirectly through the agency, introduction, or advertisements of the plaintiff, and said it was effected solely through the work of one Fisher. He admitted that he refused to pay brokerage.

The replication was general.

Mr. Upington for plaintiff; Mr. Buchanan for defendant.

Mr. Upington remarked that the sole issue seemed to be whether the sale was effected through the introduction of the plaintiff or through the agency of the broker Fisher.

F. C. Wolters (plaintiff) said that in the month of October last the defendant approached him with regard to the property. The defendant put down the figure at £3,750, giving witness a margin of £250. If witness succeeded in disposing of the property for £3,500, he was to have his usual commission of 2½ per cent. Witness was told that if he promised to advertise the property, he would be the only broker to have the right to dispose of it. Four insertions were put in the "Cape Times," and witness interviewed several clients, amongst others, Mrs. Lewis. On the 17th November Mrs. Lewis was given a list of properties in the vicinity of the South African College, including the one in question. On the 24th November Professor Lewis called and asked for a card to view "Effenburen" from the inside. He mentioned that the price was rather high, but witness said that he could come down on £3,750. The same day witness wrote to the defendant, who had instructed him to send all letters to his wife's address while he was out of town. On the 16th December witness met the defendant in St. George's-street, and he seemed very much annoyed when witness asked him who purchased the property. The defendant refused to divulge the purchaser's name. Fisher's name was not mentioned. Witness subsequently discovered that the property was sold to Professor Lewis on the 26th November. Witness knew nothing of other brokers, and understood that he had sole control of the property. On the

12th December witness wrote to the defendant enclosing his account, and asking for a cheque for £87 10s. On the 15th December defendant's attorneys, replying to a letter of demand sent by the plaintiff's attorneys, stated that the defendant instructed them that the property had been introduced to Professor Lewis by one Fisher.

Cross-examined by Mr. Buchanan: The defendant had known witness for a long time, and had put a lot of business in his way. The defendant gave him a net and a sale price, and witness was positive of £3,750. The usual meaning of "net" was that, if possible, the brokerage was to be paid by the purchaser. The defendant told witness that there were no other brokers concerned in the property. The custom prevailing was that the broker who sold the property got the brokerage. Witness took up the position that he was the first person who introduced the property to Mrs. or Professor Lewis, and he admitted that if he was not the broker who first introduced the purchaser he would have no claim. Mrs. Lewis called three times at witness's office. Witness did not notice the property advertised by other brokers. Professor Lewis called and inquired particularly about "Effenburen." He asked whether it was still for sale, and said he would like to see it inside. The first intimation witness had of the sale of the property was from Mrs. Goodman's letter. Subsequently, witness met Mr. Goodman in the street, and was informed that Professor Lewis was the purchaser.

By Kotzé, J.: Witness's instruction from the seller was to sell for £3,500 net. The seller required to be paid £3,500. and if the property realised this, witness would have to get commission from the buyer if he could. Witness did not at any time tell Professor Lewis that he would be liable for the commission.

Mr. Upington closed his case.

For the defence,

Alexander Goodman, the defendant, was called. Witness stated that about October 17 he gave the property to Wolters for sale. He had given the property to other brokers, including Mr. Fisher, Mr. Steer, Sibbett, and Stephen, Mr. Cohen, and Mr. Herbert. He made no special agreement with Wolters. It was incorrect to say that he had given the property solely to Wolters to sell. The price was to be £3,500 net; there was no mention of brokerage or commission. He paid no brokerage; Mr. Fisher got his charges from the purchaser. Mr. Wolters had not asked him if he gave the property to any other broker. He then went up-country, where, on November 26, he received a wire from Mr. Fisher stating that the property had been sold for £3,500 net, purchaser paying brokerage. Witness telegraphed to his wife.

Mr. Upington objected to the latter telegram being put in.

The Court held that it was not evidence.

On December 6 he returned to town, and met the plaintiff, whom he told that the property had been sold. He received no letter stating that a viewing order had been issued to Professor Lewis.

Cross-examined by Mr. Upington: He did not remember telling plaintiff anything about Fisher; he thought it unimportant. He did not remember asking Wolters to advertise the property; it was probable that he did so. He never saw the letter of November 24, which Mr. Wolters stated he sent him apprising him of having issued an order to view the property. He was away at the time, but his wife would have opened the letter and sent it on. With regard to some land at Somerset Strand he had made an arrangement with Wolters to allow him commission if he sold the ground for £1,000. Afterwards, he saw the property listed in Wolters' books at £1,200. On pointing out this to Wolters he remarked to witness that that was a common practice, and witness then agreed to accept £1,000 net for the land.

Mrs. Goodman, wife of the last witness, denied the receipt of a letter from Wolters on the 24th November to the effect that Professor Lewis had been given a viewing order. On the 25th November witness gave her husband's address to Fisher, and on the 26th November she received a communication from her husband. Next day she wrote to all the brokers her husband had employed, informing them that the property had been sold. Witness did not know to whom the property had been sold until she received the broker's note from Fisher.

Professor Charles Edward Lewis stated that he purchased the property, Effenburen, through Mr. Fisher. There was

a house in Fisher's list at £3,500, but he could not say if it was Effenburen, as he took no particular notice. He received a number of property lists from Mrs. Lewis. On Monday, November 24, he called on Mr. Wolters, about two houses in Faure-street. Mr. Wolters told him Mrs. Lewis had been there a few minutes before. He received no viewing order. He could not have asked Wolters if Effenburen was still in the market, as he did not at that time know of its existence. With Mrs. Lewis he visited the houses in Faure-street, which were unsuitable. Coming away from Faure-street, he and Mrs. Lewis saw the outside of Effenburen. He asked Mrs. Lewis where he could get an order to view, and he immediately proceeded to Mr. Fisher's, where he received the order. He went back by tram to Effenburen, saw the interior, and returning to Fisher's, concluded the purchase.

Cross-examined by Mr. Upington: He had never had any business transactions with Fisher. He instructed Mrs. Lewis to see Fisher, as witness not knowing any other brokers, thought that Fisher would protect his interests. Mrs. Lewis also called on the plaintiff, and brought witness a list of properties, including Effenburen. Witness was prepared to say that Mrs. Lewis had not put the lists before him. When witness heard of Effenburen, he immediately asked Mrs. Lewis on whose list she got it first, and she replied "Fisher's." He did not remember seeing the document from Wolters, and when he spoke of the prices he was comparing them with what Mrs. Lewis had told him. Witness paid Fisher the brokerage. Witness did not receive any viewing orders from Wolters.

Re-examined by Mr. Buchanan: He never considered the purchase of Effenburen until he visited it with Mrs. Lewis.

Mrs. Lewis, wife of Professor Lewis, stated that she visited Mr. Fisher before she visited any other broker. That was before she called on the plaittiff. On Fisher's list Effenburen appeared at £3,500. Her husband said that that price was out of the question. She had called on other brokers, and Effenburen appeared on almost every list.

Cross-examined by Mr. Upington: She called on Wolters for viewing orders for the properties in Faure-street because they appeared on his list at a lower rate. She saw the plaintiff twice after she called on Fisher. Her husband never troubled about the lists, and when she mentioned £3,750, Professor Lewis said that the sum was too high. If she said £3,750 it was a mistake, as she meant £3,500.

Re-examined by Mr. Buchanan: She only discussed with her husband the properties of from £2,000 to £2,500.

By Maasdorp, J.: Professor Lewis had not a viewing order from the plaintiff in his possession.

Adolph Fisher, broker, said that in the early part of October Mr. Goodman gave him the property for sale. Early in November Mrs. Lewis called on him with reference to property in the vicinity of the South African College, and witness recommended "Effenburen" very strongly and gave her a list of other properties. On the 24th November Mrs. Lewis and Professor Lewis were given an order to view the house.

Cross-examined by Mr. Upington: Between the first interview and the 24th November Mrs. Lewis had not been at his office about the properties. He was aware that other brokers had the property in hand.

Mr. Upington having been heard in argument, the Court intimated that it was unnecessary to hear counsel for the defence.

Maasdorp, J.: In this case the plaintiff seeks to recover from the defendant a sum of £87 10s. as commission due to him upon the sale of a property belonging to the defendant for the sum of £3,500, commission being reckoned at 2½ per cent. upon this price. The plaintiff and the defendant agree that the property that was sold was placed by the defendant in the hands of the plaintiff for sale, and the plaintiff was instructed to sell this property for £3,500 net. It might have been of importance to decide what construction was to be placed upon the term "net" used in the contract. The plaintiff says that it was stipulated that the property was to be sold for £3,500 net, and he expected that there would be no reduction for charges on that amount. We find an entry in the plaintiff's book, which corroborates the defendant's statement, which there states that the property had been placed in his hands to sell for £3,750 or for £3,500 net. Now, the ordinary construction of these words would be that the plaintiff had instructions to sell the property for £3,500, which

sum the defendant was to receive without deduction of any charges or expenses of any kind. The plea rather causes a difficulty in this matter, because it is admitted there that the commission was to be paid by the defendant, and I must say that that admission upon the plea would have caused great difficulty if the Court had now to decide whether the commission was to be paid by the seller or by the purchaser in this case. In the view I take of the case upon the evidence, it will be unnecessary to decide that point. We have now to decide whether this sale was brought about through the efforts and agency of the plaintiff, and whether he is, consequently, entitled to his commission upon it. If we take the evidence as given by the plaintiff, he has made out a fairly strong case, because he says that when Mrs. Lewis came to see him on the first occasion he mentioned to her the different properties he had for sale, and gave her a list, including this property, and that, subsequently, when she came to see him again, he gave her two viewing orders for two other properties, and shortly after he had done so Mr. Lewis came to see him and specially requested him to let him have a viewing order for this particular property, "Effenburen," and, upon Mr. Lewis's request to provide him with a viewing order, a letter was addressed to Mrs. Hofmeyr, who occupied the premises at the time. That certainly would show, if it is taken to be correct, that efforts were used by the plaintiff to sell this property, and to find a seller, and it would almost seem, if the case rested there, that this viewing order which was given on the 24th November must have been the one which was acted upon by Mr. Lewis upon his inspecting the premises. But, unfortunately for the plaintiff, his case is unsupported by the evidence of any other witness, or by documentary evidence. In referring to the documentary evidence adduced by the plaintiff, it seems that the documents are not of such a character as to afford any support to his case. He states that he gave Professor Lewis this viewing order, and he certainly, at one time, left the impression on my mind that he put in a document which was a copy of that viewing order. The document that was put in is marked as a copy, and it certainly impressed me very strongly as an important document, because, if it actually was a copy, the plaintiff must have had in his possession at the time the original from which he copied it, and if he could have established that point I think he would have gone very far to show that he had actually given Professor Lewis a viewing order. That evidence entirely breaks down, because it appears he merely from memory wrote out a document as the probable contents of some document he alleges he handed to Professor Lewis. Then there is a letter which also might have been of great assistance to him if it was substantiated. That is the document put in which purports to be a copy of the letter written at the time to Mrs. Goodman informing her that a viewing order had been given to Professor Lewis. That letter was never received by Mrs. Goodman, and one would have expected that if it had been written she would have received it. And here again this letter is put in as a copy of what was sent to Mrs. Goodman, and upon inquiry it turns out it was merely written from a recollection which plaintiff had of what that document contained. In these circumstances the plaintiff is unsupported by other witnesses, or by any document which he has put in. Now, when we refer to the evidence for the defence it is of importance to inquire what view the purchaser took as to the introduction he received, either to the seller or the property in question. We have it from Mr. Lewis that he did not purchase the property through any efforts used by the plaintiff. He denies absolutely that he received any viewing order from the plaintiff in this case, and I think the conflict of evidence upon that point is very important, and the decision on that point will go largely to decide this case. On the one side we have the statement of the plaintiff that he gave Mr. Lewis this viewing order, and on the other side, the contradiction of Mr. Lewis, and I must say, considering all the circumstances of this case, I cannot help coming to the conclusion that I must accept the evidence of Mr. Lewis, and that this viewing order was never given by the plaintiff to Mr. Lewis. If we decide that point against the plaintiff, it would go very far to upset the rest of his evidence, for if the viewing order is

once set aside, the only efforts which the plaintiff exercised in this matter was handing a list of these different properties to Mrs. Lewis, and we hear from Mrs. Lewis that that is no more than several other agents, who include Mr. Fisher, have done. She had been to several other agents, and these agents had, all of them, mentioned "Effenburen" as a property for sale. When it was first mentioned by Mr. Fisher, she would not entertain the question at all, and consequently it could not be considered that in the first instance Mr. Fisher actually introduced her to Goodman, or was the means of bringing her to conclude the purchase of this property. Whenever this property was mentioned by the other brokers, it was set aside as a matter which could not be entertained, and that was the effect it had on the minds of Mr. and Mrs. Lewis after the interview with Mr. Wolters. While they were inspecting the two other properties, the matter arose in Mrs. Lewis's mind again, not through anything that had been done by Mr. Wolters, but simply because she was then in the neighbourhood of the property, and what brought it to her mind was that it had been mentioned by several brokers and several people as a desirable property, and there was then a good opportunity for Mr. Lewis to see the property. One would have fancied if they had the viewing order of plaintiff in their possession, they would have gone forthwith and inspected it. When Mrs. Lewis mentioned the property again, she referred to Fisher as a likely person to put the whole matter through for her, and they thereupon went to Fisher to get a viewing order for the property, which they could have seen without going to Fisher if they had had the plaintiff's viewing order in their possession. Under all the circumstances of this case, I come to the conclusion that the plaintiff had done nothing more than several other brokers in this case, and what they had done did not tend to an introduction of the purchaser to Mr. Goodman, or negotiations to bring about the purchase. I come to the conclusion, therefore, that what really brought about the sale of this property was the general information which Mrs. Lewis seemed to possess at that time, and which induced her to go to Mr. Fisher, and through the instrumentality of Mr. Fisher, brought about the sale subsequently. The plaintiff is not entitled to any commission in the matter, and judgment will be given for the defendant, with costs.

Kotzé, J., concurred.

[Plaintiff's Attorneys: Herold and Gie; Defendant's Attorney: G. Trollip.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZÉ.]

MCKENZIE AND CO. v. THE "HYDASPES." — 1903, June 23rd, " 24th, " 29th

Coal—Discharge—Custom of the port—Negligence.

The plaintiffs sued the defendant in respect of damage by breakage done to a certain cargo of house coal occasioned by its having been negligently delivered into lighters by means of shoots and not in bags according to the alleged custom of the port.

Held, *that as neither the custom of the port nor injury to the coal done by the mode of discharge had been sufficiently proved, and as discharge of coal by shoots was no evidence of negligence; judgment must be given for the defendant with costs.*

This was an action for £250 damages, alleged to have been sustained through the improper delivery of a cargo of house coal consigned to the plaintiffs.

The declaration set forth that by order of this Court there was an attachment of the S.S. Hydaspes granted, but it was not put into execution, as security was given. On or about the 24th October, 1902, the plaintiff company entered into a contract with the defendant, by which a certain cargo of

house coal was to be conveyed from the Port of Glasgow to the Port of Cape Town, according to a bill of lading. The coal, then in a fit and proper and merchantable condition, was received and brought in the steamship to Cape Town. The defendant undertook to deliver the coal in like good order and merchantable condition from the ship's tackle. The customary, usual, and proper manner of delivering house coal was in bags, but, contrary to the customary, usual and proper manner, the defendant did not deliver the said coal in such like condition, but, through his servants and agents, by having it shot or thrown down from the ship's side, the coal was greatly broken in pieces and damaged: large quantities of it becoming practically useless and unmerchantable. The defandant was warned against this manner of delivering the coal, but persisted therein. The plaintiff claimed £500 damages and costs of suit.

The defendant's plea admitted the contract, and said that the coal was received on board the steamer in the usual manner by being tipped from coal trucks from a considerable height direct into the hold. He admitted the allegations as to the delivery of the coal in like good order and condition, but referred to the bill of lading, and said that the coal was in a diligent, lawful, and proper manner discharged from the ship into lighters lying alongside, the work being done by the Harbour Board, who were necessarily engaged according to the custom of the port. Defendant admitted that the coal was frequently delivered in bags at this port, but he denied that it was the only and proper mode of delivering house coal. He denied negligence, and specially denied any liability to the plaintiffs. The coal was discharged into the lighters from the ship in like good order and condition as that in which it was received, and was not more broken than it naturally would be, having regard to the condition of the coal when received, and the manner of unloading the ship. He denied that the plaintiffs had sustained any damage through his mode of delivery.

Sir H. Juta, K.C. (with him Mr. Buchanan) for plaintiffs. Mr. Schreiner, K.C. (with him Mr. Benjamin), for defendant.

Mr. Schreiner applied for leave to amend paragraph 8 of the plea by adding after "specially denies that he is liable." the words "under the bill of lading." and adding at the end of the paragraph, "or by any act or negligence whatsoever of the stevedores in the loading, towing, unloading, or delivery of the coal."

No objection was raised, and the plea was amended accordingly.

Sir H. Juta said that the issues raised were that plaintiffs said that the coal was received on board at the port of Glasgow in a proper and merchantable condition. The defendant did not admit that. Evidence was taken on commission in Glasgow, and would be read to the Court, but he would submit that it amounted to this—that the coal was loaded in the usual way in which coal was loaded at Glasgow, that the vessel arrived here, and that the captain or his agents appointed the Harbour Board as his stevedores. The plea said that the Harbour Board was "necessarily engaged according to the custom of the port to effect such discharge." The evidence would be that in stevedoring the ship could employ any stevedores that it pleased.

Mr. Schreiner: That is so.

Sir H. Juta said that that was an error. The vessel arrived here, and the captain engaged the Harbour Board as stevedores. The discharge began in this way. The ship was a very big one, and she had some coal for the Railway Department. This coal was discharged in bags into trucks on the quay. On the other side of the ship were lighters in the water, and the ship brought the coal out from the hold, and then had a chute from the deck projecting out, from whence it was shot for a distance of 30 feet or more into the lighters. As the lighter was filled in one place, it was moved about, so that the coal was continually dropping into it. That was the mode of discharge from the ship that was complained of. The result was that a large part of the cargo could not be sold as house coal, and had to be sold as dross. Half of the cargo was in a fit and merchantable condition, and realised the full price. Instead of the amount set down in the declaration, the damages should be set down at £250. On 50 per cent. of the coal the price realised was 30s. to 32s. 6d. per ton, instead of

52s. 6d., which was the market price for house coal.

Hermanus Johannes Niehouse, manager of the sales department of the plaintiff's firm, stated that he had been two years with the firm, and during that time they had imported large quanties of coal from Glasgow. Up to the present they had never received any coal in the same condition as the coal in question. Witness went down to the Docks to see about the coal from the Hydaspes early in December. There were about forty tons in the lighter. He found the coal being lifted up in a basket, which was swung round to an iron chute and dropped down about 30 feet into the lighter below. The lighter was shifted along in order to get filled. They were discharging coal in bags on he other side of the ship. For the purposes of sale, house coal should be in lumps, and when it got broken up, it was useless for the purposes of sale. The usual way of discharging house coal was to fill the bags in the hold, and lower them on to the quay side. He had never seen house coal shot down into lighters. Witness saw the coal when it was in the basket, and it was then in a good condition. If the coal had been in a bad condition, the matter would have been reported, He did not see the captain on board, and he immediately reported the matter to his employers. When the coal was delivered at the store it was very fine, and they had to screen it. Out of the 500 tons they got about 250 tons of good stuff, which they sold at 52s. 6d. The rest was disposed of for 30s. and 32s. 6d. The plaintiffs lost £1 a ton on all the fine stuff. The coal was brought to the stores in bags. They had never received any coal in such a broken, damaged condition as that of the Hydaspes. He watched the coal dropping from the chute and becoming smashed up as it rebounded off the lighter's side.

Cross-examined by Mr. Schreiner: He would not be surprised to know that the chute was thirteen feet long. He would swear that the drop was more than twenty feet. He had never seen coal shot into lighters. He could not remember complaining to Mr. Seddon that the wind was blowing the dust of the coal about. He was on his oath, and he could not repeat what he said to Mr. Seddon. He might have complained of the dust blowing about. He had no knowledge that McKenzies had previously used chutes to discharge coal. Roughly speaking, he had sold from 250 to 300 tons of the best coal, and from 250 to 280 tons of the other. Fifteen tons were sold to Bordsiens, which was not a branch of McKenzies, at 47s. 6d., but that was unscreened coal. He could not say what the coal cost them freight paid at Cape Town. He could not say that Cheese was a branch firm of McKenzies. The plaintiff firm had no interest in the firm of Cheese, to whom the coal was sold at 41s. a ton. Fifty-six tons were sent to Cheese direct from the Docks. That would make 420 tons that were delivered to the plaintiff's firm. He could only explain the statement that he had disposed of from 250 to 300 tons of one class and from 250 to 280 of the other class by the probability that the Harbour Board scales were incorrect. He must have got more from the ship, as it very often happened that they got from thirty to forty tons over from the ship. The coal was not by any means in the same condition in the lighter as it was in the basket.

Re-examined by Sir Henry Juta: Five hundred English tons equalled 560 Colonial tons.

Wm. Beattie, a director of McKenzie and Co., Ltd., said that he had many years' experience of shipping coal. Their agents in Glasgow often shipped the same class of coal as that of the Hydaspes. He had 22 years' experience of delivering coal at the Docks. He had never seen house coal shot down into lighters. When witness saw it in the stores it was more like dross than house coal. In consequence of a report by Mr. Niehouse, witness went down to the Docks. There would have been a drop of twenty feet from the chute into the lighter. The coal was in a good condition in the basket. Had he seen it in the basket in the condition it arrived at the store he would have had a survey. Witness complained to the captain that the coal was being destroyed, and the captain rather agreed with him. The captain had said that Mitchell Cotts and Co. were the agents, and that he had nothing to do with the stevedores, who were put there by the agents. Witness reported the matter to Mr. Sexton, who went to see Mitchell Cotts and Co. The captain admitted that the coal was being handled improperly.

Cross-examined by Mr. Schreiner: The captain told him he would go up to Mitchell Cotts and Co. about the matter. He believed he told Mr. Sexton that the captain had said that the coal was not being properly treated. He never saw house coal discharged by chutes in the docks or in the bay while McKenzies were in the docks. He had seen steam coal so discharged. The only purpose for which McKenzies used chutes was for coaling ships' bunkers. Witness could not say what was the present custom of the port in this respect for the past two years. He certainly maintained that the coal was broken by the fall into the lighter. There was a great difference between the coal in the baskets and that in the lighter. There were other means by which the coal could have been discharged. The coal could have been landed on the quay and stacked in bags. Witness did not object to the coal being lightered, but it was the manner in which it was done which he took exception to. Had the coal been lowered into the lighter in bags or baskets it would have been all right. He had heard no complaints of the method of discharging by bags in use in McKenzies' time. McKenzies sold coal by Colonial tons.

Re-examined by Sir H. Juta: Up to two years ago witness, with Mr. Dent, was in joint charge of the stevedoring at the Docks.

By Maasdorp, J.: There would, in the ordinary way, have been about 10 per cent. of fine coal in the cargo.

By Kotzé, J.: McKenzies used in their time to supply the bags for discharging.

William Keegan, member of the firm of Wilson, Son and Co., of Cape Town, said he had had a considerable experience in regard to the importation of coal. Witness saw the coal of the Hydaspes in the store. He knew the class of coal; it was a good house coal. Witness had never known house coal to be discharged by chutes. It was not the custom of the port to discharge house coal by chutes. Witness was not aware that the Harbour Board did so. He had seen the Harbour Board discharging house coal in bags. Witness saw this coal on the 9th January. He found it exceptionally small. Witness had never seen coal in anything like the condition. His firm was constantly having coal from Glasgow. The usual percentage of dross was about 12½. Witness saw two heaps of this coal. In the one there was about 30 to 35 per cent. of lump; in the other—the larger—about 40 per cent. There were no big lumps. People would not buy this small coal. The ruling price in November was about 52s. 6d.; the bad stuff was worth about 30s.

Mr. Schreiner asked to have the other witness recalled, so that he might be examined as regards the inspection of the coal mentioned by Mr. Keegan.

Hermanus Johannes Niehouse, recalled, stated that the screening was commenced on the 18th December, and was finished on the 11th February.

Cross-examined by Mr. Schreiner: Witness did not identify the coal as that of the Hydaspes to Mr. Keegan, but there was no other coal in the store. He could not account for the coal being classed in two different heaps when Mr. Keegan saw it.

Re-examined by Sir H. Juta: When the coal was screened the dross was put to the one side. What Mr. Keegan saw was not dross that had come from the Hydaspes mixed with the house coal.

The witness Keegan was recalled, and under cross-examination by Mr. Schreiner, he stated it was only when they dug into the heaps that they found lumps of coal. To all outside appearances it was dross. He did not know that coal was discharged with chutes. He found the coal in heaps in Hyland's stores, and he was aware that it had been sent up in bags.

Re-examined by Sir H. Juta: He was quite clear that the coal he saw was house coal.

Frank Bishop, broker, said that for many years he was Dock Superintendent for the Union Company up till the amalgamation with the Castle S.S. Co. It was only in cases of emergency that they used chutes to discharge coal. In the ordinary course of business they would object to that mode of discharge. He had never known of house coal being discharged by chutes. The ordinary way of discharging house coal was to pack it in bags and lift it from the hold.

Cross-examined by Mr. Schreiner: At present he was a broker, and had nothing to do with the discharge of coal. He ceased to have anything to do with coal before McKenzie's work was taken over by the Harbour Board. He was not

aware that McKenzie's had chutes; in fact, they borrowed chutes from the Union Company. Even steam coal was not usually discharged by chutes. Within recent years chutes were only used under special circumstances. Generally speaking, the bags were emptied into the lighters. If the bags were dropped down a chute there would not be the same breakage as if loose coal was shot down. There was more breakage through using chutes than trucks. Ten or twelve per cent. was a fair average of the amount of coal broken through discharging by bags, and about double that amount would meet the loss through chutes. Trimming was not usually carried out on lighters.

Re-examined by Sir H. Juta: Since the war pressure lightering had been on the increase, and for some fifteen years lighters had been used in discharge.

William Dent, coaling superintendent for the Union-Castle Co., stated that steam coal was never discharged through chutes except when it was impossible to discharge by bags. He had never known of house coal being discharged by chutes; he considered it an improper way.

Cross-examined by Mr. Schreiner: McKenzies had got chutes about the time of the war, but these were used in coaling ships. All coal put into the bunkers was shot down through chutes, either on deck or at the ship's side.

Re-examined by Sir H. Juta: He had twenty years' practical experience of discharging coal in Table Bay.

Warren Bradford Sexton, one of the managers of Messrs. McKenzies, stated that he had experience of the Docks. His firm imported house coal. He had never seen house coal discharged except in bags. On a report from Mr. Niehouse, he went to Mitchell Cotts and Co. He told a gentleman there, whom he now believed was Mr. Cotts, that the coal was being discharged by chute from the Hydaspes. He was told that the matter would be seen to. The mode of discharge was not, however, altered, and he again called on Mitchell Cotts and Co. When the coal was delivered into the stores there was a very large percentage of fine dust in it.

Cross-examined by Mr. Schreiner: He had received a letter from Captain Lee, of the Harbour Board, stating that no trucks were available for the discharge of the coal. He never saw the coal in the lighters; he did not see it until it was brought into the stores, when its condition was bad. Most of the coal for his firm came by the Clan Line steamers. Mr. Cotts promised he would remedy the matter when witness spoke to him about the chutes being used. He did not know Mr. Cotts was now out of the country.

Re-examined by Sir H. Juta: He thought that the Clan steamers were generally speaking as large, and as high out of the water as the Hydaspes. His firm had received coal by several of the Clan boats without the coal being inordinately damaged.

By, Kotzé, J.: Mr. Cotts certainly gave him the impression that he would have the matter of the chute remedied, although he could not remember the exact words.

Sir. H. Juta closed his case.

Mr. Schreiner called for the defence

Captain Sampson, marine superintendent of the Houston line of steamers, who said that he arrived in Cape Town on the 8th December, and the next day the plaintiffs objected to the mode of discharge from the Hydaspes. The Hydaspes was also discharging railway coal. When the vessel arrived she was from twenty to twenty-one feet out of the water. As she discharged she took in ballast, so that she never rose much out of the water. The lighter was drawing about two feet of water. Witness continuously watched the discharge of the coal. The chute and the basket were provided by the Harbour Board. The chute would be about thirteen feet long, and there would be about ten to twelve feet of a drop. After the complaint was brought to his notice he paid special attention to the coal coming up in the basket, and it struck him as being a rather small coal. There was no material difference when the coal dropped into the lighter. Witness would call it small house coal. Discharging by bags was peculiarly a Cape Town practice. Unloading by trucks was a most wasteful way of dealing with coal. A dozen of bags dropping to the lighter would undoubtedly cause more breakage than slipping the loose coal through the chute. Invariably in practice where bags were used the bags were emptied into the lighter. Once it went into the lighter the Harbour Board were the agents of the consignee. He preferred the method of discharging by chute, and in other

parts of the world it was the only method he had seen. Witness never heard of any different ways of landing house and steam coal. The Harbour Board would not allow any coal to be stacked on the quay. They had no other alternative than to lighter the coal. Witness's experience was that chutes were used here when coal was lightered.

By Kotzé, J.: All the dross left in the ship's hold would be delivered to the consignees.

Cross-examined by Sir H. Juta: He had been connected with Table Bay since September last, and during that time he had dealt with about twenty coal carriers. The Hydaspes was the only ship carrying private coal that he had dealt with. The other ships had carried coal for the Railway Department, and, although the chute system was such a desirable one, they could not use it into the trucks, as there would be no trucks left.

When he arrived on the 8th December the discharging had not commenced. In consultation with the Harbour Board, it was decided to discharge the coal by chute. Witness could not be certain whether the suggestion of the chute came from him. He was anxious to release the ship, and the chute would slightly expedite matters. Mr. Cotts must have known the case was coming on when he left the Colony. The complaint was made on the 9th December, and witness consulted with the stevedore and the captain. They decided that the plaintiffs had no just cause for complaint. Witness took particular notice after the complaint, and he considered his notice more thorough than that of anyone else. He did not go down to the hold, nor did he go on board the lighter. About the time he got the letter of complaint he brought it to the notice of the stevedores. The reply stating the coal was being discharged in the usual way was the result of information obtained from people working at the Docks. Witness would call a good deal of the coal in the basket dross, and he would have called the consigness to look on at the discharge, but that he considered the complaint frivolous, in face of the fact that the coal had been dropped into a hold of thirty or thirty-five feet.

[Kotzé, J.: According to your theory, it would be difficult to obtain good house coal in Cape Town.]

Continuing, witness said that steam coal would depreciate in value when broken either through bags or a chute. The discharge by bags by the Union-Castle Co. witness would consider a stupid policy. Witness added: It is an antiquated method that has continued here from the days of sailing ships.

Sir H. Juta: It is a stupid method?

Witness: Yes, I think so, and I believe men from other parts of the world think so too.

Re-examined by Mr. Schreiner: It was impossible to discharge the coal on the quay, and they had to use a lighter. Personally, witness did not see Mr. McKenzie's objections. It was never suggested that any remedy would be put into force. Steam coal depreciated more in value when broken than house coal.

By Maasdorp, J.: If he had thought the discharge obviously wrong, he would at once have stopped it, and substituted other methods. As marine superintendent for the company he had full control of steamers. The chute was the general method of discharge. He had seen bags used elsewhere. The captain was present during the operation, and he had the same opinion as witness with regard to this being the proper method of discharge.

Richard George Jackson, partner in the firm of Wilson, Jackson and Co., stevedores and contractors, Cape Town, stated that he had nothing to do with the case, and as a rule chutes were used on outside berths for discharge into lighters, and also with vessels lying in the bay. The discharge by chutes would entail about the same breakage as that by bags. The discharge by chutes was more expeditious.

[Kotze, J.: You are speaking from a stevedore's point of view.]

Cross-examined by Sir H. Juta: He could not name any ships that discharged house coal by chutes. He had never seen house coal discharged into lighters; it had always been on to the quay. It was the quickest way to discharge through chutes. He would never use bags; he would use baskets, which would save him sixpence a ton on the bags. It was the quickest and the cheapest method.

Captain Attrey, master of the Courtfield, which was at present discharging coal at the Docks, said that he had been thirty years at sea, and had discharged

coal in every part of the world. The chute was the general custom except in some coast ports, where you had to discharge into small lighters. The mode of discharge by bags was unusual in his experience. He had only come across that system on the Indian coast, where the coal had to be taken into small lighters in bags through the surf. He could not say that there was any difference between bags and chutes in the way coal was landed in this port; in fact, he thought the way it was done by bags at this port would cause more breakage than by the chute. He was now discharging his boat on to the quay. As to house coal, he had carried a few loads in the Mediterranean.

Cross-examined by Sir H. Juta: The Docks here were similar to others. He had said he could not use chutes in these docks. It was a matter of the height of the dock walls. He had never discharged coal in a dock.

Sir H. Juta: So that your great experience of discharging is not discharging into docks at all?

Further cross-examined, witness said the dock walls here were very high—higher than in the Mediterranean. He should have to use a stage if he discharged by chute here. He had not previously brought a cargo of coal to this port. The last cargo of coal he had was seven years ago, when he took the cargo to a desert. He had discharged five cargoes of coal into lighters by chute in Venice. He had only had two cargoes of house coal that he had carried. He had not had any house coal discharged by bags, though he had discharged steam coal by that method.

By Maasdorp, J.: In his observation the common method was to discharge by chute.

Captain Bennett, of the St. Quintin, which was at present in the Docks with a general cargo, stated he had been twenty-two years at sea, and had been master for five years. He had discharged coal all over the world, and the coal was always discharged through chutes. He would use a chute if he had drop enough on to the quay side. A couple of months ago he discharged a cargo of house coal at Boston, where shore derricks were erected and the coal dropped through graded chutes of forty or fifty feet high into trucks below. If no berth was vacant, the same method would be applied for discharge into the lighters.

Cross-examined by Sir H. Juta: As to carrying out by chutes where there was not enough drop, he had seen stages rigged up on the ship. He did not think it would be possible to fix up a similar method at this port. What he meant by the "graded chutes" at Boston was that the coal came through bends, and did not go down at one rush, a depth of about 40 or 50 feet. He had heard no complaints about the coal as it came out of the chute.

Sir H. Juta: I suppose you saw the coal as it came out?

Witness: Well, when there is coal about you generally get out of the way as much as possible.

Sir H. Juta: Perhaps you did not stay long enough at Boston to hear any complaints?

Witness: Well, I stayed there as long as the ship did.

Sir H. Juta: Yes, but as long as you and the ship remained there you received no complaints about the coal being broken?

Witness: No.

Sir H. Juta: Just one more question. Have you ever brought a cargo of coal to this port before?

Witness: No, and I hope I never will again, the way they are working it.

Re-examined by Mr. Schreiner: The last drop through the graded chute would be eight or nine feet.

By Kotzé, J.: The reason he said he hoped he would never bring a cargo of coal to this port again was on account of the very wasteful way the discharge was carried out. The bags always seemed to bump up against the ship's side; the bags became torn, and a lot of coal went overboard. They never seemed to have the correct drop.

Wm. Peter Seddon, shipping clerk, in the employ of Houston and Co., said that he had been formerly with Mitchell Cotts and Co., when they had the contract. He had had seven years shipping experience. The transference of the agency was no reflection on Mitchell Cotts and Co., as Houstons had opened their own agency. The Harbour Board would only allow discharge by bags on to the quay. McKenzies' coal was completely discharged by the 12th December. He first heard of the complaint on the morn-

ing of the 9th December. Witness had called at plaintiff's office about the discharge when Mr. Niehouse first made the complaint that a great deal of it was being wasted by the dust being blown away. There was no mention of breakage. The following morning Mr. Sexton called to see Mr. Cotts, and witness was present at the interview. Mr. Sexton complained that the coal was being damaged by being shot down into the lighter. Mr. Cotts made no promise to rectify the matter, and it was arranged that the captain should meet Mr. Beattie on board. He was unaware of any other interview. The firm attitude was taken up that the method of discharge was quite in order. He had not much practical knowledge, but he would say that there would be quite as much breakage with bags as with chutes. After the complaint he was frequently on board the Hydaspes. The stevedores appeared to be doing their work properly. The coal in the lighter was not visibly smaller than that in the basket.

Cross-examined by Sir H. Juta: Personally, he dealt with about fifty cargoes, including several of house coal. During his experience he could not say that house coal was discharged through chutes. There was no definite system at this port. They could not discharge by chutes at the knuckle berth on account of the height of the quay. Mr. Sexton may have complained that the chutes were not the ordinary method of discharge. It was merely as a matter of etiquette that the captain should meet Mr. Beattie.

By Kotzé, J.: They might just as well have given Mr. Beattie a letter to the officer.

Further cross-examined, witness said that it was not for the purpose of looking into the matter that Mr. Cotts suggested that Mr. Beattie should go down on board wih the captain.

Theodore Seymour, a coloured stevedore, said he was working as a contractor under the Harbour Board. He discharged the coal from the Hydaspes. He first took the coal out in baskets, which were raised to the yardarm, and then put into the chute. Witness had often discharged into the lighter from a ship by chute. He had done this while employed by McKenzie. He had discharged house coal by lighter, but had not used chutes for this. When house coal had to be discharged, the people interested supplied sufficient bags to fill the lighter. Witness had known stevedores to use chutes in connection with house coal.

By Sir H. Juta: Witness first started to discharge by basket direct into the lighter, but finding this did not work well, he used the chute. Witness's instructions were to discharge by basket and chute.

By the Court: Witness was paid by the ton; so that the more quickly he discharged the sooner he got his money.

Thomas Hogan, stevedore, said he had had to do with the discharge of house coal by chute. He had so discharged the "J. G. Pendleton" in November, 1901, using the same chutes as the Harbour Board now used. There was another instance witness remembered where discharge was made by chutes. This was the "H.B.I."

By Sir H. Juta: These were the only two cases in which witness had discharged house coal. The cargoes of the two ships he had named were heated. One bound for San Francisco had to discharge part of her cargo here on account of it being heated. There was, however, no need to discharge these two ships hurriedly, and the men did not work overtime.

Harry Densford Stacey, a foreman on the C.G.R., stated that since last November he had been receiving coal at the Harbour Board weigh-bridge on behalf of the Railway Department. He had observed the methods of discharge. The only other way in which the Hydaspes could be discharged was into trucks, if they were available; the coal could not have been stacked on the quay. In McKenzie's time he had seen coal discharged by bags, but as the ship rose, and the necessary height was obtained, chutes were used. Coal could not possibly be discharged by bags without considerable breakage.

Thomas Webb, dook superintendent in the employ of Mitchell Cotts and Co., said he had been employed formerly by McKenzies. Coal was generally discharged into lighters by chutes by McKenzies. This was the case in regard to house and steam coal. Baskets were only occasionally used. Witness was employed by McKenzies for fourteen months. Witness considered the coal was more knocked about when the bags were used to convey the coal to the lighter than when a chute was used.

Cross-examined by Sir H. Juta: He could not remember specifically cases in which house coal had been discharged by chute. He made a daily report to McKenzies, in which he stated that certain lighters had been sent to certain ships These reports he could not lay hands upon. If Attwell and Co. would state that none of their coal was discharged by chutes except in the case of heated coal he would not contradict them, as he was speaking from memory.

Re-examined by Mr. Schreiner: On his oath he was certain that house coal had been discharged by chutes.

Further cross-examined by Sir H. Juta: If Anderson and Co. would say that during thirty-seven years they never had house coal discharged through chutes he would be very much inclined to contradict them.

By Mr. Justice Maasdorp: He made no difference between house coal and steam coal, and there was never any objection raised to his method of discharge.

Wm. Keery, assistant coaling officer to the Table Bay Harbour Board, stated that he was on board the Hydaspes when she was discharging McKenzie's coal. The chute was being worked in the usual way. Previously he had had seven years' experience with the plaintiff firm, and since May, 1901, he had seen that firm discharge house and steam coal in the Bay. The plaintiffs had a special chute for that. To his knowledge, coal was also discharged through chutes into lighters when a vessel had an outside berth. The usual thing was that house coal was discharged in bags on to the quay. It was only when the consignee made special request that bags were used in the lighter. When the stevedoring was taken over by the Harbour Board, McKenzies were only allowed to finish certain cargoes. The Cadogan, which was discharged by McKenzies, had a cargo of house coal, but witness could not say if chutes were used

Cross-examined by Sir H. Juta: If ships had an outer berth the coal would be lightered. He had never seen chutes used in the dock. The stevedores started with baskets, but Mr. Small was instructed to use chutes. Witness could not give a single case of house coal being lightered by chutes.

Re-examined by Mr. Schreiner: He was quite certain that chutes had been used irrespective of the class of coal.

Mr. Schreiner closed his case.

Sir H. Juta, K.C. (for plaintiff): My first point is: was this coal received in good condition in Glasgow? House coal has been loaded there for years in the way in which this cargo was loaded. If the coal was so badly loaded in Glasgow would any firm like Wilkinson, Son and Co. continue to deal with the consignors? No coal has ever been before received here in such a condition.

[Kotzé, J.: To what do you attribute that?]

To the shoot. But that is the ordinary way in which coal is delivered, and yet there have been no complaints for years. Keegan says that the coal arrived in bad condition. There is no evidence as to any damage having been done to the coal during the voyage by rough weather, shifting of cargo, etc. The coal when loaded was good coal, and nothing happened on the voyage to make the coal small. There is a conflict of evidence, and if the consignees had anything to complain of they should have called in a surveyor. The defendants only say that they were discharging in accordance with the custom of the port. They do not show that the coal was bad when it arrived, and the only thing that could have injured it was the shoot. The rule is that discharge must be in accordance with the custom of the port. See *Carver on Carriage by Sea* (p. 459).

[Maasdorp, J.: The question is whether the coal has been injured by a discharge not in accordance with the custom of the port.]

Quite so, and I will first take the point as to the custom, and then the point your Lordship raises. As to the first point, no witnesses were called to prove the custom of the port. No witness could give a single instance of house coal being discharged by shoot, save under pressing and extraordinary circumstances. Carey denied that house coal was ever discharged by shoot, and that is the evidence of independent witnesses.

[Kotzé, J.: Is it necessarily negligence not to discharge according to the custom of the port?]

I am coming to the question of negligence. There are many cargoes in respect of which there must be a certain amount of wear and tear. Apart from that, the defendants are bound to deliver goods in the condition in which

they received them. It lies upon the defendants to show that something, not covered by a bill of lading, has happened to prevent them from doing this. If a ship discharges in an unusual manner the onus of showing she was not guilty of negligence is thrown upon her. Sampson gave evidence as to the custom of other ports, but that has nothing to do with us. The ship tries to shelter herself behind the stevedore, but they do not prove negligence on the part of the stevedore. My chief point is to show that they did not deliver the coal in the same order and condition in which they received it. If the defendants wish to shelter themselves under the exception of negligence (see *Kay on Shipmasters and Seamen*, p. 367), the onus lies on the defendants to show that they fall under this exception in the bill of lading. Their case is that the coal was delivered in bad condition by reason of the neglect, act, or default of the stevedore, but on this point see *Scrutton on Charter Parties* (p. 110) and *Carver on Carriage by Sea* (sec. 16). It would be most absurd if an owner professed his inability to control the acts of his stevedore or could shelter himself under such acts.

Mr. Sohreiner, K.C. (for defendant): The usual mode of delivering household coal at this port is by bags. In this case it was not so delivered, and, therefore, the onus rests upon the plaintiffs to prove the custom of the port. The contract embodied in the bill of lading says "weight and quality unknown, captain not liable for breakage or for negligence." It might well be that the stevedore was to be liable for negligence, but here the evidence does not show that either we, the Harbour Board, or the stevedore were guilty of any negligence. Shipowners constantly contract themselves out of liabilities of various kinds, and there they contracted themselves out of liability for damage by breakage. It has been argued for the plaintiff that we must fail in this action unless we could prove the negligence of the stevedore; but we have nothing to do with that. We are responsible only till the cargo has left the ship's side. I do not, however, wish to base my defence on this point, but on the fact that we have covenanted ourselves out of liability in respect of "breakage." No doubt the coal has been broken, and the plaintiffs say that that was done by our default; but shipowners are not liable for the acts of stevedores. See *Masterman* v. *Bailey* (72 L.T., 677), *Baerselman* v. *Barr* (87 L.T., 656).

[Kotzé, J.: What were the terms of your bill of lading as to the stevedore?]

The stevedore was not mentioned specifically, and no doubt it may at first sight appear unreasonable that a carrier should be able to contract himself out of liability for the consequences of his own negligence: but see *Carver* (p. 101). As to our own law see Act 8 of 1879, sec. 1. In this case, however, the facts in evidence do not disclose any negligence. An attempt was made to discharge the coal by means of baskets, but that plan did not work. It was found necessary to lighter the vessel, and, in order to do so, shoots had to be used. Surely a consignee cannot come to the shipmaster and complain of the way in which the stevedore is doing his work. The special clause in our bill of lading (as to stevedores) was intended to obviate anything of that kind.

Maasdorp, J.: The plaintiffs allege in their declaration that the defendant received on board the steamship "Hydaspes" at Glasgow certain house coal in a fit, proper, and merchantable state, which he undertook by bill of lading to convey to Cape Town, and there deliver to them in the like apparent good order and condition. They say it was the duty of the defendant to deliver the coal in the like apparent good order and condition in which he had received it, and to deliver it in the usual and customary way of delivery by means of bags, but that, in breach of his duty, and contrary to the customary and usual manner, he, through his servants and agents handled the coal carelessly and negligently, and delivered it by having it shot and thrown down from the ship's side, so that the coal was broken and damaged, and large quantities of it became practically useless and unmerchantable; that the defendant persisted in his negligence, notwithstanding being warned by the plaintiffs; and that they have sustained damage in the sum of £500, which they now claim. The defendant states in his plea that at Glasgow the coal was delivered by means of railway trucks, out of which it was tipped from a considerable height into the ship's hold; he does not admit that the coal

when received by him was in the condition described by the plaintiffs, but says the quality and condition were according to the bill of lading unknown; that it was agreed that the coal should be discharged from the ship as soon as she should be ready to unload into hired lighters, if necessary, and that the coal was delivered in a diligent and proper manner lawfully by means of shoots into lighters. The defendant denies that delivery by means of bags is the customary and proper manner of delivering house coal, and also denies that his servants were guilty of negligence. The plea further alleges that the coal was delivered in the like good order and condition in which it was received, with such breakage as takes place in due course of discharge, and denies that the defendant is liable under the bill of lading for damage sustained through the breakage of coal in the course of delivery, or for any neglect of the stevedores in unloading the coal. Under the bill of lading in this case, the defendant could discharge the goods into hired lighters, if necessary, and the fact that he did so is not a ground of complaint on the part of the plaintiffs. It is therefore unnecessary to go into the circumstances which rendered the discharge into lighters a proper proceeding on the part of the defendant. It is only the manner in which the coal was put out of the ship into the lighters which is called in question. The plaintiffs contend that, in accordance with a custom established at the port of Cape Town, house coal, when put into lighters at the ship's side, whether in the Bay or in Docks, should be discharged by means of bags. That process consists of filling the bags with coal in the ship's hold, hoisting the bags, swinging them over the ship's side, and then letting them down into the lighters. In the lighters the coal is either emptied out of the bags and carried in bulk, or the full bags are placed in the lighters, and taken to the quay. It is said that this manner of delivering house coal has become the established custom of the port, and a point is made of it that, by custom, house coal is handled differently from steam coal. The plaintiffs have sought to prove that, although it is a very common practice in the case of steam coal to discharge by means of shoots into lighters, whenever house coal is discharged, that mode of discharge is never adopted, except under circumstances of great stress and emergency. It is necessary for the Court to determine whether the practice of delivering house coal by means of bags has been so general and constant as to have grown into an established custom, and if it is consequently to be taken as a condition binding on the parties under their contract. The custom is not mentioned in the bill of lading, but it has been held that the absence of reference to the custom of the port is of no great importance, because it is obvious that the contract is always made with regard to the custom of the port of discharge, and that it is contemplated that the discharge must take place in accordance with what is the usual way of performing the operation. It is necessary to determine the question of custom in this case, although it does not follow that the decision on that point will dispose of the rights and liabilities of the parties. It appears that the firm of McKenzie and Co., which was afterwards floated into the plaintiff company, was largely employed in the discharge of coal of all kinds for a long course of years, and I should have thought the plaintiffs would have experienced little difficulty in obtaining evidence in support of the alleged custom from the many servants whom they have had in their employment, if such custom existed. Several of the stevedores who used to work for them are still engaged at the Docks, but none of them have been called for the plaintiffs as witnesses in this case. Instead of that three witnesses, engaged mainly in the office work of the plaintiffs, were called, two of whom, Mr. Niehouse and Mr. Sexton, admitted that they had little to do with the practical work of discharging coal. Mr. Beattie, the other employee, a director of the plaintiff company, says he has had 22 years acquaintance with the discharge of coal, and he has never seen house coal discharged by chute at this port. Mr. Regan, of the firm of Wilson, Son, and Company, says he has never known house coal to be discharged by chute, and he adds "I know the custom of the port, it is not the custom even now to discharge house coal by chute." Bishop and Dent, who were Dock superintendent and coaling superintendent to the Union-Castle Company, say it was not the custom to discharge house coal by means of chutes, and that it was only

done in case of emergency, and when they could not help themselves. This is the substance of the evidence for the plaintiffs on this point. And in my opinion there is an absence of general and varied experience in this evidence, especially if it is taken that the two last witnesses speak of their observations chiefly in the business of their own company. Some of the witnesses called for the defence say that house coal was commonly discharged in bags, but at times chutes were used, others say they used chutes irrespective of whether they were engaged in discharging house coal or steam coal. It seems to me that it is not very difficult to explain the conflict of evidence in this case. On the whole, the evidence for the plaintiffs amounts to this that coal was commonly discharged in bags, except in cases of emergency and when they could not help themselves and possibly these cases of emergency may have occurred so frequently that in the opinion of others they constituted a serious obstacle to the establishment of the custom contended for. What was regarded as an exception by some was looked upon as a common occurrence by others. I think Mr. Seddon was right in saying that with respect to the discharge of house coal there was no defined custom. It must also be borne in mind that until lately house coal was more commonly discharged at the wharf, where chutes cannot be used, and where discharging must therefore take place by means of bags. I think this circumstance must have influenced the plaintiff's witnesses when they spoke of the constant use of bags. Lighters have come into more frequent use lately, and with the more frequent use of lighters the practice of discharging by means of chutes has increased within the last few years. The onus of proving that it is a custom of the port that house coal should be discharged by means of bags only was on the plaintiffs, and in my opinion they have failed to prove such a custom. It is of course always open to the parties to a bill of lading to make the mode of discharging coal one of the stipulations of the contract if they desire to do so. Proof of custom having failed, the defendant was at liberty to use chutes in discharging house coal, if that is a proper mode of discharge. Even if the custom were proved, the plaintiffs must have failed if they did not trace the damage done to the coal to the deviation from the custom. I am quite satisfied upon the evidence that the use of chutes for the discharge of house coal, as well as other coal, is a common practice in all parts of the world, and that there is no objection to it as a mode of discharge. As to the comparative merits of the two systems in question there seems to me to exist such an honest divergence of opinion that possibly there is really nothing to choose between them, provided they are properly employed. It is quite clear that coal is not gently handled anywhere, and that those who deal in it make their calculations accordingly. Rapid loading and unloading is expected and desired by all parties, and the consequent rough handling is contemplated when people deal in coal. But it is quite true that there must be a limit to this. If undue breakage of coal occurs through negligence the person injured is entitled to redress. Here again we come face to face with a conflict of evidence, but on the whole there is no proof that the chutes of the "Hydaspes" were used in a negligent manner, nor is it satisfactorily proved that more breakage occurred during the process than must generally be allowed for in such cases. Witnesses for the defence say that the coal when it came out of the hold was fine and small, and Captain Sampson, who superintended the discharging, says he took special notice after complaints were made, and he could see no material difference in the condition of the coal after it got into the lighters. Unfortunately the two witnesses who were called to survey the coal in the plaintiff's stores on behalf of the plaintiffs saw it for the first time a month after it was unloaded, and after a considerable portion of it had been screened and sold. Witnesses called in Glasgow say the coal was in a good condition in the wagons before it was tipped into the hold, but none of them speak as to its condition in the hold of the ship, and it must be confessed that the coal received very rough usage at Glasgow, where, when the hold is empty, a fall of nearly forty feet takes place. I think we must come to the conclusion upon the evidence that this shipment was not as good as the plaintiffs usually received from the same shippers, or as good as they expected, but I

am not satisfied that the condition of the coal when it reached the plaintiffs was due to the negligence of the defendant. Under the bill of lading, the defendant "is not liable for loss or damage occasioned by breakage." As pointed out by Mr. Justice Wills in the case of *Phillips* v. *Clark*, "if those words were not in the bill of lading the carrier would be liable for the delivery of the goods as they were delivered to him. When those words are introduced the meaning of the contract by the shipowner is, 'I shall take all care in the carrying of the goods, but I shall not ensure the delivery of them in the same condition, if the difference be caused by breakage.'" Notwithstanding those words, the defendant would still be liable if the loss was consequent upon his own negligence or that of his servants. In this case, however, the defendant further protected himself from liability for loss or damages occasioned by the stevedores in unloading. It might, therefore, be said that it was unnecessary to go into the question of negligence, for in any case the defendant was exempt from liability under the exception in the bill of lading. But if negligence had been proved another question would have arisen not free from doubt as a question of fact upon the evidence, and one upon which there is no direct authority. There is no doubt that Captain Sampson, who is marine superintendent of the Houston line of steamers, took a very active part in the discharging of the coal, and it would have become necessary to decide, in case negligence was proved, whether he was not responsible for the negligence, and in that case it would have been necessary further to decide whether the defendant was protected by the clause absolving him from liability for the negligence of the stevedores. The plaintiff having failed to prove negligence, it is not necessary now to decide upon the legal consequences of Captain Sampson's interference in the unloading. Upon the whole, the plaintiffs have not succeeded in showing that they have suffered damages for which the defendant is legally responsible, and judgment must be given for the defendant, with costs.

Kotzé, J., after reviewing the pleadings and evidence in the case, proceeded to say: When the "Hydaspes" got alongside the Knuckle berth at the South Arm in the Table Bay Docks, she was about 15 feet above the water line, and did not at any time while discharging rise to an additional 6 feet. The chute running from the ship's side to the lighter was about 13 feet in length, and at an angle of about 45 deg., and the lighter was drawing when empty about 2 feet of water. Consequently the drop of the coal from the end of the chute on to the bottom of the lighter would at the most have been about 14 feet, and would gradually have diminished, as the lighter got filled, to about 8 feet. This being so, it is difficult to come to the conclusion that the breakage caused by the use of the chute would be greater than that caused by the mode of loading at Glasgow, where the drop of the coal into the hold of the vessel was at least double that of the drop from the end of the chute into the lighter. Of course, regard being had to the breakable nature of coal, each separate handling thereof would cause additional smalls or waste, and it follows that, when, on discharging cargo, coal was first taken out of the hold and placed into lighters, and then afterwards removed again from the lighters for delivery in bags on the quay or wharf, it could not be expected to arrive at the plaintiff's stores in exactly the same condition as when it was put on board the defendant's ship. The moment the coal left the ship's side or tackle the responsibility of the shipowner ceased, and upon the evidence it seems to me that the probability is that the coal, when delivered into the lighters, was, allowing for necessary waste or smalls resulting from the handling of the coal in order to complete delivery, practically in the like good order and condition as when it reached and was stowed away in the tank or hold of the ship. The receiving of the coal by the master on behalf of the shipowner was not actually completed until the coal was put into the ship, and the shipowner is not responsible for the breakage caused by independent stowage of the coal, which was according to the custom of the port of loading, and beyond his control. There is also the fact that 250 of the 498 tons were disposed of by the plaintiffs as good house coal. The last of this consignment of coal reached the stores of the plaintiffs about the 15th December, 1902, but no independent examination thereof was held until the 9th January, 1903, although the summons was issued on the 22nd De-

cember. This delay has not been explained, and is not a satisfactory circumstance in the case. Upon the whole, therefore, I have come to the conclusion that the plaintiffs have failed to establish that the coal was not delivered over the ship's side in the like apparent good order and condition in which it was received, allowing for fair and reasonable breakage necessarily caused by the discharge of the coal, an allowance which the plaintiffs admit should be made in favour of the defendant. The plaintiffs contend further that, according to the custom of the port, the usual and proper mode of delivery is by placing the coal in bags, and not by means of a chute. Assuming that in a case like the present the shipowner would, as regards delivery, be bound by the custom of the port, in the sense of the settled and established practice of the port, then it has not, to my mind, been satisfactorily proved that at the port of Cape Town house coal has been and is always discharged from the ship by bags, and not by means of a chute. There is evidence to show that house coal has not merely been discharged by means of a chute under special circumstances, where expedition was necessary, as where, for instance, the coal had got heated or had taken fire on board, but also ordinarily where no special circumstances requiring despatch existed. Several witnesses state that the discharge of all kinds of coal by means of a chute is not only more expeditious, but also causes less, or at least not more, breakage than by delivering by means of bags. They also add that in other parts of the world where they have been, the use of a chute is the usual and general mode of discharging both house and steam coal. There can be no doubt that the use of a chute is more expeditious than the employment of bags, although I am slow to believe that there is less breakage by using chutes. But be this as it may, I am not prepared to say that the delivery of coal by means of a chute is contrary to the custom of the port, nor that a chute is not a proper means of discharging house coal. I think that with the exercise of due and proper care in the using thereof, the employment of a suitable shoot is a proper means of discharging house coal as well as steam coal. Both methods of discharging coal seem to have been adopted at the port of Cape Town, and when more than one suitable method exists, if the shipowner selects one of them, it cannot be said without more information that he has acted negligently or failed in his duty. There is, moreover, nothing to show that, while using the chute, the stevedore and his men were guilty of any negligence or want of due care in handling or dealing with the coal. The conclusion at which I have arrived renders it unnecessary to consider the exception in the bill of lading protecting the shipowner against liability for negligence of the stevedore. I agree that judgment should be for the defendant, with costs.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller; Defendant's Attorneys: Findlay and Tait.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

MULLER V. MULLER. { 1903. June 24th.

Mr. Wilkinson moved, as a matter of urgency, for an interdict restraining the General Estate and Orphan Chamber from paying over certain money to the respondent, against whom an application was pending by his wife for alimony to enable her to pursue her suit for divorce. If the money were paid out, it was feared that any order which the Court might make would be fruitless.

An interdict, restraining the company from parting with the money until a further order of Court was granted.

SUSVIELA V. GARDINER AND EASTON.

Mr. Benjamin moved for judgment for the plaintiff, the defendants being in default. The affidavit of service of notice of trial was put in. The action was for an account, calling upon the defendants to render an account of the fine received for certain cows and calves which they undertook to sell on behalf of the plaintiff at Johannesburg. They had rendered a partial account, showing a sale of a portion of

the cows and calves, and the plaintiff had called upon them to furnish a full account, showing the money received for the sale of the cattle.

Judgment was given in terms of the motion, the account to be rendered within a fortnight.

TABLE BAY HARBOUR BOARD v. MILLER. 1903. June 24th.

Negligence—Rule of the road—Collision — Ordinance 4 of 1846, Sec. 3—Act 27 of 1882, Sec. 7.

The plaintiff's waggon which was being driven along the proper side of the road, as provided by Ordinance 4 of 1846, Sec. 3, and Act 27 of 1882, Sec. 7, Subsec. (1), collided with the defendant's waggon, which was coming down the wrong side of the street.

Held, *that by not keeping to the proper side of the street defendant's servant had been guilty of negligence, and that judgment must be given for plaintiff, with costs.*

This was an action brought by the Table Bay Harbour Board against William Miller, a resident of Cape Town, to recover the sum of £36 6s., being £35, the value of a horse of the plaintiffs, which was killed through the negligence of the defendant's servant, and £1 6s. expenses for removing and burying the horse.

The declaration set forth that on the 6th February, a wagon drawn by two horses, the property of the defendant, was wrongfully, unlawfully, and negligently driven down Parliament-street, and as a result collided with a team, the property of the plaintiffs, and killed one of their horses.

The plea admitted the formal allegations, but set forth that on the 6th February, in Parliament-street, a wagon drawn by two horses, the property of the defendant, was being lawfully driven on the proper side when the wagon drawn by four horses, the property of the plaintiffs, was wrongfully and unlawfully driven on the wrong side of the street, and ran into the defendant's team, the pole of the wagon striking the horse on the chest. The defendant did not admit the value of the horse, or that the plaintiffs were entitled to recover any damages in connection with the matter.

Mr. Searle, K.C. (with him Mr. Bisset) for plaintiff; Mr. Buchanan (with him Mr. J. E. R. de Villiers) for defendant.

For the plaintiffs,

James John Dreyer, inspector of wagons under the Harbour Board, was called. He stated that he met the wagon in question opposite Claridge's Hotel. He was on horseback. Witness went down Plein-street, and the wagon went down Parliament-street. As he passed Lelie-street he looked towards Parliament-street, and saw one of the horses which were attached to the wagon rise up on its hind legs and then fall. He immediately spurred his horse through Lelie-street, and he saw the horse on the ground. There was a pool of blood by the wagon. The road was muddy, and he saw the track made by the wagon as it came along. The track ran straight down on the left-hand side, quite close to the wall. The other wagon was standing in front of the office of the Commissioner of Public Works. He saw the track of that wagon, too, and as far as he could see the wagon had come up the street at the wrong side. Witness valued the horse at £35. The pole had struck the animal right in the chest, and had penetrated the body for about one foot.

Cross-examined by Mr. Buchanan: He merely saw the horse jump up and drop right down dead. The harness was then off the horse. Witness found the horse lying by the kerb at Lelie-street corner. The Harbour Board wagon was by the railings of Parliament House. The blood ran in a trail right across the road from the wagon to the kerb, where the horse lay. The road was damp by the wall, and he traced the tracks of the wheels. The horses were good horses, but not spirited; the leaders were good leaders. There was no brake on the wagon. The hole was in the middle of the horse's chest.

Re-examined by Mr. Searle: He sent for Mr. Pattison, who examined the spot on his arrival. Nothing had been moved in the meantime.

By Kotzé, J.: Two wagons could easily have passed in the street.

Alphonso Pattison, chief inspector under the Harbour Board, stated that he arrived on the scene at about 5.15 p.m. He traced the tracks of the wheels, which ran down quite parallel to the wall about three feet from it. The Harbour Board wagon was standing parallel to the wall. He traced the blood from the harness across to where the horse was lying dead. Witness traced the track of the other wagon across the street, but he could not follow the track down the street. The value of the horse was £35; cast-off horses would fetch nearly that amount. The width of the road was about 26 feet.

Cross-examined by Mr. Buchanan: The left wheel of the Harbour Board wagon was about 3 feet from the wall. The wagon stood in the same spot where the accident occurred. He was quite surprised to observe from the tracks how carefully the driver must have driven. The driver had left the Board's employment about six week's ago, as a consequence of an accident which occurred to his cart while going to Camp's Bay.

John Abrahams, the driver of the wagon in question, stated that at about ten minutes to five o'clock, he was driving slowly down Parliament-street, on the left side. The horses were going quietly. He saw the other wagon about 25 yards away, coming along on the same side. When the other wagon was about five yards off, witness stopped his horses. He shouted to the other boy to hold his horses, but the horses continued to come on, and the pole of the wagon struck one of witness's horses in the chest. Before the accident, the police van was coming up the street on the left hand side, and Miller's wagon passed it on the outside.

Cross-examined by Mr. Buchanan: Friday was pay day, and when he arrived back, he would have got his pay. Five o'clock was the time for paying. There was only a slight slope in the road. Witness drove the whole way down the street close to the wall.

Re-examined by Mr. Searle: Witness was now working for Mr. Berry.

William Pick, a storeman in the employment of Geo. Findlay and Co., stated that he was standing at the middle gate of the grounds of Parliament House, and saw the accident. He saw the Harbour Board wagon come slowly down the street, about two feet from the wall. He also saw the police van come up the street on the left-hand side. Miller's wagon passed him, and witness then went into the grounds of Parliament House. He heard the Harbour Board driver shout, "Keep to your side." Miller's wagon was then on the right side of the street going up. He saw the pole strike the horse. The horse was unharnessed and led out, but it fell dead on the other side of the street. Between the time of the accident and the arrival of the Harbour Board "baas" (Mr. Dreyer), the wagon was not moved.

Cross-examined by Mr. Buchanan: Miller's cart was going pretty quickly. The driver did not rein in his horses at all. Witness was standing about 20 yards off when the accident occurred.

Mr. Searle put in certain correspondence, and closed the case for the plaintiff.

For the defendant, Police-constable John Jones was called. Witness was sitting in front of the prison van at the time in question. Miller's wagon passed the van out on the right, and then veered in towards the left. There was room on the left of Miller's wagon, so that the van could have passed between it and the pavement; but on its left, the whole of the street was vacant, and any cart could have passed. The Harbour Board wagon at the time of the accident was coming along on its wrong side. The day was very windy and dusty. His impression of how the accident occurred was that the Harbour Board wagon was coming along on its wrong side, and when approaching Miller's wagon, the driver tried to cross to his proper side. Miller's driver, too, seeing the Harbour Board wagon, in order to avoid a collision, tried to cross to his right hand side—which was actually his wrong side of the road—with the result that both horses, heading to the same side, collided.

Cross-examined by Mr. Searle. The horse that was struck was as near as possible to the centre of the street. He did not see the Harbour Board wagon move after the accident.

By Maasdorp, J.: The Harbour Board wagon was across the street, so that the prison van could not pass.

The wound was right in the middle of the horse's chest. When the collision

occurred, witness was 60 yards off. Miller's wagon was going somewhat less than six miles per hour.

Re-examined by Mr. Buchanan: He was sitting pretty high on the van so that he had a good view of the wagons. The back of the Harbour Board wagon was about 7 feet, at the most, from the pavement.

By Maasdorp, J.: He did not look for the tracks of the wagons, but he was convinced that the Harbour Board wagon was on the wrong side.

Henry Mullins stated that he witnessed the accident. He was walking down Parliament-street, and the Harbour Board wagon passed him at a full trot. It was evident that the driver could not manage his horses. The wagon was in the centre of the road. Miller's wagon came up the street about 1½ or 2 yards from the pavement. He saw the accident take place. The Harbour Board driver could not hold his horse, and the leader bumped twice off the pole of Miller's wagon. The wound was a little to one side of the horse's chest. Mr. Meyer did not come up Lelie-street at all; he came up Grave-street. Witness did not hear the Harbour Board driver shouting, "Keep to your side."

Cross-examined by Mr. Searle: The prison van could not have passed between Miller's wagon and the pavement. There was a pool of blood where the horse was outspanned. He did not take notice of the tracks of the wagons. The wagons pointed straight along the street, not across it.

By Maasdorp, J.: The policeman was wrong in saying that the wagons slanted across the road.

John Tuck, a driver in the employ of the defendant, stated that he was the driver of the wagon to which the accident occurred. He had considerable experience of driving in the city, and was in the service of Mr. Miller for about eight or nine months. He was driving the wagon, to which two horses were attached. He saw the police van and passed it about half-way in the street. After passing the van he saw the Harbour Board wagon coming down. He was going at a walking pace. He drove on the left-hand side at a walking pace. He drove on the left-hand side at about a yard or a yard and a half from the pavement. There was plenty of room on the right for two more wagons to pass. The plaintiff's driver ran into him near the corner of Lelie-street. Witness was driving very carefully, and did not hear the other driver shout. The other men did not pull up at once. At the first bump the pole did not penetrate the horse; the second time it entered the animal's chest. There was plenty of room for the other driver to pass on witness's right. There was room for even two other wagons.

Cross-examined by Mr. Searle: He was quite close to the pavement at the time of the accident, and it was quite wrong to say that the prison van could have passed between witness's wagon and the pavement. The other wagon was coming straight down. He had nearly stopped at the moment of the collision. When the horse struck the pole the first time it swerved the pole somewhat across the road, but the wagon remained unmoved. The Harbour Board wagon was shifted after the accident.

By Maasdorp, J.: He drove straight on. He could not get nearer the pavement owing to the gutter.

By Kotzé, J.: He went slowly past the police van.

William Samuel Miller, son of the defendant, stated that he was driving on his father's wagon, and when they passed the prison van they were going at a slow trot. He saw the Harbour Board wagon coming along. It was going at a fast trot, and the leaders were going from side to side. The Harbour Board driver did not shout, but the previous witness held up his hand to stop. The accident took place on the pavement side of the street.

Cross-examined by Mr. Searle: He could see blood all the way. The Harbour Board wagon was coming down in the middle of the road, but the two front horses zigzagged, otherwise they could have passed them. Witness's wagon did not take a turn to the right. The police van could not have passed between witness's van and the pavement.

Re-examined by Mr. Buchanan: When they were driving up they were close to the pavement.

By Maasdorp, J.: After the accident witness drove up the street a little bit.

Counsel having been heard in argument on the facts.

Maasdorp, J.: The Court has to determine in this case whether the injury to the plaintiff's

horse was caused through the negligence of the defendants' servant, or through that of the plaintiffs' servant. It is of importance in cases of this kind to ascertain in the first place whether the drivers were careful in observing the rules of the road, and if each kept to the proper side of the road at the time the accident took place. The rule of the road is very concisely laid down in Ordinance No. 4 of 1846, section 3, where it is provided that if the driver of any wagon which, when meeting or being followed upon the public road by any other wagon, shall not keep upon the left or near side of the road, he shall be liable to a penalty. Well, it is quite clear here that where the driver of a wagon passes a a wagon, or expects to be overtaken by another, he should keep on the left or near side of the road, and I may at once refer to that portion of the evidence of the policeman, in which he says that it appeared to him that when the defendants' driver had passed him, he seemed to keep in the middle of the road, in order to allow the prison van sufficient space to pass him on his left if necessary. In doing this, he did what was wrong, because his duty was to go as near the pavement as possible, and if the prison van had to pass him, it should have passed him on his right side. It is useful also to refer to the Police Offences Act, No. 27 of 1882, in which it is provided that any driver of any vehicle injuring any property by negligence or driving on the wrong side of the road, shall be liable to a penalty. Now it is quite clearly indicated here that a driver in driving on the wrong side of the road is acting improperly, and his conduct in law is classed with negligence. In these circumstances, it is quite true that the bare fact of a driver being on the wrong side of the road is not conclusive evidence on which a question like that raised in the present case has to be decided, but it is certain that a driver who is on the wrong side of the road puts himself so far in the wrong that he has to justify his conduct and to explain how it was that he was not on the proper side. Now the Court has first to decide whether the plaintiffs' driver kept to the proper side of the road when he was coming down Parliament-street. The case of the plaintiff is that his driver carefully kept towards the left all the way down, and that is what the driver himself says he did. The plaintiff has called two witnesses, Mr. Dreyer and Mr. Pattison, who were on the spot immediately after the accident, and it is said when they arrived there, they found the wagon exactly in the same spot in which it had stopped after the collision. Upon arriving there, they set about ascertaining what line both these wagons had taken in their course up and down the street, and they traced the tracks of each wagon back from where it was standing. They both say the track of the plaintiffs' wagon was quite clear for a long distance down the street, and they found it within 3 feet of the left-hand wall, for a considerable distance before it arrived at the spot at which the accident took place. They also traced back the track of the defendants' wagon, and found it came from somewhere near the right hand of the road going up, and they could not trace it much further, because of the nature of the ground; but just after the accident happened, in their opinion, it must have passed from the right hand side of the road towards the left, where they found it standing when they arrived there. Another witness was called who states he saw the plaintiff's wagon coming down the street on the left hand side, and that at the same moment defendants' wagon was on the same side of the street. If we accept that evidence, it is clearly proved that the plaintiffs' wagon was driven on the proper side of the road and the defendant's on the wrong side. The question now arises whether evidence has been adduced by the defendant to rebut and upset that evidence. When the policeman was called, it struck me he would be a very important witness in this case, because he was a disinterested witness, and it would be his duty to ascertain at once who the party was that was to blame, but unfortunately, though he is a disinterested witness, and though in performing his duty he ought to have ascertained the exact circumstances of the case, we find in most material points he is contradicted by other witnesses for the defendant. The policeman says he saw the defendant's wagon going up the road running towards the middle of the road, but somewhat to the left, and just before the collision took place, the driver must have observed

that the other wagon was approaching it on the same side, and thereupon the driver turned to the right, and that after the defendant's driver had turned to the right the collision took place He also says that when he came up to the defendant's wagon with the prison van it was far enough away from the pavement for him to pass it on the left, and the only thing that blocked the way of the driver of the prison van was the wagon of the plaintiff's, which was too near the left side of the road going up. These would have been very important points if they had been proved, because it would have proved that the defendant's wagon went to the left and that the plaintiff's wagon was directly in its way, but we find from the other witnesses for the defence, amongst them the driver himself, that he did not upon approaching the wagon of the defendant turn to the right, but that he kept straight on Here, therefore, the policeman is wrong. and wrong in a very material point, because the effect of his evidence would have been that the defendant's wagon swerved to the right because the plaintiff's wagon was on the wrong side. Then again, young Miller contradicts the policeman in saying that it was not the plaintiff's wagon which hindered the prison van, but that after the accident he had driven defendant's wagon alongside the plaintiff's on the left, where there was room enough for it to stand. The policeman was one of the witnesses of whom I expected a great deal of useful evidence, but he is contradicted by the other witnesses for the defendant. Now, the other witnesses for the defendant state that the defendant's wagon was going up towards the middle of the road, about a yard and a half from the pavement, and the driver says that was as near as he could possibly go. Well, that in itself cannot possibly be accepted. I come to the conclusion that the plaintiff's wagon was on the proper side of the road and the defendant's on the wrong side. The question of the position of these different wagons having been disposed of, it is necessary to ascertain whether, when the accident actually took place, either of the parties was to blame in such a way as to be guilty of negligence. Now if we accept the evidence of the plaintiff's driver, it would appear that he was quietly driving down the road on the left-hand side when the defendant's driver approached directly in front of him. This resulted in a serious impact between the breast of the horse and the pole of the wagon, which caused the injury, and this evidence would satisfactorily explain the wound received by the horse. That circumstance is quite consistent with the statement of the plaintiff's driver, but if we take the evidence of the defendant's driver it would be difficult to understand how the injury could have taken place. He says he was driving up towards the plaintiffs' wagon when the front horses of the plaintiff came into contact with the pole of his wagon, which was slewed round, and that it was after the pole had been slewed round that the horse in rearing came into contact with the point of the pole, which pierced its breast. I must say I cannot accept that statement. If the pole had slewed round it would follow that the position of the horse would be such that when it reared its breast could not come into direct impact with the pole. Under all the circumstances of the case I come to the conclusion that the plaintiffs' driver was driving carefully on the proper side of the road, and that his evidence satisfactorily explains the manner in which the injury was inflicted on the plaintiffs' horse, and the evidence given by the defendant's driver is inconsistent with a fact established beyond doubt by the other evidence in the case. If we accept the evidence of the plaintiffs' witnesses we come to the conclusion that the injury was done through the negligence of the defendant's servant. The question then arises, what damages ought to be allowed. We have the evidence of the plaintiffs' witnesses, which estimates the value of the horse at £35, and the other necessary expenses incurred in consequence of the injury at £1 6s. This is not denied by defendant's witnesses. The Court will, therefore, allow the plaintiff damages in the sum of £36 6s., with costs.

Kotzé, J. concurred.

[Plaintiff's Attorneys: Reid and Nephew; Defendant's Attorneys: C. Bernard.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

ADMISSION. { 1903. June 25th.

Mr. Benjamin moved for the admission of Ernest Frederick Hendrikz as an attorney.

Application granted, oaths to be taken before the magistrate at Somerset East.

GENERAL MOTION.

WEINTROB V. SCHAVERRIN.

This was a motion to have a rule *nisi* made absolute, interdicting the respondent from interfering with property and materials at Lady Grey-street, Paarl, pending an action to be brought by applicant.

The affidavit of the petitioner set forth that in September last he purchased certain property near Lady Grey Bridge from one Isaac Jacob de Villiers, and that immediately after the sale he framed plans of alterations which he proposed to make in fulfilment of the conditions of the agreement which was executed between seller and purchaser. The plans were approved by the seller. The agreement was that the property should be sold to the applicant for £2,000, subject to his making improvements at a cost of £500, the whole of the purchase sum could remain on mortgage at the rate of 6 per cent. per annum, otherwise £300 sterling was to be paid in cash, and a bond passed for £1,700 sterling, from the date bond was passed, interest to be paid for six months, otherwise to be paid monthly; transfer to be taken from the 1st April, 1903, after six months; all costs to be paid by the purchaser. Deponent had deposited a quantity of stone and other materials on the premises. The said I. J. de Villiers had collected rents on the property up to the end of April on behalf of petitioner, in part payment of interest, and applicant had paid to him £2 15s., being the balance of interest due on the said purchase price to the end of March. Applicant had always been ready and willing to fulfil the conditions of sale, and take possession at due date, and pass a mortgage bond for £2,000 in favour of the said seller. He had not received transfer, and the said seller now refused to sign the necessary documents. He understood that the said seller had since disposed of the property to the respondent, Morris Schaverein, who had broken down, and was still breaking down, a portion of the said premises, and was effecting certain alterations on the said premises without the consent and against the wish of the said applicant, although he had been warned to desist from so doing.

The affidavit of the respondent stated that the property had been sold to him by the late owner, De Villiers, and that he was informed, and verily believed, that the sale of the property to the applicant had been cancelled by mutual consent. He added that he had taken considerable materials to the premises, and that if he were restrained from using the same, pending the result of the action, he would suffer considerable damage owing to the rainy weather.

The affidavit of the said I. J. de Villiers said that the applicant had failed to comply with the conditions of the sale, and that he subsequently approached deponent, and asked to be released from the agreement, as he was without money. An affidavit by the seller's son was to a similar effect.

The replying affidavit of the applicant denied that he had asked to be released from the agreement of sale, and said that he had tendered the full purchase price of £2,000 to the said De Villiers, and that he was being financed by the Paarl Board of Executors. He denied that he had given notice or otherwise for the said sale to be cancelled. His attorneys had written to the seller, tendering the amount of the purchase price. The said I. J. de Villiers granted him an extension of time for four months, in order to complete the said sale, and it was agreed that he should be given full possession on the 15th May, 1903, and that in consideration thereof he was to pay a sum of £15.

Mr. Close for applicant; Mr. C. W. de Villiers for respondent.

De Villiers, C.J., asked why De Villiers was not joined as a party to the application.

Mr. Close said he did not know.

Mr. Close contended that his client was prepared to carry out the first agreement, and that it was owing to De Villiers' refusal that he was unable to get full possession of the premises. There was no mention of time within which the £500 for alterations was to be spent. The mention of time was as to the interest to be paid every six months, otherwise it was to be paid monthly. It was owing to De Villiers' failure that the applicant was not allowed to complete the property. In that way De Villiers cancelled the contract. They had his own receipt for the interest of the money payable under the contract. There was absolutely no ground for cancelling the agreement.

Mr. C. W. de Villiers said that it appeared from the statement of I. J. de Villiers and his son that no improvements at all had taken place, and the applicant himself had admitted that he had done nothing but cart materials to the place. It is common cause that an extension of time was asked, and that the applicant was allowed until the 15th April. Then, according to Mr. I. J. de Villiers, Weintrob asked for the agreement to be cancelled. Weintrob never paid anything. All he did was to cart soil and materials to the property; he did not take any bricks there.

[De Villiers, C.J.: Yes, but he tenders the full purchase price?]

Quite so, my lord; but that was after the second sale had taken place. The applicant had never had transfer of the property, and, in fact, he never seemed to have had real possession. The vendor (De Villiers) said that the applicant himself asked him to cancel the sale.

[De Villiers, C.J.: But the applicant denies that.]

I admit that that is so. The tender was a very incomplete one, inasmuch as although £2,000 was tendered, nothing was said as to the improvements. I submit that the applicant has not made out a sufficient case for an interdict.

De Villiers, C.J.: On the 23rd September last year a sale was effected by De Villiers to the applicant of the property in question for £2,000. That appears from the writings which have been put in. There was a condition "that if purchaser make improvements to the value of the sum of £500 sterling, the whole of the purchase sum can remain on mortgage at the rate of 6 per cent. per annum, otherwise £300 sterling is to be paid in cash, and a bond passed for £1,700 sterling, from the date the bond is passed interest is to be paid for six months, otherwise to be paid monthly, transfer to be taken from the 1st October, 1902, after six months. All costs to be paid by the purchaser." It is said that this condition is a suspensory condition, but I am inclined to look upon it as a resolutive condition. The sale is to take effect, and the sale may be put an end to afterwards if the condition is not complied with. But to put an end to a sale which has been completed requires an Order of Court, and no such order has been given. De Villiers has taken upon himself to cancel this sale—the completed sale; there has been no transfer; so far as the sale itself is concerned, that was completed. Now he says that there was an agreement between the parties that the sale should be cancelled. Well, of course, if there was such an agreement, then comes a question; but the sale was effected by means of a writing, and I should have expected if there was to be a cancellation of that sale, that a writing would have been executed for the purpose of cancellation. At all events, the applicant denies that there was a cancellation, and it is impossible for the Court now upon these affidavits to decide which statement is correct. It is clear, therefore, that the interdict ought to continue pending an action to be forthwith brought by the applicant against De Villiers for transfer of the land in question, and against the respondent as subsequent purchaser of the land from De Villiers. As to the costs of this application, they must abide the result. The rule is made absolute, interdict to continue pending action to be forthwith brought by the applicant against De Villiers for transfer of the land in question, and against respondent as subsequent purchaser from De villiers: costs to abide the result.

ESTATE HUDSON V. STEINBRUCK.

Mr. De Waal moved for a rule *nisi* to be made absolute restraining the respondent from selling or disposing of certain assets contained in two shops and a dwelling-house at Main-road, Claremont, pending

the result of an action for £87 for arrears of rent.

The Acting Registrar (Mr. Gately) reported that the respondent had become insolvent since the date of the rule, and the property was now in the hands of the Master.

De Villiers, C.J.: The action will have to be brought against the trustee, but the rule will be made absolute, pending the action.

Ex parte COOMBER.

This was a motion for an order authorising the Master to pay over certain monies to one Jane Coomber, the petitioner. Petitioner, in her affidavit, said that her husband left her after they had been married about a year, and that he had not supported her since 1896. She had had no communication from him since that date, and she had had to maintain herself and the children. There was a sum of £534 7s. 4d. due to her from the estate of the late Joseph Woodward (her grandfather), now in the hands of the Master, and there were further sums becoming due to her in the estate of the late Mary Elizabeth Shearer (her mother). She was refused payment of the said money, on the ground that she was married in community, without her husband joining in the discharge of receipt. Her husband's whereabouts were unknown, and his assistance could not be obtained. She prayed for an order of Court authorising the executors in the estates of the late Joseph Woodward and Mary Elizabeth Shearer, to pay over to her all such sums of money as might be found to be due to her without the assistance of her husband.

Mr. Alexander for applicant.

De Villiers, C.J.: Is she proceeding against her husband for separation or divorce.

Mr. Alexander: There is nothing to show that, but there have been cases in which the Court has ordered money to be paid and transfer to be passed to women married in community, without the husband's assistance. *Ferreira* v. *Registrar of Deeds* (5 Juta, 387), *Pretorius* v. *Executors of Pretorius* (2 Juta, 293).

[De Villiers, C.J.: What right has the applicant to the whole property?]

Will not the Court grant a rule *nisi* to show cause why we should not have half the money paid over to us, and also an allowance for the children?

[De Villiers, C.J.: The proper course would be for the petitioners to sue her husband for separation or divorce.]

An action will take time to bring, and we want money for the support of the children.

[De Villiers, C.J.: You had better consult your client as to sueing for separation or for divorce, and mention the matter again.]

Subsequently Mr. Alexander said his client was prepared to accept an order for leave to sue by edictal citation for judicial separation, for the division of the property, for custody of the children, and for the support of the children pending action to authorise the Master and the executors of the estate mentioned in the petition to pay the petitioner the half of the amount devolving on respondent.

An order was granted in these terms, personal service to be effected, failing which service to be made by two publications in a Johannesburg newspaper, intendit and notice of trial to be served with the citation.

Ex parte HUNT.

Mr. Close moved for leave to sue by edictal citation for divorce and custody of the minor child of the marriage. The parties, it appeared, were married in Johannesburg in 1892, without community of property. In January 1898 they went to England, but about September of that year the petitioner's wife returned to South Africa without lawful cause and against his wish. Petitioner came to this colony in 1899, and had correspondence with his wife's father respecting her return to him, but his wife, who was residing in the Transvaal, refused to return to him and restore conjugal rights.

Leave to sue was granted, and the respondent was called upon to show cause by the 12th August why an order for dissolution of the marriage should not be granted against her.

MULLER V. MULLER.

Mr. Wilkinson moved for an order directing the respondent to pay £30 to the petitioner to enable her to institute proceedings against her husband for judicial

separation by reason of his cruelty and personal violence towards her and also to pay to her the sum of £10 per month by way of alimony, to enable her to maintain herself pending the result of the action, and also for an interdict restraining the General Estate and Orphan Chamber from parting with any moneys due to the respondent out of the estate of his father. Mr. Benjamin appeared for the respondent.

The affidavit of the applicant stated that she was married to the respondent at S. George's Cathedral, Cape Town, and that the marriage still subsisted. There was one child born of the marriage. She intended to institute an action for judicial separation against her husband. Last October, while in the bedroom, he struck her, and tried to cut her throat with a razor. He was then in an intoxicated state. He also took a bayonet and tried to stab her, but her father rushed to her aid. Since that date the respondent had frequently given way to intemperate habits, and while in that state, he invariably assaulted her. On the 12th May, 1903, while they were walking through the brickfields near Mowbray Cemetery, he threatened to cut her throat with a knife, and made her kneel down and beg for her life. On the 14th May she left him, and went to live with her father. Since that time he had contributed nothing to her support. She verily believed, and was informed, that respondent was to receive a sum of £180 from the estate of his late father, and that the money would shortly be in the hands of the General Estate and Orphan Chamber.

Mr. Benjamin read the respondent's affidavit, which denied the alleged threats and assault in the bedroom, and accused the applicant of first slapping the respondent's face. Deponent denied that he was intoxicated or that he had given way to habits of intemperance. He also denied the brickfield incident. He added that his wife had accused him of being intimate with other women, a charge which he repudiated.

Mr. Wilkinson read the replying affidavits of the applicant and her father in which the allegations were repeated.

[De Villiers, C.J.: Are the parties married in community?]

I am not instructed, my lord.

[De Villiers, C.J.: It is most extraordinary that upon the most important point in the case there is no evidence at all.]

An order was granted requiring the respondent to pay to the applicant £30, to enable her to institute proceedings against him for judicial separation, the interdict to continue against the General Estate and Orphan Chamber, with leave, however, to the Orphan Chamber to pay to the applicant out of the father's estate the sum of £30 above mentioned, and to pay to the respondent the sum of £30 to defend the action, costs to abide the result.

Ex parte BROWN.

This was an application for leave to transfer certain property which the petitioner had vested in his son, Ernest James Brown.

The petition of James H. Brown showed that the petitioner was a builder carrying on business at Claremont. In December, 1902, the petitioner purchased 138 square roods and 138 square feet of ground for £320, which he vested in trust for his minor son. His son was only six years of age, and the property had been transferred to the said son. Petitioner was under the impression that he would have a free and full interest in the said property, and he desired to erect a couple of dwellings thereon. The secretary of the S.A. Association had refused to cancel the sale, as the papers had been signed. Petitioner applied to the Treasurer-General, but the Government refused in any way to vary the receipt thereof. If the property was left in the name of Ernest James Brown, it would be necessary to apply to the Court on all occasions, and petitioner was unable to pay such costs

[De Villiers, C.J.: The child was a mere pawn in his game for this speculation.]

Mr. C. W. De Villiers for the applicant: It would seem he wished his son to have an amount over and above the original price.

[De Villiers, C.J.: But if he had it in his own name he could have given the son the profits just the same.]

Mr. De Villiers: He said he was ignorant of the fact that he could not part with it.

[De Villiers, C.J.: There seems to be an ulterior object in putting the property in the name of the minor.]

Mr. De Villiers: He says his motive was to provide a fund for the son, and if he was able to sell he might make considerable profit.

De Villiers, C.J.: The property which has been transferred to the son belongs to the son, and before the Court can take the property away from the son and give it back to the father there must be a motion brought against the son. A curator should be appointed, and must represent the interests of the son, and upon such an action or motion the Court will consider the matter, but at present the Court cannot, without the son being represented by a curator, give an order which deprives the son of the property which is vested in him by law. There can be no order on the present application.

Ex parte STRUCK.

Mr. Van Zyl applied that the petitioner, as the executrix of her late husband, might be allowed to pass a mortgage bond. The husband died suddenly in the course of the erection of a certain property, on which a necessary bond was to be passed.

Order granted as prayed.

Ex parte WELKEN.

Mr. Benjamin, for the petitioner, asked for leave to enter into an agreement whereby a transfer of certain property might be effected to the petitioner's surviving son, the mother to have a life interest in the property, subject to certain conditions. A consent paper of the executors was put in.

De Villiers, C.J., said that he thought it better to refer, what he considered to be meaningless conditions, again to the executors.

Ex parte DE JOND AND SONS, LTD.

Mr. Alexander, for the liquidator, presented the liquidator's second and final report. The report as to the assets in Belgium was the same as before.

The usual order as to inspection and advertisement was granted.

Ex parte SNYMAN.

Mr. Close applied for leave to transfer certain property. The petitioner had executed a joint will with her late husband, and had, under a misapprehension, disposed of certain land for the benefit of her minor children.

The sale was confirmed subject to the Master's report.

Ex parte INGALL AND WIFE.

The petition of Horace and Marian Ingall shewed that Marian Ingall was married to Horace Ingall at Worcester, Cape Colony, on the 3rd April, 1903, in community of property. The wife before marriage was a widow, having been married in England twenty years ago. After having lived in Kimberley, she went to England, and there engaged to be married. She then consulted a solicitor, who advised her that the Married Women's Property Act was in operation in Cape Colony. Subsequently she came out here and married Horace Ingall. When the marriage ceremony was performed the petitioners fully contemplated a division of the estate, and were fully under the impression that the Married Women's Property Act operated here. The parties now desired to execute a post-nuptial contract, and prayed the Court to authorise the execution of a post-nuptial contract excluding marital power. In support of the petition,

Mr. Alexander, for petitioners, cited the cases the cases of *Ex parte Fricker and Wife* (2 Sheil, p. 312), *Taylor* (5 Sheil, p. 371), *Schoombie* v. *Schoombie's Trustees* (5 Juta, p. 189), *Ex parte Peters and Wife* (16 Juta, p. 442), *Ex parte Scott and Wife* (7 Sheil, 240), and *Moore* v. *Sayman* (4 Sheil, 4).

De Villiers, C.J.: But for the decision in the case of Fricker, I should have hesitated to make an order, but I take it that in the present case there was an understanding between the parties before marriage that the marriage should be without community of property. This petition speaks of a post-nuptial contract. The Court has continually said that a post-nuptial contract cannot be registered. I take it, however, that there was an understanding before marriage that there should be no community of property. That understanding would amount to a contract between the parties that their marriage should be without community, and it may be embodied in a notarial agreement. The Court will grant an order for the registration

of a notarial contract to be forthwith drawn to carry out the understanding of the parties before the marriage that the marriage should be without community of property and the marital power excluded, saving all rights of creditors, who became such after the marriage.

Ex parte MAJERU.

Mr. Russell asked for an extension of the return day in this case, and for an amendment in the order of Court respecting the mis-spelling of the petitioner's name.

An order was granted as prayed, the return day being extended until the 1st August, personal service to be effected failing which service by publication once in the native paper, "Imvo," and once in a Johannesburg newspaper.

Ex parte SWANEPOEL.

Mr. Howel Jones applied for leave to sell certain property belonging to a minor and for an order to pay the proceeds into the Guardian's Fund to the credit of the minor.

The Master's report was favourable. report was favourable.

Granted.

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., the Hon. Mr. Justice MAASDORP, and the Hon. Mr Justice KOTZE.]

CRANKO v. CRANKO. { 1903. June 26th

Will — Construction — Such children as may be born.

The testator, having two children, C. and the plaintiff, made a will in 1861, nominating as heirs C. and such other children as may be born of his marriage.

Held, *that the will applied to the plaintiff as well as to C.*

This was an action brought by William Cranko against Elizabeth Cranko, sole executrix testamentary in the estate of the late William Cranko, for a declaration of the plaintiff's rights under the said will.

Mr. Schreiner, K.C., was for the plaintiff, and Mr. Searle, K.C., appeared for the defendant.

The declaration set forth that the plaintiff, William John Cranko, who was 66 years of age, and resided at Cape Town, was the surviving son of the late William John Cranko. About June, 1862, the parents of the plaintiff executed a joint will, which was drawn up under the instructions of a notary, and in which it was stated that Christina Cranko and such other children as may be born of the marriage were to be the heirs of the estate. The plaintiff, who was born previous to the execution of the will, was excluded from any benefit under the words "may be born."

Mr. Schreiner contended that the words "may be born" did not necessarily mean children born after the date of the will. The words were as consistent with the present as they were with a future interpretation. He held that it was the testator's intention to include the plaintiff.

Mr. Searle stated that he was instructed that the defendant had no desire to exclude the plaintiff from benefit under the will, and that she would be very glad if the difficulty could be got over. Defendant would submit to the judgment of the Court on the point, and felt that she could not argue against the plaintiff's contention.

[De Villiers, C.J.: Is Christina a party in this case?]

Mr. Searle: No, my lord.

De Villiers, C.J.: The instructions for the making of the will in question should not be taken into consideration for the purpose of interpreting the will. The words of the will are as follows: "The testator declares to nominate the survivor, together with Christina Cranko and such other children as may be born of the marriage." Taking it in its strictly grammatical sense it may be said that the words "may be born" refer to children thereafter born, but when it is considered that there is every presumption in law against parents disinheriting their children or passing them by, and that at the time when the will was made the parents were bound to leave their children their legitimate portion, the Court migt fairly take it that

it was the testator's intention to include the plaintiff amongst the children. In England it has been held that a bequest to children lawfully begotten applies to children born after as well as before the execution of the will. That would not be the strictly grammatical construction but it carried out the real intention of the testator. I am of opinion, at all events, that there is a *prima facie* ground for holding that the testator's intention was to include the plaintiff, but the Court will not give a final decision on this point until Christina Cranko, who is interested in this case, shall have an opportunity of showing cause. The Court will grant an order calling upon Christina Cranko to show cause by July 13 why the plaintiff should not be declared to have a vested right in the said estate.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant's Attorney: G. Trollip.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

Ex parte TABATA. { 1903. June 29th

Mortgage of entailed property—Native custom.

The applicant, a Tembu, was heir-at-law to his father of a certain farm, which in accordance with the Tembu law of inheritance, would on his death similarly pass to his heir-at-law. He now sought the leave of the Court to mortgage this property, in order to enable him to meet the demands of certain creditors.

Held, *that as it was not shown that these debts to the said creditors had been incurred in connexion with the preservation of the said property, the application must be refused. No order was made in respect of costs.*

This was an application for leave to pass a mortgage bond on the petitioner's farm in Tembuland, and for leave to raise sufficient money to start farming operations and to defray the expenses of the application. The petition shewed that the petitioner was, according to native customs, the legal heir to his father's farm, but in order to establish his claim thereto, he had become seriously involved through legal expenses. The creditors were at present living on the farm, which was valued at between £3,000 and £4,000. In consequence of certain proceedings in 1887 at Queen's Town, the petitioner had incurred certain costs, and the amounts of £1,009 2s. 6d., £370 and £463, with interest, were due to two of the creditors. The petitioner desired to return to the said farm, but before he could do so, he would have to repay the said sums to the creditors. To enable him to do so, it would be necessary to raise a loan on bond of £2,072 5s. 4. A certificate from the Resident Magistrate at Queen's Town set forth that he was acquainted with all the circumstances of the case, and he considered that the help asked for would be of great benefit to the family, as the farm was going to rack and ruin.

Mr. Close, for applicant; Mr. Searle, K.C., for respondents.

Mr. Searle, K.C., said that the affidavits which he would read did not strictly oppose the application, provided it was carried out with certain safeguards. The affidavit of the son Solomon Tabata set forth that he had supported his mother and his sisters, and that the applicant had never contributed anything to their support. According to the custom of the Tembu tribe, he, as eldest son of the applicant, who was 80 years of age, would be the heir to the said farm, and he believed that his father was under the influence of his uncles. He feared the money would be wasted, although he was anxious that the creditors should be secured. The principal creditor was willing to accept a bond, and allow the applicant and deponent to live on and enjoy the farm during the rest of their

natural lives. The affidavit of the respondent Dingey set forth that the rate of interest charged by him was usual among natives. He had given the applicant every assistance, and during his occupation he had done everything possible for the benefit of the farm. The affidavit of Dondola, the third respondent, set out that he had lent the money in all good faith. The rate of interest was usual, and he had erected buildings on the farm.

Mr. Close (for applicant) referred, in support of the application, to *Silver* v. *Silver's Executors* (5 Juta, 28).

[Maasdorp, J.: You see he got the property subject to a certain mortgage.]

He had to borrow money to pay off the costs.

[Maasdorp, J.: I do not see how we can vary the Magistrate's order.]

These debts have been running on for fifteen years, and have increased to such an extent as to reduce the applicant to the direst poverty. He cannot even pay his rates and quitrent.

Mr. Searle, K.C. (for the three respondents): I submit that the petition cannot be granted in its present vague form, but I would suggest that the matter should be referred to some impartial person, such as the Resident Magistrate, that he may find out how much of this money has been expended for the benefit of the property. I would point out that there is some incongruity in Solomon (the heir) being joined with the creditors, as it is against his interest that the farm should be mortgaged.

Mr. Close, in reply, I consent to further enquiries being made, and would suggest the Resident Magistrate as the best person to make them.

Mr. Searle agreed that the matter should be referred to the Magistrate to report to the Court as to what amounts had been beneficially, or otherwise, expended on the farm.

Maasdorp, J.: I think with the information now before the Court this application cannot be granted. It seems that the rights of the applicant in this case depend upon a judgment given by the Resident Magistrate of Queen's Town, in which it was found that the said Andries Tabata, being the eldest son of the house of Solomon, was the heir-at-law to the farm which would descend from heir to heir according to the law of inheritance of the Tembu tribes. This property will pass from Andries Tabata to Solomon Tabata, and then to the next heir of this house. According to the affidavits before the Court, it appears that Andries Tabata was seriously involved, and is being pressed by his creditors, and that he got involved in respect of debts which are in no way connected with the preservation of this property. I think the Court could not possibly grant leave to pass a mortgage on this property for the payment of debts of creditors, or as security for the payment of debts of creditors, whose debts have not been incurred in respect of this property. It is quite possible that some part of the moneys mentioned in the affidavits may be in respect of expenditure—past expenditure—upon this property, or for the preservation of this property, and the Court might have allowed a mortgage for such moneys, but it appears from the affidavits that all the debts are not in respect of such expenditure. I think that further information should be placed before the Court before it deals with this matter at all. It has been suggested it might be referred to the Magistrate, but in the position in which the matter now stands it is difficult to decide what points might be referred to the Magistrate. I think the applicant should put his case more fully before the Court, and if he is entitled to relief in respect of any debts he has incurred, the Court will settle the matter when the application is again referred to it. The Court will make no order as to costs.

[Applicant's Attorneys: Walker and Jacobsohn; Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

TABLE BAY HARBOUR BOARD V. BERGL. } 1903. June 29th.

Removal of bar—Specific accounts—Costs.

Where a defendant applied for a removal of bar on the ground that he had been unable to plead owing to certain detailed accounts not having been furnished by the plaintiff, which accounts the plaintiff alleged had been furnished from time to time; the Court

removed the bar and ordered the plaintiff to again furnish specific accounts. Costs of the application to be costs in the cause.

This was an application for an order calling upon the respondents to remove a bar of plea in an action pending, and, further, to furnish the defendant (present applicant) with a detailed and reasonable specification of the items in dispute, with costs of application. The affidavits of the defendant's attorneys set forth that they had made repeated application to the plaintiffs, without success, for such specifications, and that it was impossible for the defendant who admitted that he was indebted to the plaintiffs, and had tendered £180 out of the claim of £221, to go to trial without such information.

Mr. Benjamin for applicant; Mr. Searle, K.C., for respondent.

Mr. Searle said that a full and specific account had been furnished, and it looked as if the matter was merely being delayed. Instead of filing a plea, defendants (now the applicants) kept on saying they had no account. With regard to the application for leave to plead, it certainly appeared as if the applicants simply wished for delay.

Mr. Benjamin said that the details were wanted for the purpose of entering a plea. The Harbour Board's allegation was that they had supplied a full and specific account. Counsel then proceeded to read a lengthy correspondence which had passed between the parties in the matter.

Mr. Searle read an answering affidavit to that of the defendant in the case, which set forth that the applicant had been supplied with a full and detailed report.

Maasdorp, J.: The applicant in this matter moves for leave to purge his default, and to file his plea. That part of the application is not opposed by the respondent, and it will consequently be granted. The applicant further applies for a specific account of the items appearing in the plaintiff's declaration. It seems that certain services were rendered by the plaintiff to the defendant in respect of a number of vessels, and certain large items are given in the account annexed to the declaration in respect of the services rendered in connection with these different vessels. The applicant says he is entitled to have a specific account of these large items, and that it is impossible for him to plead until he receives such a specific account. He says that he admits that he is indebted to the plaintiff in certain sums of money, but it is impossible for him to say how far his admissions will go until he receives this specific account. I think it is impossible under the circumstances for the defendant to plead until these specific accounts are rendered, and that he is now entitled to them. When he requested the plaintiff's attorney to furnish him with these accounts, the answer was that these accounts were from time to time rendered. I don't think that is a position which could be taken up, and the plaintiff is bound again to give specific accounts on which his claim is based. It appears that the correspondence proceeded for some time, in which the defendant insisted it was impossible for him to plead. Notwithstanding that, the required information was constantly refused by the plaintiff, and while the correspondence was proceeding, the defendant was barred. These remarks bear largely also upon the question of costs, which has to be decided in this matter. I think the plaintiff is entitled to have specific accounts, and upon the ground that the refusal to furnish them caused the delay in pleading, the costs in this case will be made costs in the cause. Leave is granted to the defendant to plead, and the respondent is ordered to render specific accounts of the items contained in the declaration. Costs to be costs in the cause.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton; Respondent's Attorneys: Reid and Nephew.]

WHITE, RYAN AND CO., v. HILLIARD. 1903. June 29th.

Member of club — Judgment against members collectively —Execution against one of them.

A judgment had been obtained against the members of a certain club collectively for the balance of an unpaid account.

By one of the rules of the Club each member was liable in solidum *for all debts contracted by the Committee: and application was now made for leave to issue execution against one individual member.*

Held, *that as the respondent had not been a party to the suit in which judgment was obtained the application must be refused with costs.*

This was an application for leave to issue execution against the respondent for the sum of £166 8s. 2d., in respect of a judgment which was obtained against the Cape Town Club by the applicants, which judgment was unsatisfied. Applicants also asked for costs.

Mr. Benjamin was for the applicants, and Mr. Searle, K.C., appeared for the respondent.

Mr. Benjamin explained that some time ago the Cape Town Club had made application to be wound up under the Companies' Acts, but the application was refused, and the creditors, accordingly, took action separately for the recovery of their claims. All these claims had been satisfied with the exception of this particular one of White, Ryan and Co.s, which could not be met as there were no further funds remaining. Mr. J. T. O'Reilly had been appointed liquidator of the Club, but all the funds at Mr. O'Reilly's disposal had been exhausted, and there were now no assets. Applicants now asked for execution against a particular member, and that was the respondent. Under the rules of the club the members were responsible severally and jointly *in solidum* for debts contracted for tobacco, wines, etc., for which articles this debt was incurred.

Mr. Searle (for the respondent): This procedure is quite informal. The funds in the hands of Mr. O'Reilly, the informal liquidator, were declared executable, but now the applicants want to make one particular member liable *in solidum*. The Court refused to place the said Cape Town Club under liquidation, holding that the Companies Act did not apply. The applicants now apply on motion to have the respondent declared liable for the full outstanding balance of account, and attempt to go behind the judgment and writ of execution against the committee of the club.

Mr. Benjamin (for applicants): See Rule No. 2 of the Club, which makes the members jointly and severally liable for all Club debts incurred by the Committee. Hence the respondent is liable through the Committee. We have a judgment against the Committee.

[Maasdorp, J.: In what form?]

I would submit that as there is no precedent for a case of this kind, the ordinary rules of procedure in partnership should be followed. The only point raised is on the question of procedure; but if once judgment has been obtained against a partnership, any individual member may be sued *pro solido*.

[Kotzé, J.: Having taken out execution against the Committee, can you levy that execution on any particular member of the Club?]

Yes; Rule 2 makes every member liable *in solidum*.

[Kotze, J.: That rule might possibly estop the respondent from setting up a defence, but how can you ask for execution against a man if there is no judgment against him?]

I do so on the analogy of partnership in an unlimited liability company. Suppose that twenty or more persons enter into a partnership under the common law and arrange that the secretary shall sue and be sued on behalf of the company, and judgment is obtained against him, that judgment can be executed against any member of the company.

[Maasdorp, J.: If a member is liable under Rule 2 for all Club debts, you can sue him, but you have not done so in this case.]

The Committee had to be sued. We did so, and got judgment against them The Commitee were by the rules the agents of each member.

[Kotze, J.: Suppose he says, "I am no longer a member?"]

He must take up that position in his affidavits. The individual members are liable through the Committee.

[Maasdorp, J.: If an individual member is liable, you must surely get judgment against him before you can execute it.]

If we had sued the respondent individually, he would have said that under the rules we had no right to sue him.

It may be that the Committee are liable to the respondent, but he is liable to the applicants in the first instance.

[Maasdorp, J.: The whole question is one of procedure. If the respondent is liable, why do you not bring your action?]

It would be very inequitable if debts could be contracted without somebody being liable.

[Kotzé, J.: Possibly the Roman-Dutch law of sequestration might afford a remedy. I do not say it is so, but you may consider the point.]

[Maasdorp, J.: You cannot cite any case in which execution has been granted against a person who has never been sued?]

If the liability is unlimited you can execute *pro solido* against any member a judgment obtained against the company. The only grounds on which the respondent can oppose execution is by showing that the judgment has been obtained by fraud or collusion.

Mr. Searle was not called upon in reply.

Maasdorp, J.: It appears that the plaintiffs in this case sued a certain number of persons, in their capacity as members of the committee of the Cape Town Club, and as such representing the said club, for the recovery of the sum of £166 3s. 2d., for goods delivered by the plaintiffs to the said club. Judgment was given upon the summons in that case in the following form: "Defendants having failed to enter an appearance, the Court, on the motion of plaintiffs' counsel, grants judgment as prayed, with the costs, and declares any funds of the club in the hands of Mr. T. J. O'Reilly executable in satisfaction of the said judgment and costs." The applicant in this matter now craves for leave to issue execution against the respondent in this case for the sum of £148 16s. 9d., being the unsatisfied balance of the judgment of this Court, in the sum of £166 8s. 2d. Now, it seems to me that execution is asked for against a person who was not in any way a party to the suit in which the judgment in question was given. The respondent is a member of this club, and it is said that as a member he has rendered himself responsible by the second rule of the Club for the debts of the Club through the committee of the club. That may be perfectly true, and the plaintiff in this case may have a good cause of action against the respondent, or he may not. That is a question which we have not now to decide, but it is quite clear that he was in no way a defendant to the suit in question. Sometimes a provision is made in the rules of these societies by which certain persons are appointed, who may be sued in an action brought against all the members, and if there is such a provision, then it may be said that these persons who are so appointed represent in the action all the members of the club, and that all the members may by that means be made defendants to the suit. But there is no provision of that kind in the rules of this club, and I do not now say what the effect of such a provision would have been if it had been made—if there was a rule to that effect. The closest analogy to this case is suggested by Mr. Benjamin to be that of a partnership, where, on a judgment given against a partnership, execution may be taken out against any member of such partnership. That is true, but that is only when all the partners are made defendants to the suit. I know of no case in which a partner, who has not been joined as defendant in the suit, has been held liable to have execution taken out against him upon a judgment against the partnership. I think this matter should shortly go off upon this point: That execution cannot be taken out against a person against whom there is no judgment. This respondent has had no judgment against him, not having been a defendant in the action which was brought by White, Ryan and Co.; and on that ground execution cannot now be obtained against him by the plaintiff. In my opinion the application must be refused with costs.

Kotzé, J.: Said he was of the same opinion. Assuming that the respondent was liable under the rules of this club, there still remained the question of how that liability might be established against him by the creditors. The present application was that execution should be made to issue against him on a judgment given against a set of persons of whom he was not one. Now, even supposing that the respondent was liable, it did not follow that such an application goes as a matter of course against him. As had been pointed out, he was no party to the suit, and he might

have the best defence to an action brought against him.

[Applicant's Attorneys: W. E. Moore and Son; Respondent's Attorneys: Van Zyl and Buissinné.]

KOENIG v. LANDESHUT. { 1903. June 29th.

Commission *de bene esse* — *Res judicata*—Play rights.

The applicant having applied for a commission to take certain evidence which he alleged to be material in an action to be brought; the respondent objected on the ground that the question to be decided in the said action was res judicata.

Held, *that as the question as to whether the said evidence was material or not could not be decided without going into the merits of the case, the application should be granted, but that the question of costs must stand over for further argument.*

This was an application upon notice of motion calling on the respondent to show cause why a commission should not be appointed to take the evidence of Ernest Henry Collins and May Pollard, in Melbourne, Australia, and Ernest Wilkinson, in London, and why David Sydney Wandliss should not be appointed to take the evidence of Collins and Pollard in Melbourne, and Frederick Mackerness, to take that of Wilkinson in London.

From the affidavits it appeared that the respondent, who was the plaintiff, sued for the recovery of a large sum of money, which he alleged was due to him as proprietor of certain play rights in respect of plays played by the defendant in South Africa. The defence was that the plaintiff obtained these play rights as the agent for and on behalf of the defendant, but that he wrongfully and unlawfully obtained the assignment of these rights in his own name and without acquainting the defendant of that fact. The contention of the defendant was that under all the circumstances the plaintiff was not entitled to claim from the defendant.

The affidavit of William Templar Bussinne, stated that the evidence of the parties mentioned was necessary and material.

The answering affidavit of Julius Koenig stated that the parties were not material witnesses in the case, that they were in Cape Town when the matter was previously before the Court, and their evidence could at that time have been taken, and that none of the persons was a party to the agreement.

The replying affidavit of W. T. Bussinné suggested that the respondent's opposition to the application was due to a desire to delay the matter.

Mr. Upington (with him Mr. Bisset) for the applicant; Mr. Searle, K.C. (with him Mr. Alexander), for the respondent.

Mr. Alexander wished to put in an answering affidavit to the preceding one of Mr. Buissinne's, when Mr. Upington objected. The course, he held, was unusual, and he had been instructed to oppose the affidavit being put in.

Mr. Searle said that the second affidavit put in by the applicant had covered very wide ground, and the respondent wished to answer the points raised.

The Court gave permission for the document to be read.

Mr. Alexander then read the answering affidavit of Mr. Julius Koenig. Deponent held that Wilkinson's evidence would be inadmissable, as it would necessarily deal with the private relationship existing between deponent and Wilkinson, who was his attorney.

Mr. Upington (for respondent): This is an application to take evidence of some most material witnesses. The question is whether Koenig engaged to secure the rights in these plays for the company or not. If it is admitted that Koenig acted wrongly in obtaining these rights for himself, I should be quite willing to take my stand on this, but in replication they say that all these matters have been decided by arbitration. They have tendered the bare sum which Koenig paid for the plays; but the deed of submission gives the accountant power to frame statements of accounts, and to decide on whose side the balance lay and what was due from the one party to the other. Nash had power only to make up the account to July 20th, 1902. I admit that

the price paid for these play rights came under Nash's instructions. All he had to do was to fix a reasonable sum as compensation for the representation of the plays. If it be said that Koenig had acted illegally in obtaining cession of the plays in his own name, that statement should have appeared on the record. As to the fifth clause of the award, that is very difficult to follow. A play right does not consist in the possession of books or scores, but in the right to perform a play.

[Maasdorp, J.: Why should the applicant want to obtain possession of the scores?]

Presumably because he had paid for them. (See pages 5 and 13 of the award.) These are inconsistent with the view that the play rights were Koenig's property. The arbitrators only say that the play rights were acquired in Koenig's name. On July 20th, 1902, Koenig's agreement with the company expired. We cannot go back on an award if once it has ben made a rule of Court. But the award does not say that Koenig is the owner of the plays, and now it is sought to draw an inference from the terms of the award. That award does not say that Koenig is the owner of the plays, and such an inference would be inconsistent with par. 5 of the award. Koenig's interest in the Company ceased on July 20th, 1902, but Mrs. Landeshut still continued to perform these plays. If the evidence we wish to take be immaterial, why did the applicants not except to it?

[Maasdorp, J.: That affects the question as to whether the costs of the application should be costs in the cause.]

Mr. Searle, K.C. (for the respondent); If this application be granted, much expense will be incurred. We shall have to get one commission in Australia and another in England. The present applicants applied to have the award made a rule of Court, and we opposed. We wanted the £300 travelling expenses, and the position they took up was that we had the plays and must pay for getting them. The whole question of the terms of the award was then considered, and the Court refused to set it aside. Par. 16 of the award says clearly that the manuscripts are our property. We ask for either a royalty of 15 guineas a night, or for half share of the profits. After having asked to have the award made a rule of Court, they cannot be heard now to say that the arbitrator exceeded his powers. They must now make out a *prima facie* case to show that these witnesses are necessary. They were ready to go to trial without these witnesses, why then should they be necessary now? Miss Pollard was here, but they did not propose to call her, and yet now she is in Australia they find that her evidence is essential.

[Maasdorp, J.: If this evidence is immaterial, why need you appear before the commissioners?]

We might want to cross-examine, and it would be dangerous not to be represented.

Mr. Upington was not called upon in reply.

Maasdorp, J.: The applicant in this matter moves for the appointment of a commission to take the evidence of certain witnesses whose evidence he says would be material in deciding a dispute between the parties as to their title to certain play rights. It does appear that the evidence which these witnesses are likely to give, as indicated by the affidavits, has a direct bearing upon the capacity in which the plaintiff in this case, and the respondent in this matter, obtained these play rights. The defendant contends that the play rights were obtained by Koenig as her agent, and that, consequently, they really belong to her, and not to Koenig. The respondent alleges that this question between the parties is really a matter which is *res judicata*, and has already been disposed of by the Court, and although the evidence might have been material on the question of title, that question has been decided. In this action a plea is put in by the defendants claiming these rights, and to that a replication is filed stating that the matters raised in the plea had already been decided by the Court when its order was given upon the arbitrator's award. It is quite possible that these matters have already been disposed of, but that is not a question which we can now decide. It is not quite clear how far the award of the arbitrator covers all these questions in dispute, and in how far his award is decisive as to the title to these play rights. We are, therefore, not prepared to hold that this evidence is not material, upon the ground that the question between the

parties has already been disposed of by the judgment of the Court, because that would be really giving judgment on the pleadings in a case to be heard. It is quite possible, when this question is considered by the Court, it might be found that the main question in dispute between the parties in the case has already been decided, and in that case this evidence would be immaterial. The order which the Court will now give will, consequently, be in such a form that if it ultimately appears that this commission should not have been granted, that the costs in the matter will fall on the defendant. The Court will grant leave to take the evidence of the witnesses mentioned in the affidavit on commission, appointing the Commissioners mentioned in the affidavit to take such evidence. The question of costs in the matter must stand over for further argument.

[Applicant's Attorneys: Messrs. Van Zyl and Buissinné; Respondent's Attorneys: D. Tennant, jun.]

MASON v. DIHNING. { 1903. June 29th. " 30th.

Trespass — Illegal impounding — Act 15 of 1892.

A person who finds cattle trespassing on his land can recover compensation only by either (1) sending the cattle to the pound and claiming trespass money under Schedule C. to Act 15 of 1892, or (2) having the damage assessed by the field-cornet, or (3) by action at Common Law. In any case he must notify his intention to the poundmaster, and having once selected his remedy he cannot abandon it and pursue another.

This was an appeal brought by one W. Dihning (defendant in the Court below) against a judgment of the Resident Magistrate of Wynberg, whereby the defendant was condemned to pay to the plaintiff the sum of £5 as and for damages for the illegal impounding of a certain cow. From the evidence led in the Court below it appeared that the said cow, the property of appellant, had trespassed on respondent's property, and eaten certain vegetables. The ground was not properly fenced. Appellant tendered 1s. as damages. It cost appellant and a friend 21s. for horse-hire to the pound where the cow was impounded. Appellant also lost a day's milk's from the cow in consequence of her being driven home; the supply of milk had since fallen off. The plaintiff claimed £5 from the defendant for improper pounding. The evidence for the defence showed that one Williams occupied a portion of defendant's farm, that the damage done by the cow was done on the land so occupied by him, and that he impounded the cow on behalf of Dihning, and received the pound fees.

The Resident Magistrate gave judgment for the defendant with costs.

The Magistrate's reasons were as follows: "The defence relied upon two points:

(1) That Dihning should not have been sued at all; that the action, if any, lay against the witness Williams.

(2) That the cow was properly impounded, inasmuch as the trespass money tendered was insufficient to cover the damage done.

I found that, although Dihning might have been the proper person to sue, as the witness Williams admits that everything was done in his (Dihning's) name and by his direction, yet the amount tendered was insufficient, and the cow was lawfully impounded.

Mr. McGregor (for the appellant): The evidence in the Court below shows that respondent's ground was not properly fenced, and therefore the shilling tendered by the appellant was in excess of the sum fixed by Schedule C to Act 15 of 1892. Then, again, the trespass was not committed on Dihning's land but on that of William's and therefore he, and not Dihning (if anybody), should have been sued.

Mr. Upington (for the respondent): Whether Williams was a mere caretaker or a manager he was clearly a servant of Dihning, and a master is bound by the acts of his servant, executed in the ordinary course of that servant's employ. Dihning was responsible for the acts of Williams, and I therefore submit the appeal should be dismissed with costs.

Mr. McGregor was not called upon in reply.

Maasdorp, J.: In this case when the defendant found the cow of the plaintiff trespassing in his garden there was any one of three courses open to him to adopt. He might send the cow to the pound and claim trespass money under schedule C of this Act. If he did so it was necessary for him to send a memorandum to the pound master, setting forth the number of animals sent and giving a description of the property trespassed upon. Or he might elect to have the damage suffered by him assessed by the award of a Field-cornet. In that case also he was bound to send a memorandum to the pound master stating that he adopted that course. Or, on the other hand, he might choose to institute an action to recover the damages suffered by him; and also in that case a memorandum had to be sent to the pound master, stating it was his intention to do so. Now it seems that it is necessary that his election should be made known to the pound master because the action adopted by the pound master thereafter would depend upon such election. We also find under section 75 of this Act, No. 15, of 1892, that no person who has once claimed damages under sections 32 and 33 (that is to say, claimed trespass money under schedule C) shall be competent afterwards to require an assessment by a Field-cornet, nor shall any person who has once claimed such an assessment by the Field-cornet or such trespass money be competent afterwards to seek redress by legal process. It would appear therefore from that that the election must be made by the person sending the cattle to the pound, and he is bound by such election; he cannot afterwards, when he has once decided to adopt one course, change his mind and pursue another. The question, therefore, arises: What was the election that was made by the defendant in this case? Now I must say at once that it seems to be quite clear to me that he never intended to submit the damages suffered by him to the award of a Field-cornet, nor did he intend to seek redress at common law by means of action to claim damages. No memorandum was sent stating such election, or stating that he elected either of these two courses, and it is quite clear from his conduct that he did not intend to adopt either of them. The only course that was open for him then was to claim trespass money, and I think that it appeared from all the circumstances of the case that this is the election that he made. We have no actual evidence as to what memorandum was sent or whether in the absence of such a memorandum as is allowed by law a verbal statement was made setting forth in so many words what his election was. But we have the account put which was made out by the pound master, which is some guide to the Court in this case. From that it would appear that the claim was 1s. 6d. Though it is in the account called damages, to my mind it is clear that it was intended to be the trespass money provided for under Schedule C, and there is another reason for coming to that conclusion, because it appears from the evidence that Dihning himself had suffered no damages, that Dihning consequently could claim no damages, but he could only claim trespass money. The claim of Dihning is therefore based upon Schedule C, and the question arises whether he is entitled to receive 9d. for trespass upon unenclosed ground, or 1s 6d. for trespass upon fenced ground. It appears from the evidence that this ground was not fenced, and consequently the extent of damage claimed was confined to the sum of 9d. Under section 27, where a claim is made by the person upon whose land a trespass is committed, and thereupon a tender is made by the owner of the cattle, if such tender is refused, the owner of the land shall be liable for damages sustained by the owner of the animals by reason of their detention after the date of the tender, unless the tender is found to be insufficient by a competent Court. The Magistrate found that the tender of 1s. which was made was insufficient. Now, there I think the Magistrate was wrong. It seems to me that the Magistrate had in mind at the time the damages which it was said were suffered by Williams, which was stated to be the sum of 5s., but that was not the question which he had to decide at the moment. The question he had to decide was whether the tender made to Dihning of trespass money was insufficient. Dihning having elected to take trespass money, he was entitled only to so much as the schedule would award him. It is quite clear that the schedule awarded him

the sum of 9d.; consequently the Magistrate was wrong in finding that the tender was insufficient. Upon that ground, the judgment of the Magistrate must be reversed. We come to the conclusion that the tender of 1s. was more than sufficient, that it should have been accepted, and consequently the plaintiff in the Court below was entitled to some damages. It has been argued that the tender was made to the wrong person, because it should have been to the caretaker, and that there is no evidence to prove that Williams was the caretaker of Dihning. But he himself says: "I look after Dihning's farm." I think that is clear proof that he is the caretaker, and the tender of 1s. to Williams, under the circumstances, was sufficient. We have now to decide whether this matter might be disposed of at once, or whether it is necessary to send it back to the Magistrate to assess damages. In this case it is clear that 4s. 6d. was actually paid by the plaintiff to the pound master, that he was kept out of the benefit of the milk of his cow for a day, and a few shillings ought to be awarded for that. The only question is whether counsel can agree upon some small damages.

Mr. McGregor said counsel preferred to leave it in the hands of the Court, though he would suggest that a sovereign would be a proper amount to allow for the loss sustained by detention of the cow.

Maasdorp, J.: The appeal will be allowed, with costs in this Court and the Court below, and judgment entered for the plaintiff for 15s., damages for detention.

Kotzé, J. concurred.

[Appellant's Attorneys: Michau and De Villiers; Respondent's Attorneys: D. Tennant, jun.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

WATSON V. BRADLEY. 1903. June 30th. July 8th.

Conspiracy — Unlawful assembly Belligerents.

The defendant, a British subject, joined a commando of the Boer forces after they had invaded the Colony and after they had been recognised as belligerents. The commando, acting under the instructions of their superior officer, took away the plaintiff's horse for use in the campaign, but the defendant derived no personal benefit from the taking beyond riding it for a few hours while it was brought to the superior officer.

Held, *that the defendant was not civilly liable in damages for the taking of the horse.*

The case of Steenkamp v. Kyd (*15 S.C. R. 221*) *distinguished.*

This was an appeal from a judgment of the Court of the Resident Magistrate of Maclear, whereby the defendant (William H. Watson) was condemned to return a certain mare claimed by the plaintiff (C. H. Bradley) and damages £15, or in the event of the mare not being returned, her value, the sum of £60, and £25 as damages, and also costs of suit.

From the evidence in the Court below, it appeared that in 1901 the defendant joined the rebel forces. On September 27 they visited plaintiff's farm, made him a prisoner, and took away a black imported mare, and was subsequently seen by other witnesses riding her. Commandant Myburgh was in charge of the force to which defendant belonged.

[Defendant's attorney applied for a postponement of the case to enable him to call other evidence. Plaintiff's attorney admitted that defendant took the mare while acting under orders.]

Defendant admitted that he had joined the Boer forces, and said that he first saw the mare with one Van Staten. At defendant's request, Van Staten lent him the mare, on condition that he should hand it over to Field-cornet W. Roux. This he did. He was under Roux's orders, and they were a portion of Commandant Myburgh's commando. Van Staten was a Free Stater.

The Court below gave judgment (as above) for the plaintiff.

The Magistrate's reasons were as follows: "In this case the plaintiff claims the restoration of a certain mare alleged to have been taken by the defendant from the plaintiff's farm during the late war. The fact that the mare was taken by the commando of which defendant was a member (defendant being at the time a rebel) is not denied. The plaintiff sought to prove actual taking on the part of the defendant, who, however, denied this, but admitted temporary possession and use of the mare until she was handed over to his commanding officer. Defendant further contended that at the time of the incursion into this district he was acting under the orders of his commanding officer. It would, in my opinion, be a dangerous precedent to lay down that even though a citizen of a state in rebellion against that State be coerced into acts whereby citizens of that State suffer damage, he is freed from liability for reason merely that he is acting under orders of a superior possessing belligerent rights. The defendant by his own act, and an illegal act, placed himself under the orders of an enemy of his own State. The rights of the enemy cannot devolve upon him, and he must be held not to hold the rights of war. Clearly, then, the defendant was engaged in the commission of an illegal act, and was not possessed of the rights of war, and as far as he was concerned, he was a member of an unlawful assembly, and must be held liable for the acts of any and every member of that assembly falling within the reasonable scope of the objects of the assembly (Act 24 of 1886, section 98). In support of these views may be cited the cases of *Kaplan* v. *Hanekom* (13 C.T.R., 56), *White* v. *Barnard* (13 C.T.R., 160), and *Steenekamp* v. *Kyd* (8 Cheil, 260).

With regard to the question of damages, the Court below drew a distinction between the damages sustained by the plaintiff in the event (*a*) of the mare being returned to him and (*b*) not so returned. The animal was evidently required for breeding purposes, and her return would enable the plaintiff to make profit out of her as a brood mare. He has also lost the use of the mare for nearly two years, and all his expenditure on her keep has been lost to him and also his chance of breeding from her during that time. Obviously, if the mare is not returned, the chance of profit is irretrievably gone.

Mr. Upington (for appellant): The question of a rebel acting under orders of a superior officer has been decided as to criminal liability. I do not think that any case as to his civil liability has ever been decided. As to criminal liability, see *Queen* v. *Smith* (10 Sheil, 486), where the principle was laid down that a soldier acting under the orders of a superior officer was exempted from liability, unless those orders were manifestly illegal. That principle was extended to the case of rebels in a case heard before the Special Court at Mafeking, in which two men, Marais and another, were tried for the crime of murder. The facts of the case were that they received orders that all natives attempting to leave Mafeking were to be shot, and in pursuance of that order, they captured certain natives coming out of Mafeking, took them, and shot them in cold blood. They were brought before the Special Court at Mafeking and acquitted, upon the ground that the principle in Smith's case should be extended to them as portion of the belligerent forces. That principle was also adopted in the case of the King against Geldenhuys and others, which was tried in that Court before Mr. Justice Hopley. He thought, therefore, it would seem clear that Acts that were committed by rebels under the orders of their superior officers were not punishable criminally. He believed that in all these cases the orders proceeded from a person who was a Free Stater, or a Transvaaler, that was to say, an officer who was properly at war with Great Britain. But in the case now before the

Court these cases did not seem to have been considered by the Magistrate at all. He seemed to have relied upon the case mainly of *Steenekamp* v. *Kydd*, which was reported 15 Sup. Ct. Reports, p. 251, where see the judgment of De Villiers, C.J. (p. 223). That case is clearly distinguishable from this. In that case none of the party had any belligerent rights. They were simply a number of native rebels. Here two nations were at war. Watson was admittedly a rebel, but that fact did not deprive him of belligerent rights. He acted in accordance with the orders of his superior officer, and in conformity with the rules of civilised warfare.

[De Villiers, C.J.: In a recent criminal case a rebel was convicted of the theft of a watch because he had not acted in accordance with the rules of civilised warfare.]

Exactly; but our contention is that here the appellant did act under those rules. In *Steenekamp's* case there would have been criminal liability. Here there is not, if the rebel was acting under the instructions of an officer having belligerent rights. I submit that a rebel who joined a Boer commando is just as free from civil liability as he is from criminal. He was bound at the risk of his life to obey the orders of his superior officer.

Mr. Benjamin (for respondent): I submit that unless counsel for the appellant can refer to authentic reports of the cases he has mentioned, the Court cannot be guided by them. Moreover, in this case there is no evidence as to who was the superior officer, and there is nothing to show that he also was not a rebel.

[De Villiers, C.J.: Who was Van Staatden?]

If we accept the evidence of the appellant, he was a Free Stater.

[Maasdorp, J.: The Magistrate takes up the position that the appellant was acting under the orders of his superior officer?]

He did not formally decide that. There was no evidence to show that the commando in question had belligerent rights. The onus is on a rebel to show that this was a belligerent commando, and that he acted under the orders of an officer who had belligerent rights. If the horses in question were taken by rebels, the case of *Steenekamp* v. *Kidd* is quite in point. There is no evidence to show that any persons save rebels took part in the capture of the horses. The case of *White* v. *Barnard* (13 C.T.R., 160) is also in point. The evidence given before the Magistrate shows that the appellant himself took the horse.

[De Villiers, C.J.: The Magistrate did not find that this was a rebel commando, but that the appellant was a rebel who joined the enemy.]

I admit that if that was the fact, the law is against me, but it is a pity that the Magistrate was not clearer on his facts.

[Maasdorp, J.: Suppose an enemy had come and taken these horses under orders of his officer?]

He would have to prove his orders, or he would be a common horse-thief. The appellant does not prove his orders.

[De Villiers, C.J.: Could these rebels have been found guilty of theft?]

Yes.

[De Villiers cited *Rex* v. *Burns* (12 C.T.R., 882).]

But see *White* v. *Barnard* (13 C.T.R., 160).

[Maasdorp, J.: That was a case of a purely rebel commando.]

Mr. Upington (in reply): The whole basis of the plaintiff's case was that the defendant had taken his horse. The Magistrate does not find that he had done so, but that he had by an illegal act placed himself under the orders of belligerents. It was admitted that the defendant was acting under orders, and that admission was made to save delay in calling witnesses to prove the fact. The case of *Rex* v. *Geldenhuys* (Criminal Cases) shows clearly that the orders of a superior belligerent officer excuse even a rebel acting under them. See also *Ex parte Marais* (11 Sheil, 467).

Cur. Adv. Vult.

Postea (July 13th).

De Villiers, C.J.: The question in this case is whether a British subject who joined a commando of Orange Free State burghers after they had invaded the Colony, and had been recognised as belligerents, is civilly liable in damages for any act of regular warfare committed by such commando in this colony, even if he has neither personally committed such act, nor derived any personal benefit from it. The act complained of was the taking of the plaintiff's horse for the use of the commando. The defendant was a corporal, acting under his superior

officer, Field-cornet Roux, and he admitted that he formed part of the force which was sent to obtain horses for their use in the field. He admitted also that he rode the horse when his own horse was knocked up, but he added that the horse had been taken by Van Straaten, a Free State burgher, and that he (the defendant) delivered the horse, after riding it for a few hours, to the Field-Cornet. The defendant, whose evidence as to his not having taken the horse was in conflict with that of some of the plaintiff's witnesses, asked for a postponement of the case in order to produce witnesses to prove his statements, but the application was opposed on the ground that his admissions fixed him with liability. The magistrate supported this view, and held, upon the principles laid down in *Steenkamp* v. *Kyd* (15 Juta, 221), that as the defendant formed part of an unlawful assembly he must be held liable for all the acts of that assembly "falling within the reasonable scope of the object of that assembly." It is obvious, of course, that the defendant committed an illegal act in joining the Boer forces, and for his act of treason he appears to have been criminally prosecuted. But the Boer commando cannot be regarded as an unlawful assembly in the proper acceptation of the term, for the Boers had been recognised as belligerents, and the burghers themselves could not be held criminally liable for acts of regular warfare committed by them. This Court was careful in the case of *Steenkamp* v. *Kyd* not to lay down any general rule which might have the effect of attaching civil liability to the commission of acts not falling under the class of cases then being dealt with. It was a case of conspiracy to wage war against the Queen, and it was held that the appellant, who had joined in the conspiracy, and had taken a part in appointing a leader to conduct the war, was responsible for damage done to individuals by the orders of such leader, if such orders might reasonably have been anticipated as a consequence of the conspiracy. In the present case the defendant joined the Boer forces after war had been declared, after the Boers had been recognised as belligerents, and after they had invaded the Colony, and there is no evidence whatever to show that he invited or induced the Boers to invade the Colony or the district in which the horse was taken. If the plaintiff's contention in the present case is correct the defendant would be equally liable to a criminal prosecution for the theft of the horse, and, if a single person was killed by the commando after he joined it, he would have been guilty of murder. As I have already remarked, he was certainly guilty of high treason in joining the commando at all, but it does not follow that every act of regular warfare rendered him liable to criminal prosecution for such act. This question appears to have been carefully considered in the case of *Maritz*, who was tried for murder before the Treason Court at Mafeking on the 7th November, 1901. "It has been urged," said Solomon, J., delivering judgment on behalf of the full Court, "that this (carrying out the ordinary orders of his superior officer) would not be any defence on the part of the prisoner Maritz, as he was a rebel, and cannot cover himself under the orders of Snyman. True, he was an insurgent, and had joined the Republican forces, and therefore every single act he performed with them was an act of treason, but to say that because he is a rebel he is not entitled to a belligerent's ordinary rights is going too far. If we did so we should have to say that every shot fired by rebels is the crime of attempted murder, but no such charge has been brought before us, although there were some hundreds so engaged. The insurgents who joined the burghers must be placed on the same footing as those burghers fighting against us; therefore, we must overrule the point raised by Mr. Hutton." This ruling was followed by Hopley, J., in the case of *Gildenhuys*, tried before him at the recent Criminal Sessions in Cape Town. It is admitted that the burghers who invaded the Colony were belligerents, and cannot now be sued for damages for any acts committed by them according to the ordinary usages of war. The taking of horses for the purposes of their campaign would not expose any burgher to an action for wrongful conversion. It appears from the plaintiff's evidence that he was taken prisoner by the commando, but released after a few hours. The burghers who took part in this act would certainly not be liable to an action for false imprisonment, nor do I consider that the defendant would be so liable, seeing that the act was a legitimate act

of warfare. Although I am not prepared to say that a British subject joining a belligerent stands on exactly the same footing in regard to civil liability as the enemy himself, I am clearly of opinion that he is not civilly liable for acts of legitimate warfare committed by the enemy for the due prosecution of the war and not for his personal benefit. It may well be that if the horse had been found in the defendant's possession after the war he would have been bound to restore it to its owner, but the mere fact that during the war he had ridden the horse for a few hours does not render him liable for the value of the horse, or to pay damages for its detention. The appeal must therefore be allowed, with costs, and judgment entered for the defendant with costs, in the Court below.

Maasdorp, J., concurred.

[Appellant's Attorneys: Michau and De Villiers. Respondent's Attorneys: Faure and Zietsman.]

SUPPLEMENT.

*MCNEILL V. EATON. 1903. May 27th. Aug. 29th. Sept. 11th.

Lease—Tenant's right of back entrance to premises leased—Damages.

A lease of premises includes everything necessary for the due and proper enjoyment and occupation thereof.

Where, therefore, a house with yard and stable was let to the plaintiff.

Held, *that she was entitled, in the absence of anything to the contrary, to a right of way through the yard of the defendant, such being the only exit from her yard and stable to a public thoroughfare.*

The defendant, as lessor, who had obstructed the plaintiff in the due and reasonable enjoyment of this right of way, held liable in damages for the loss and inconvenience caused thereby.

This was an action for £500 damages brought by Margaret Jane McNeill, a boarding-house keeper, of 62, Strand-street, against William Eaton, a butcher, residing at Cape Town, for wrongful obstruction.

The declaration set forth:

1. That the plaintiff carried on business as a boarding-house keeper in Cape Town.

2. About 22nd October, 1901, a written contract was entered into between the parties, by which the plaintiff hired 62, Strand-street, for one year on a lease, and with an option to renew the contract.

3. Under certain conditions the defendant agreed to keep the outside portion of the premises in a good and efficient state of repair.

4. About the month of October, 1902, plaintiff exercised her option as to a renewal of the lease.

5. About January, 1902, defendant wrongfully and maliciously obstructed the plaintiff's premises by causing a small gate to be erected in the rear of the house.

6. As a result, the plaintiff was unable to keep a horse and cart, as she intended.

7. The defendant from time to time locked the gate, and prevented plaintiff from going into Palace-lane, thereby depriving her of the beneficial use or occupation of the said premises. She had been compelled to quit the premises, and suffered damages to the extent of £500. Wherefore she claimed:

(*a*) Damages to the amount of £500.
(*b*) Interest *a tempore moræ*.
(*c*) Alternative relief.
(*d*) Costs of suit.

The defendant's plea admitted the first four paragraphs in the plaintiff's declaration, but alleged that it was provided by the lease that the rent should be paid per month in advance from November, 1901, and that the lease should be cancelled if the plaintiff failed to pay as stated. Plaintiff failed to pay the rent on the 1st February, 1903, within the

* (This case was by an oversight omitted from its proper place.)

seven days stipulated. The defendant denied that Palace-lane formed any part of the premises leased, or that the plaintiff had any right to use it for any traffic. The defendant was always willing to allow the plaintiff to use Palace-lane, and alleged that persons could pass freely through it at all reasonable times. He further denied that the plaintiff was compelled to quit the premises, or that she suffered any damages, and prayed for a dismissal of the plaintiff's claim, with costs.

The plaintiff's replication was general.

Mr. Searle, K.C. (with him Mr. Rainsford) for plaintiff; Sir H. Juta, K.C. (with him Mr. Benjamin) for defendant.

Mr. Searle called the plaintiff.

Margaret Jane McNeill. She stated that the premises she hired from the defendant in October, 1901, consisted of thirteen bedrooms, dining-room, kitchen, and several outhouses. The plan put in by defendant's counsel showed the adjoining property, which was also owned by the defendant. The defendant showed her over the house, and explained that she could have free access to the house through Palace-lane. When she rented the house there were no obstructions of any kind. The stables had been used previous to her occupation of the house. The occupants of the house used the back exit freely for a time, but shortly afterwards the defendant put up wire netting, and made a sort of cage of it, and also erected a gate. Subsequently he erected another gate towards Palace-lane. For a time the defendant allowed them to use the passage, and as a result of an action the plaintiff was compelled to repair the premises in September, 1902. When plaintiff renewed the lease, Mr. Saber, the defendant's agent, promised to have the obstruction seen to. She told Mr. Saber that she intended getting a horse and cart. About December, 1902, the defendant turned very nasty and locked the gate at intervals through the day. The defendant kept poultry in the cage, and one of his men kept the key. Witness wrote several letters to the defendant and his agent, but things got very much worse, in fact relations were strained ever since she won the action against him in the Magistrate's Court. Many of the boarders left the house on account of the obstruction. Rubbish had been lying at the back for as much as eight days, and on several occasions for four or five days. At the beginning of February, 1903, plaintiff wrote, stating that if the defendant did not remove the obstruction she would be compelled to leave. After a notice had been sent from a law agent the gate was locked more frequently than ever. In reply to the notice, defendant's attorneys wrote stating that access had been given as a matter of grace, and that the defendant retained the right to close the gate between sundown and sunrise. In her business she could make £1 profit on every boarder, providing she had between 25 and 30 in the house.

Cross-examined by Sir Henry Juta: Witness never complained to the defendant about his fowls, nor was she aware that the defendant had complained to her about missing some fowls. Witness could not give the dates when she reported the refuse lying at the back of the house. Witness claimed damages from December, 1902. She expected that the defendant would leave the gate open during the night. She could not explain how the sanitary men removed the rubbish if the gate was locked, but witness was positive that the gate was locked on several occasions during the month of January. Witness had partly bought the cart on the belief that the gate would be thrown open. She had never tried to sub-let the premises, neither had she applied to the agent to convert the premises into a coffee shop.

Archibald McNeill, husband of the plaintiff, said that before the lease was entered into, he saw Mr. Saber, the defendant's agent, who explained that there was a large stable and some outhouses, which he could reach through Palace-lane. When he entered the house, the passage was free for a couple of months, but at the end of that time the netting was put up, and subsequently the gate was erected. When he saw Mr. Saber, the agent said he would remove the obstruction. Dozens of times on his return from work he found the gate in Palace-lane locked. The cart could easily have got in through the back gate.

Cross-examined by Sir Henry Juta: He was not aware that the stables had been condemned by the municipality. He thought it most absurd to go and see the sanitary authorities as to whether he might keep a horse. The sanitary authorities condemned the coachhouse as unfit for habitation when

they discovered there an old man, whom witness put up as a matter of charity. The gates were locked about 6 or 7 months after he took up residence.

Percy Reid, railway guard, said he was living at plaintiff's boarding house from May 25th, 1902, up to January 31 of this year. He left on account of not getting access to the back. While he was at the house the back gate was locked from time to time during the day. It was always locked at night. In December and January matters became worse in respect to the back gate being constantly closed during the day. Twelve other boarders left. It was a great inconvenience to many of the boarders, who, in their working clothes preferred to enter through the back.

Cross-examined by Sir Henry Juta: Mrs. McNeill's inner gate was locked during the night.

Beatrice McNeill, daughter of the plaintiff, said that about the beginning of December she heard her mother say to Mr. Saber: "What about the obstruction?" Saber said he had no time then, but that he would see about it. In about January, 1902, witness heard Saber tell plaintiff he would have the obstruction removed. The gate was constantly locked in the day time in January. In February witness did not think she found it open day or night.

Aletta Coxitt, previous tenant of the premises in question, deposed that during her tenancy of three years she let the stable. A cart used to be brought through the gate during the first year. When Mrs. McNeill came, witness left. Horses were kept there without objection being raised by the sanitary authorities up to the time witness left. The entrance was always open. There was no gate in the passage when witness was there.

Cross-examined by Sir Henry Juta: Witness had no knowledge of the stable being condemned during plague time. She received the rent of the stable up to September.

William Joseph Smith, plumber, said that in January of this year he was living at the house. On one occasion, on a Sunday, between 9 and 10 in the morning, witness saw the gate padlocked. In the following week, between 5 and 6 at night, he also found the door locked.

Henry Meckish, police constable, gave evidence as to seeing the gate locked at about 6.30 one evening in January. His attention was called to it by Mrs. McNeill. He was on duty in Waterkant-street at the time.

Mr. Searle closed his case.

Sir Henry Juta called

Alfred P. Preston, sanitary inspector, in the employ of the municipality, who said that in April, 190 he was a boarder at the house. The netting was put up by Eaton to keep his fowls in. Witness considered that the putting up of the gate by Eaton was a proper precaution. A complaint was made in January in connection with the removal of the refuse. Witness went up to investigate. He found both gates of Eatons open; plaintiff's gate was locked, and Mrs. McNeill had to fetch the keys to admit him. Witness made inquiries as to the cause of the non-removal of the refuse. He made no complaint to Eaton as to the omission being due to obstruction. There was another complaint in February, which witness investigated. He found that the Corporation employee was to blame. Witness had visited the place every other morning for about six months up to March this year, and had always found Eaton's gate open. Witness had no interest whatever in this case. The stable was in a very bad state when witness was there. He had never seen a horse in it. There was no drainage to the stable. No one would be allowed to keep horses there. An ordinary vehicle could not enter Palace-lane without damaging the walls.

By the Court: Witness had not seen any trace of a padlock on the outer gate.

Wm. Hy. Morton, sanitary inspector, gave similar evidence. His duties frequently took him to Palace-lane. Witness was never stopped or incommoded in removing refuse by these doors being locked. No complaint was ever made to him in this respect by his subordinates. Witness had never found the doors locked. Plaintiff had told witness the doors were locked, but witness never saw a door locked.

Wm. Eaton, the defendant, said he bought the premises in September, 1901. Palace-lane was frequented by loafers at night, and witness kept fowls. Mrs. McNeill complained on one or two occasions of the fowls going into her yard, and witness put up netting, with a gate, fastened by a hook, in the middle. At night a locked chain used to be put around the post. On the outside there

was formerly an old gate, of which the remains could be seen when witness took over the property. Witness replaced this with a new gate, which was fastened at night by a padlock. Witness's workmen began at 5 a.m., and one of the men, who slept on the premises, locked the door at night and opened it in the morning between five and six. In December witness heard plaintiff wanted to get a horse and cart. Witness had to have his carts specially made in order to bring them into the lane. On the hotel side, witness had had down pipes let into the wall, in order to allow room for the carts to come in. Notwithstanding this, the carts frequently damaged the wall when they were brought in. An ordinary cart could not be brought into the lane. Witness did not begin to lock the gate during the day in January. Witness was quite agreeable to give reasonable access, but he would not leave his place open at night. There was no reason why witness should close the gate at any time during the day. No one had ever complained to witness at any particular time of the door being locked. There were negotiations about the sub-letting of the house. Mrs. McNeill asked if she could convert the front room into a shop; witness refused. When application was made about the keeping of a bogie and horse, the McNeills were referred to the sanitary authorities. As McNeill did not go in accordance with notice, witness once closed the gate in February. Witness saw Mr. McNeill with a policeman at the gate on that occasion.

Cross-examined by Mr. Searle: Witness told a boy who came into the yard with coal in November to "clear out." This was not because he objected to coal being brought that way to Mrs. McNeill's, but because the boy kicked witness's dog. Witness denied that the place had been closed during the day before February; the evidence of the witnesses who said that the gate was closed during the day time was untrue. The man who had charge of the yard could lock the gate whenever he liked.

Alfred W. Bam said he had known this property for between 30 and 40 years. Witness's father put up a gate at the place where the present gate was. This was done to keep out the rowdy crowd, who assembled about the place, there being a couple of canteens there at the time. Witness's father owned certain of the cottages there. There were still remains of the old gate. During the daytime the old gate used to be open; at night it was always closed. In his father's time it was impossible to bring a cart through. Witness had never seen a cart going in there. Until Mr. Eaton got the place no cart was brought through. The passage was used chiefly for the conveyance of rubbish from the houses.

Alfred B. Saber, agent for defendant, deposed to having let the premises to Mr. McNeill. Witness said nothing about a stable or coach-house. Witness never promised to remove any obstructions. He might have said he would see to it, but he had no power to undertake that certain things would or would not be done. Witness never communicated with Mr. Eaton asking him to remove the gate or wire. Plaintiff had approached witness in regard to subletting.

Cross-examined by Mr. Searle: Mrs. McNeill had written in December, 1901, complaining that Mr. Eaton had put up a gate, and so caused an obstruction. Witness did not remember any verbal reference to the obstruction by any of the McNeills.

Charles Bass, foreman to Mr. Eaton, said the dfendant's gates were always open during the day. They were never locked during daytime, to witness's knowledge. No one had ever complained to witness about the gates being locked.

Sir H. Juta closed his case.

Mr. Rainsford (for plaintiff): The assignment of the lease to the applicant provided that these premises should be let as a boarding-house. The premises are not fit for this purpose, as the only passage into the house led through the dining-room. Again, the defendant told plaintiff that she (plaintiff) could go through the back entrance to see the premises. Defendant's contention that the plaintiff had no right to the use of this passage is quite untenable. Mr. Saber's evidence shows that his recollection of the transaction is not very clear, and on some points his evidence is in conflict with the documentary evidence. As to the wire gate at the back, the defendant says it was put up to keep his fowls off plaintiff's property at her request, but the correspondence shows that this was not so. She complained of the obstruction as soon as the gate

was put up. In a letter to Saber, she and her husband refused to renew the lease until it was removed, and Saber promised to see about it. In view of this admission by Saber, we cannot question the evidence of the plaintiff and her husband. The evidence that this gate was locked at all hours of the day in January and February of 1902 is very strong. As to what defendant says about the impossibility of using the stable, see Cochrane's evidence and the plans showing the width of the passage. There is no evidence to show that the stables were ever condemned. The evidence shows that a considerable number of boarders left in consequence of the back entrance having been closed.

Sir H. Juta, K.C. (for the defendant): This case raises a novel and interesting point, as there are so many houses in Cape Town without back entrances. Representations and guarantees have nothing to do with this case. The case is founded on the lease itself, and nothing appears on the pleadings about any representations previous to the lease. The plaintiff's case is that she has been deprived of the use of certain premises by something that we did on our own property, which we had not leased; and she claims a servitude of *via* and *actus* by night and by day over our premises. Now, she cannot establish a servitude, so she must contend that this passage was let to her as part of the premises. If so, she must be the lessee of it.

[Kotzé, J.: She may have a right of passage over the place.]

That would be a servitude, and in our law there is no such a thing as an implied servitude.

[Kotzé, J.: A servitude may be created by stipulation, and you may be estopped from denying it.]

We have no doctrine of estopple. The question is, has a servitude been created? The lease does not show that it has.

[Maasdorp, J.: But if you lease a property, you grant everything necessary for the enjoyment of that property.]

She had a front door, and I do not admit a back door to be necessary. The Court is now asked to import into the lease something which is not there. The lease only gives her the house No. 62. Strand-street.

[Maasdorp, J.: Has she any right to the yard?]

The yard is a part of the property leased; but you cannot vary a written document by a previous verbal agreement. Suppose Eaton sold his property to Brown, would Brown be bound by this supposed right-of-way without registration? Therefore the right to the use of this passage cannot be given by the terms of the lease. If the passage was leased to the plaintiff, clearly we had no right there. Even English law would not put the right to a back entrance on the ground that it is part and parcel of beneficial enjoyment, but on the ground of intermittent and continuous easements. The latter (*e.g.*, right to a drain) go with the property by implication of law; the former (*e.g.*, a right of way) do not. See *Woodfall on Landlord and Tenant* (pp. 150 and 151, 16th edition); *Tawe* v. *Knowles* (Q.B. 1891, Vol. 2, 564). To show that this back entrance is not part and parcel of beneficial use, I refer to *Brown* v. *Alabaster* (37 Ch. D., 490). Here the pleadings do not allege that the back entrance was included in the lease, but that we put up a gate on the plaintiff's property. The evidence shows that the gate was on our property. They do not claim this lane under their contract, nor as a servitude, nor as a *via necessitatis*.

[Maasdorp, J.: Is it not a *via necessitatis*?]

A *via necessitatis* depends upon the degree of necessity. See *Peacock* v. *Hodges* (Buch., 1876, p. 69). Here access was obtainable by the front entrance, so it is impossible to hold that the back entrance was a *via necessitatis*. The gate was put up in December, 1901, and the declaration alleges that access was cut off in January, 1902, so I do not see on what plaintiff's case is based, as she renewed the lease in October, 1902, months after the date of the alleged obstruction. She certainly cannot claim in respect of any obstruction which took place before October, 1902.

Mr. Rainsford was not heard in reply.

Cur. Adv. Vult.

Postea (September 11th):

Kotzé, J.: The plaintiff in this case leased from the defendant certain premises known as 62, Strand-street, for the period of one year commencing from the 1st of November, 1901, with the right of renewal. The lease was so renewed for another year. Besides a front entrance from Strand-

street to the premises, which had for several years been used as a boarding-house, and were likewise hired by the plaintiff for that purpose, there is a back entrance from Palace-lane, through a yard belonging to the defendant. The premises leased have attached to them at the back a stable for two horses and a small enclosed yard, which, by means of a gate, has an exit through a larger yard at the back of other buildings belonging to the defendant into Palace-lane, which is a public thoroughfare communicating with Waterkant-street. Before the lease was entered into, Mr. Saber, the defendant's agent, said to the plaintiff's agent, who was acting for her, that the house had a nice stable and a back entrance from Palace-lane. Before the plaintiff entered into occupation, the defendant had caused some manure to be removed from the stable, and after she had been in occupation about two months, he put some wire-netting over his yard. This was done for the purpose of keeping poultry in the yard in connection with the business of the defendant, who is a butcher by trade. The defendant also put up two gates, which he at first kept locked occasionally, and afterwards regularly at night, and eventually he locked these gates during different portions of the day as well. The plaintiff had from time to time complained to Saber about this obstruction, who, according to her statement and that of her daughter, promised to have it removed. This Saber denies, but he admits that he may have said that he "would see to it." The plaintiff on one occasion also spoke to the defendant personally about the obstruction caused by the gates, and he replied that he would do as he pleased. The plaintiff's case is that she has been seriously hindered in the free use and occupation of the premises through the acts of the defendant, which justified her in quitting possession, and she also claims £500 as damages suffered through the alleged wrongful conduct of the defendant. In his plea, the defendant denies that the plaintiff has any right to use any portion of the premises as a stable or coach-house, or that she had any right to use Palace-lane for vehicular traffic, or that the premises leased would admit of vehicular traffic. He also pleads that he was at all times willing to allow the plaintiff to use the lane for herself, her servants, and boarders, at all reasonable times, and did so allow them, not as a matter of right, but of grace, and did so construct the woodwork and netting that the aforesaid persons could pass through the same. He also admits that at certain times he closed the gates. It is proved that at one time the plaintiff had as many as forty boarders, and she says that she made a profit of £1 per boarder per month. To enable her to do this, she would require to have from twenty-five to thirty boarders a month. Several boarders left the plaintiff, as they could not, when returning from their work, come in during the night or day through the back entrance, as before. This, it is said, was due to the gates which had been put up and kept locked by the defendant. It is also proved that for the same reason a chimney sweep had to enter the house through the front door and dining-room, and in the same way coal and lime had to be taken through to the back. So, also, by reason of the obstruction, the house refuse was not regularly removed from the plaintiff's yard. Early in December, 1902, the plaintiff, by letter, informed the defendant's agent, Saber, that she had purchased a bogie cart, and again requested that the obstruction might be removed, for without that, she was unable to get the cart into her yard, and by way of answer, she was referred to the defendant's attorneys. She subsequently wrote again, pointing out that the cart and horse were intended for use in connection with her boarding-house, in order to remove baggage to and from the Docks. Nothing was done, however, to meet her wishes, and on the 27th January, 1903, she once more informed Saber that, unless the obstruction were removed, she would be compelled to leave the premises, and early in February she did leave.

The material question in the case is the right claimed by the defendant to put up the netting and gates, and keep the latter locked, so as to prevent the plaintiff from passing freely from her back yard through the defendant's yard into Palace-lane. The written contract of lease must be looked at to see if there is any clause in it dealing with this point. I do not find any express mention of a right of passage in the lease itself. All that is stated is

that a certain lease situated at No. 62, Strand-street, is leased to the plaintiff, who shall have the full, free, and undisturbed use and occupation thereof. Now, when premises are leased and a backyard and stable are attached to and form part of the premises they must be taken, unless something to the contrary appears in the contract, to be included in the lease. As, therefore, the stable forms part of the leased premises, it follows that the plaintiff cannot have the full and free use and benefit of this stable, unless she has an entrance from and exit to Palace-lane through the yard of the defendant. A cart and horse could not be expected to reach the plaintiff's yard and stable in any other manner. A lease of premises includes all those things which are necessary for the due and proper enjoyment and occupation thereof. Therefore, quite apart from the assurance given, before the lease was executed by the defendant's agent to the plaintiff's husband, who was acting for her, as to the right to use the back entrance from Palace-lane, such right must be taken to be included in the contract of lease. The defendant consequently was not justified in preventing the plaintiff from exercising this right. Of course, the plaintiff was only entitled to the reasonable exercise of this right. She could not, for instance, insist that the defendant should not keep poultry in the yard, or make any other reasonable use of it, and even lock the gates at night for the protection of his property. This was quite recognised by the plaintiff, who stated that if the gates had been locked at night only she would have raised no objection. The defendant, however, went further, and also locked the gates at different times during the day, insisting that he had a right to do so. In this he was mistaken. He was not entitled to deprive the plaintiff in this way of her right of passage through the yard. In consequence of this she has sustained loss and damage. The defendant alleges that no cart can get through Palace-lane, which is six feet wide, and will not admit of the passage of a cart. But it appears that he himself had a cart of smaller width which used to go through the lane, and it is quite clear that a small cart with a width if 4 feet 6 inches could pass through the lane and on to the plaintiff's yard. I do not think that any special damage was sustained through the inability to keep a cart and horse by reason of the acts of the defendant. At any rate, there is no proof of such specific damage. Then the fact that several of her boarders left the plaintiff, because the gates were locked, must not be carried too far, for it may be said that if a boarder found the back gates closed in the daytime he could have entered by the front door, and if he came home late at night he could have been provided with an ordinary latch-key. Still, inconvenience and loss were suffered in this respect, and the plaintiff's right was interfered with by the defendant. In addition to that, coal and other things which should have come in by the back entrance, had to be carried through the front door and dining-room of the house, and there was also the annoyance of the house refuse not being regularly removed. Taking all these circumstances into consideration, coupled with the fact that repeated requests were made by the plaintiff for the removal of the obstructions, of which no notice whatever was taken, I think that a sum of £50 will be a fair amount to award as compensation by way of damages, to the plaintiff. There will therefore be judgment for the plaintiff for this amount, with costs.

Mr. Justice Kotzé added that his brother Maasdorp agreed with him in this decision.

[Plaintiff's Attorney: W. G. Coulton; Defendant's Attorneys: Van Zy and Buissinné.]

APPENDIX.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Commissioner of Public Works, representing the Colonial Government of the Colony of the Cape of Good Hope v. *Logan, from the Supreme Court of the Cape of Good Hope; delivered the 12th June, 1903.*

Present at the Hearing:

Lord MACNOUGHTEN, Lord DAVEY, Lord ROBERTSON, Lord LINDLEY and Sir ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The short question in this appeal is, whether the respondent is entitled to compensation for lands expropriated by the Government of Cape Colony for purposes connected with a railroad constructed through the respondent's land.

The land in question is part of a farm called De Draai Farm or Kruispad, which was originally granted by the Government to one Schalk Willem Pienaar on perpetual quit rent, and by the deed of grant, which is dated the 1st November, 1838, the grant is expressed to be made subject to certain conditions therein mentioned and as "being further subject to all such duties and regulations as either are already or shall in future be established respecting lands granted under similar tenure."

It has already been decided by this Board in *The Divisional Council of the Cape Division* v. *De Villiers* (2 A. C. 567), and it is not disputed that lands of this tenure are subject to the provisions of the Proclamation of Sir John Francis Cradock of the 6th August, 1813, for the conversion of loan places to perpetual quit rent. By this Proclamation it was provided that every holder of a loan place, on his making application by memorial to the Government for the purpose, should have a grant of his place on perpetual quit rent to the same extent as he had theretofore legally possessed the same on loan. Sections 4 and 11 are as follows:

Section 4: "The Government reserves no other rights but those on mines of precious stones, gold, or silver, as also the rights of making and repairing public roads and raising materials for that purpose on the premises; other mines of iron, lead, copper, tin, coals, slate, or limestone are to belong to the proprietor."

Section 11: 'This perpetual quit rent" (meaning apparently the land held on that tenure) "shall further not be liable to any other burthens but those to which all freehold lands are already subject or which may hereafter be further prescribed."

Under later legislation the powers of the Government in respect of the making of roads were vested partly in Road Commissioners and partly in Divisional Councils. The provisions of the earlier Ordinances and Acts for this purpose were consolidated in Act IX. of 1858, intituled "An Act to provide for the Management of the Public Roads of the Colony," the material sections of which, for the present purposes, are as follows:

"Section 10.—The Chief Commissioner or any Assistant Commissioner or any officer duly appointed by the Governor and acting under the authority of the Governor may enter upon and take possession of so much of any land belonging to Her Majesty the Queen as may be required for the purpose of any main road and for the erection of toll-houses, toll-bars, residences for workmen, or for any other purpose relating to the execution of this Act; and they may enter upon all such land lying convenient to a main road, and there dig, get, and carry away any stone, clay, or other materials which may be required or serviceable for making or repairing any main road.

"Section 11.—For the purpose of making any such main road, and of providing any such toll-houses and residences as aforesaid, and generally for any of the objects of this Act, the aforesaid Commissioners of Roads, or other officer by them duly authorised, are hereby invested for the purpose of so doing with all and singular the legal rights, if any, belonging to the Government of this colony in respect to the taking of any land and the raising and carrying away materials for making and repairing public roads, whether such rights have been preserved to the said Government by the

proclamation of His Excellency Sir John Francis Cradock, bearing date the 6th day of August, 1813, permitting the conversion of lands on loan into places on perpetual quit-rent, or have been created by express stipulation or condition in any grant of freehold property, or exist in any other way or manner whatsoever: Provided that no land be taken or materials be raised or carried away as aforesaid without previous notice to the proprietor thereof.

"Section 12: If any of the aforesaid Commissioners of Roads, acting under the authority of the Governor, should require to take or use any land or to dig, get, or carry away any materials situated as aforesaid, belonging to any person who may not be bound by law to allow the said Commissioner so to do without requiring any recompense or payment, and who may think proper to require compensation from the said Commissioner—or if he should require to use any land or to take materials from any land that the Government may have a legal right to use, but which has been improved by cultivation, irrigation, or otherwise—he may treat and agree with every such person for the purpose or hire as the case may be of any such land or materials, and may enter into any contract relative to the obtaining of such land or materials, and for compensation for the use of such improved land, upon such terms and conditions as he shall judge expedient."

And the same section further provided, in case of disagreement between the owner of the land and the Commissioner as to the amount of the purchase money, or hire, or other recompense to be respectively given and accepted, for the same to be settled by arbitration as therein appears.

By section 3 of Act 19 of 1874, which provided for the construction (amongst other railways) of a railway from Worcester to Beaufort West, all and singular the powers which were by the Act 9 of 1858 bestowed upon the Commissioners of Roads in regard to taking or acquiring lands and materials necessary for the making or repairing of any such main road as in the said Act mentioned or of any works in connection therewith, were bestowed upon the Governor or any person charged by him with the making or maintaining of railways precisely as if the said powers and authorities were, *mutatis mutandis*, therein again set forth, and as if the said railways were public roads.

The railway from Worcester to Beaufort West was constructed partly on lands forming part of the farm now belonging to the respondent, and a station called the Touw's River Station was made there. Previously to and in the year 1885 the Government acquired portions of the farm for the purposes connected with the railway, including the building of an hotel, and paid Du Plessis, the then owner of the farm, £350 in respect of such expropriation. According to the evidence of Mr. Elliott, the General Manager of the Government Railways, that sum was paid because of the hotel, which he thought was not quite a railway purpose.

On the 16th December, 1896, the Government gave notice to the executors of Du Plessis (then deceased) of their intention to expropriate a further portion of the farm in extent 160 acres. The land appears to be required for certain purposes connected with the existing railway other than construction or maintenance thereof. By deed of transfer, dated the 24th February, 1897, the farm was conveyed to the respondent, who thereupon became and is now the registered owner of it. The respondent bought with notice of the notice of 16th December, 1896.

Lengthy negotiations thereupon ensued between the Government and the respondent respecting his right to compensation for the land expropriated under the notice of 1896, and respecting certain rights of water. In the result, the respondent, on the 25th of July, 1900, commenced the present action against the appellant, and by his declaration he claimed (amongst other things) a declaration that the land claimed to be expropriated since 1885 was not required for railway purposes, and restoration of the same to him, with damages. At the trial the other issues were disposed of, and as it appeared that the respondent was quite willing to the expropriation going through provided compensation was paid, the parties agreed that the issue be determined whether the respondent was entitled to compensation in respect of the expropriation.

The Supreme Court gave judgment, dated the 6th May, 1901, for the respondent, declaring him entitled to

compensation for the land expropriated. The reasons for the judgment were stated by the Acting Chief Justice, Sir E. J. Buchanan.

It is admitted that the land in question has not been improved by cultivation, irrigation, or otherwise within the meaning of the 12th section of Act IX. of 1858, and that the appellant's right to expropriate the land without payment of compensation is derived from the proclamation of 1813, which (as he contends) is extended by the 11th section of that Act to the other purposes mentioned in that section.

The question therefore turns exclusively on the proper construction of the 11th section. Does that section mean that the right of taking land and materials for the making and maintenance of roads reserved to the Government as regards quitrent lands by the Proclamation of 1813 are extended and made applicable to the other purposes mentioned in the section? Or is it only a transfer section, whereby the existing powers of the Government *tales quales* are transferred to and vested in the Commissioners? If the former is the true construction, the decision should be in favour of the appellant, for their lordships think that the power, if extended to taking land for new purposes, must be a power to expropriate without the payment of compensation as reserved by the Proclamation. It must be admitted that the language of the section is capable of either construction. In favour of the appellant's construction, it may be argued that the whole section is governed by the opening words, "for the purpose of making any such main road and of providing any such toll-houses and residences as aforesaid, and generally for any of the objects of this Act." And that the words "for the purpose of so doing" are repeated after the word "invested." On the other hand, if the object was to extend the existing power to new purposes, which is equivalent to the creation of a new power of expropriation, you would expect a much more direct expression of the intention, and it may be pointed out that the section extends to freehold lands as well as quit-rent, and the existing powers which had been created by express stipulation or condition, or in some other way or manner as regards freeholds, might well be powers which would be sufficient for some or all of the purposes mentioned so as to satisfy the words of the section. Their lordships are disposed to adopt the narrower construction of the section, which would make it a transfer only of the existing powers from the Government to the Commissioners as more conformable with the language used. But their lordships are also influenced by the consideration that the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms. This principle has frequently been recognised by the Courts of this country as a canon of construction, and was approved and acted on by Lord Watson in delivering the judgment of this Board in *The Western Counties Railway Company* v. *Windsor and Annapolis Railway Company* (7 A.C., 178, at p. 188).

Their lordships therefore agree with the conclusion of the learned judges in the Supreme Court, though not, perhaps, for quite the same reasons. They are of opinion that the respondent was not bound by law to allow the appellant to take the land for the purposes for which they are required without recompense, and he is therefore entitled to compensation under the 12th section of the Act. They will therefore humbly advise His Majesty that the appeal be dismissed. The appellant will pay the costs of it.

"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., and the Hon. Mr. Justice KOTZE.]

VAN DER BYL AND CO. v. SOLOMON. { 1903. July 2nd.

Mr. Van Zyl moved for an order confirming a writ of arrest executed against the defendant on an unsatisfied judgment for goods sold and delivered. It transpired that the defendant had been arrested while aboard in the Bay ready to leave the country.

The defendant, who said he spoke Arabic, could not be made to understand the nature of the proceedings, and eventually the case was ordered to stand over pending an interpreter being procured.

Subsequently the defendant was questioned through an interpreter. He admitted the debt.

The Court confirmed the writ, and gave judgment for the amount, with costs.

ADMISSIONS. { 1903. July 13th.

Mr. M. Bisset moved for the admission of Gottlieb Wilhelm Antoine van der Lingen as an advocate.

Application granted, oath to be taken before the Registrar of the High Court at Bloemfontein.

Sir H. Juta, K.C., moved for the admission of Charles Frederick William Struben as an advocate.

Application granted and oath administered.

Mr. C. W. de Villiers moved for the admission of Heneage Bidewell Edwards as a conveyancer.

Application granted and oath administered.

GENERAL MOTION.

CRANKO v. CRANKO.

Mr. Benjamin, for the plaintiff, moved for an order declaring the respondent of unsound mind and appointing a curator bonis, and for the rule nisi to be made absolute, calling upon Christina Cranko to show cause why plaintiff shall not be declared to have a vested right to one-half of the joint estate of the late W. J. Cranko.

Mr. Close, for the *curator ad litem*, offered no objection.

Evidence was tendered by Dr. Elliot as to the imbecility of the respondent. He held out no hope of her recovery.

An order was granted declaring the defendant of unsound mind, and appointing Mr. Steytler as curator of the property, and the defendant's mother as personal curator, the rule prayed for in terms of a special case to be made absolute, costs to come out of the estate.

SOUTH AFRICAN MINERAL WATER CO. v. LLOYD AND OTHERS.

Mr. Buchanan moved for provisional sentence for £306, less £100, paid on account by virtue of certain conditions of sale for a certain property, wherein the first-named defendant made himself

bound as principal debtor, and the second and third named defendants were liable as sureties, judgment to be against all three, one paying the others to be absolved, with interest and costs of suit, and also for the property to be declared executable.

Order granted as prayed.

GOODMAN V. GOODMAN. { 1903. July 13th.

Foreign judgment — Provisional sentence — Fraud.

The Court will not enforce a foreign judgment where such enforcement would constitute a fraud upon the person against whom it is sought to be enforced.

This was an application for provisional sentence on a judgment of the late High Court of the Transvaal for £390 on certain promissory notes, with costs.

The affidavit of Philip Goodman (the defendant and brother of the plaintiff), stated that he was a contractor residing at Sea Point. He was formerly in business in partnership with one Benjamin Greenberg, in the district of Pretoria. He admitted that he signed the promissory notes, but he denied that he owed the money to the plaintiff, or that the plaintiff made any advances to the said firm.

The replying affidavit of the plaintiff stated that he made the advances to the firm, and that his brother signed the notes, and he was liable.

Mr. Benjamin for plaintiff; Mr. Close for defendant.

[De Villiers, C.J. (to Mr. Benjamin): I was looking over the papers of the Landdrost's Court, and I see no proof of service on the present defendant. On the other hand, however, the defendant has not raised the question.]

The defence is a most extraordinary one. The defendant was losing money on the business, and he wanted to dissolve, but his partner would not agree, and the defendant then signed notes for money advanced by his brother to the firm. It is difficult to understand the defendant's object in setting up such a defence, unless it is to defraud his partner.

[De Villiers, C.J.: I think "fraud" is a very strong word to use in such a matter.]

Perhaps it is, but at any rate, it is most difficult to understand the line of action pursued by the defendant. I submit that the Court should give provisional sentence on the judgment of the Court of the Transvaal.

Mr. Close submitted that this was not a matter for provisional sentence at all, but one in which the whole case should be gone into, to decide whether the defendant was liable for these alleged promissory notes.

De Villiers, C.J.: The Court is asked to grant provisional sentence upon a judgment of a Landdrost's Court of the late South African Republic in an action against a firm consisting of the present defendant and one Greenberg. From the records of that Court it appears that the summons was servel on Greenberg but not on the defendant. The action was for the amount of certain promissory notes made by the firm in favour of the plaintiff. The defendant admits that he was aware of the action being brought in the Transvaal, but he states that it was at his own request that the action was so brought against the firm under the following circumstances. He had lent the money himself to the firm, but not wishing to let his partner know that he had advanced the money he had the promissory notes made in the plaintiff's favour.. When they fell due he requested the plaintiff to sue on them, and the plaintiff having obtained the judgment against the firm now seeks to enforce it against the defendant, who is the real creditor. If these statements are correct the defendant stands convicted of disingenuous conduct towards his partner, but not of fraud. On the other hand, assuming again that the defendant's statements are true, it would be a fraudulent act on the plaintiff's part to take advantage of a foreign judgment in his favour by suing in this Court the person who is really entitled to the benefits of the judgment against his partner. At the time of the judgment the defendant was domiciled in the Transvaal, and consequently the objection which existed to the enforcement of the judgment in *Acutt, Blaine and Co.* v. *Colonial Assurance Co.* (1 Juta, 402) does not exist in the present case. But it would, in my opinion, be a fatal objec-

tion that the enforcement of the judgment would constitute a fraud upon the person against whom it is sought to be enforced. At this stage of the case I wish to express no opinion as to whether there has been such fraud or not, but I consider that the defendant ought to have an opportunity of proving the statements made in his affidavit. The plaintiff must, therefore, be advised to go into the principal case, and the question of costs will abide the result.

[Plaintiff's Attorney: J. Bernard. Defendant's Attorneys: Dold and Van Breda.]

HAVENGA AND DICKSON V. REDELINGHUYS.

On the motion of Mr. Benjamin, the Court granted a final order of sequestration against the defendant's estate.

MENSE AND CO. V. BRANN.

Mr. Benjamin applied for a final order of sequestration against the defendant's estate.

Granted.

PRINCE, VINTCENT AND CO. V. KEADS.

Mr. Bisset applied for discharge of the provisional order of sequestration granted in this case.

Granted.

BLEISCH V. LUCAS.

Mr. Nightingale moved for provisional sentence on a mortgage bond for £300, and for the property specially hypothecated to be declared executable.

Granted.

STEER V. CARLILE.

Mr. P. S. T. Jones applied for judgment on a promissory note for £200.—Granted

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TREDGOLD V. VAN DER SPUY.

Mr. Bisset moved for provisional sentence for £365 on a promissory note.—Granted.

SANDERSON AND CO. V. YEOMANS.

Mr. Bisset applied for provisional sentence on a promissory note for £57 17s. 10d.—Granted.

RICE AND CHAMBERS V. WRIGHT.

Mr. Nightingale moved for provisional sentence on certain conditions of sale for £21 13s. 4d.—Granted.

RICE V. STRYDOM.

Mr. Buchanan moved for provisional sentence on a promissory note for £375 5s.—Granted.

NELSON V. SNAEDER.

Mr. Benjamin asked for provisional sentence on an I O U for £111.

Granted.

FLETCHER'S WHOLESALE AND OTHERS V. BAYER AND DUVENDOFF.

Mr. Greer, for plaintiff, asked that the provisional order of sequestration granted in this case be discharged.

Granted.

SUPREME COURT

[Before the Hon. Mr. Justice KOTZE.]

PROVISIONAL ROLL.

PEARNE AND ANOTHER V. MOHAMED. { 1903. July 14th.

Mr. Close moved for provisional sentence on a mortgage bond for £2,000, with interest from January 1, 1903.

Order granted.

LURRING V. ESTATE DINOR.

Mr. Buchanan moved for provisional sentence for £1,225, being the balance of the purchase price of certain houses and land, with interest.

Order granted.

AFRICAN BANKING CORPORATION V. GRAND JUNCTION RAILWAYS.

Sir H. Juta, K.C., moved for provisional sentence for the sum of £54,800 on twenty-two promissory notes.

As there was a provisional order of sequestration against the estate, the matter was allowed to stand over till the 12th September.

SHAW BROTHERS V. CROSSE.

Mr. Greer moved for provisional sentence on a promissory note.

Order granted.

PHILIP BROS. V. SUTTON.

Mr. Buchanan moved for a decree of civil imprisonment on an unsatisfied judgment for £84 17s. 3d. and £6 5s. 2d costs, with interest accrued.

Kotzé, J., said a letter from the defendant set forth that he was a watchmaker at East London, earning £9 a month, and had to maintain a wife and six children.

Mr. Buchanan said that the defendant had settled £1,000 on his wife.

The matter was allowed to stand over till the first day of the next term.

GIRATIE V. GODDESS.

Mr. Van Zyl moved for the provisional order for the sequestration of the defendant's estate to be made final.

Defendant admitted that he owed the debt to Giratie, but said he had been misled from the beginning with regard to the property he had purchased. He was a blacksmith, and had been misled by an agent with regard to a bond of £800 on the property.

His Lordship said he could not go into that matter now.

Order made final as prayed.

DALJAARD V. BAUMANN.

Mr. C. W. de Villiers moved for the order for the sequestration of the defend- order for the sequestration of the defendant's estate, granted on the 12th June, to be made final.

Order made final as prayed.

ILLIQUID ROLL.

WILSON, SON AND CO. V. WHITE AND DOYLE. { 1903. July 14th.

Mr. M. Bisset moved for judgment, under Rule 319, for £99 4s., balance of account, with interest *a tempore morœ* and costs of suit.

Order granted.

SKEAD V. TWINE.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £1,050, being the purchase price of certain premises at Rondebosch with interest, plaintiff tendering transfer of the property.

Order granted.

CUNNINGHAM AND GEARING V. JACKSON.

Mr. Russell moved for judgment, under Rule 329d, for £90 4s., services rendered and materials supplied with interest *a tempore morœ*, and costs of suit.

Order granted.

TABLE BAY HARBOUR BOARD V. GARDINER AND EASTON.

Mr. M. Bisset moved for judgment under Rule 319, for £272 16s. 8d. with interest, *a tempore morœ*, and costs of suit.

Order granted.

VAN RHYN AND CO., LTD., V. BOEKMAN.

Mr. Benjamin moved for judgment, under Rule 329d, for £58 9s. 3d., less £35 paid since the issue of summons, for goods sold and delivered, with interest and costs of suit.

Order granted.

WARNER AND CO. V. WINDELL.

Mr. Buchanan moved for judgment, under Rule 329d, for £60, goods sold and delivered by plaintiff for and at the special instance of the defendant, with interest *a tempore morœ*, and costs.

Order granted.

CAPE TIMES LIMITED V. SANDERS AND CO.

Mr. M. Bisset moved for judgment, under Rule 319, for £39 5s. 6d. and costs, but the debt had now been paid, and he simply asked for an order for costs.

Order granted accordingly.

MEAGER V. WOLFF

Mr. Pyemont moved for judgment, under Rule 329d, for £22, rent due from the 6th April to the 6th June, 1903, for an order of ejectment from the premises occupied by the defendant, with interest *a tempore morœ*, and costs of suit.

Order granted as prayed.

LYONS V. THORNTON.

Mr. Close moved for judgment under Rule 329d, for £30, rent due for tenancy of a certain house at Claremont for four months. Counsel stated that a rule had been issued against the defendant restraining him from removing certain furniture pending an action to be brought. The order was made returnable for the 1st August. The summons was issued, but defendant did not enter appearance, and the action could not, therefore, come on on the 1st August. He asked that the costs of the rule be included in the present orderd.

Kotzé, J., said that the rule was not returnable until the 1st August, and he did not see how counsel could obtain costs at present. He could only give judgment on the summons now before the Court. Judgment would be given for the rent, with costs.

FINDLAY AND CO. V. SANDERS.

Mr. Nightingale, for the plaintiffs, moved for judgment, under Rule 329d, for the sum of £347 5s. 6d., being the balance of an amount due for goods sold and delivered to the defendant at his special instance and request.

Mr. Pyemont, for the defendant, applied for a postponement, and put in an affidavit by the defendant, which set forth that owing to a change of attorney he was unable to come to Court. He admitted his indebtedness in the sum of £47.

Mr. Nightingale opposed the defendant's application. The amount he was instructed to apply for judgment on was £347, and the defendant had had ample notice of the claim.

Order granted as prayed.

CLUVER V. MARES.

Mr. Nightingale moved for judgment under Rule 329d for the sum of £91 10s. 8d., and also for the sum of £4 11s. 6d., being 5 per cent. on that amount for collection, and also for 6 per cent. interest on the original amount, with costs.

Order granted.

NIEMAN AND LEWIS V. WEINTROB.

Mr. Benjamin moved for judgment for the sum of £55 for work and labour done, with interest and costs of suit. The defendant had, he said, admitted his indebtedness to the amount of £50. Counsel was instructed to accept judgment for that amount, with costs.

Order granted accordingly.

REHABILITATIONS.

Mr. Alexander moved for the rehabilitation of Annie Fitz Neville and Arthur James Pearson, trading as Neville and Pearson. Counsel stated that the insolvents applied about four months ago, and were given leave to apply again in three months.

Application granted.

Mr. Close moved for the rehabilitation of Michael O'Reilly.

Application granted.

Mr. Alexander moved for the rehabilitation of Jacob Cosay.

Application granted.

Mr. M. Bisset moved for the rehabilitation of Frederick Hendrik Elstadt.

Application granted.

Mr. Benjamin moved for the rehabilitation of Jacob Stephanus van der Spuy.

Application granted.

GENERAL MOTIONS.

GEZWINT V. GEZWINT. { 1903. July 14th.

Mr. Alexander, for the applicants, Daniel Gezwint and others, moved for an order declaring the respondent Dirk Gezwint, of unsound mind, and the appointment of Daniel Gezwint as curator, with power to go into previous business transactions of the respondent.

Mr. Russel, for the *curator ad litem*, did not oppose the application.

The evidence taken on commission by order of the Circuit Court at Oudtshoorn, set forth that the respondent was of infirm mind, and quite incapable of

managing his affairs. There was no objection to the appointment of Daniel Gezwint as curator.

Kotzé, J., pointed out that, with the information before him, he could not grant the latter part of the motion. The curator would either be in a position to pay for a law suit, or he could proceed *in forma pauperis*. An order would be granted declaring Dirk Gezwint of unsound mind, and appointing his eldest son as curator of his person and property, costs of the application and evidence to come out of the estate.

Ex parte MABUYA.

Mr. Greer moved for the rule nisi under the Derelict Lands Act to be made absolute.

Order granted as prayed.

THOMAS V. THOMAS.

Mr. Alexander moved for a decree of divorce, with costs against the defendant, in default of compliance with an order to return to the plaintiff on or before the 30th June.

Order granted as prayed.

HERBERT V. HERBERT.

Mr. C. W. de Villiers applied for the return day to be extended for directions as to service. Counsel stated that the order of the Court was that personal service should be effected on the defendant, who was sued by his wife for divorce. The defendant had been in Johannesburg, but the petitioner was informed that the sheriffs of the Transvaal had been unable to find him. The defendant's relatives stated that his whereabouts was unknown to them. Petitioner asked that the return day be extended and that service be authorised to be made on the defendant's solicitors in Johannesburg.

The order of the Court was that the return day be extended, the defendant to return to his wife by the 13th August, failing which to show cause on the 31st August why an order for divorce should not be granted, service to be effected on the defendant's solicitors.

CONSTABLE V. CONSTABLE.

Mr. Benjamin moved for a decree of divorce, with costs, defendant having failed to comply with an order for the restitution of conjugal rights by the 30th June.

Order granted as prayed.

Ex parte DE WET AND ANOTHER.

Mr. Van Zyl moved for the appointment of a *curator ad litem* to the petitioners' mother, who is a private patient in the Valkenberg Asylum.

Application granted, Mr. Advocate de Waal being appointed *curator ad litem*, and the summons being returnable for the 13th August.

ASSIGNEE OF INSOLVENT ESTATE WEIDNER V. BRAND. } 1903. July 14th.

Trustee in insolvency—Contempt of Court.

Leave given respondent to file an affidavit in answer to applicant's replying affidavit, which introduced new and material matter. The Court does not lightly presume that a person failing to do a specific act ordered by the Court neglected to do so ex contemptu.

This was a motion for an order for committal of the defendant for contempt of Court in failing or refusing to comply with a judgment of the Court given in April last directing the defendant to render an account of his administration of the affairs of the plaintiff, and all moneys, documents, and securities received by him, and all moneys disbursed by him as agent of the plaintiff,, payment of such sum of money to plaintiff as should be found due to him, and delivery of all documents and securities belonging to the plaintiff.

Mr. Close, for the defendant, asked that the matter be allowed to stand over in order to enable the defendant to answer certain affidavits filed late last week.

Mr. Benjamin opposed the application, and contended that there was really no ground for postponement. Counsel proceeded to read the affidavits of the assignee and others showing that the defendant had not complied with the

order of the Court. Sums amounting to £1,600, paid by Weidner to the defendant, were not accounted for.

Mr. Close read the answering affidavit of the defendant, which detailed a number of transactions. Defendant should have complied with the terms of the order of the Court so far as lay in his power, and he was at the time of such order being granted in communication with the plaintiff's attorneys with a view to the settlement of the matter.

Mr. Benjamin read replying affidavits in which attention was drawn to certain items in the account, in respect of which it was alleged that payments were shown to have been made by respondent on the plaintiff's account, which were in excess of the amounts due, and for which no vouchers had been produced. It was stated that although the purchase price of certain property sold on Weidner's behalf had been paid to the respondent this payment was not referred to. Weidner did not consider that he was indebted to the respondent, but was sure that if a full and correct acount were given it would shoy a balance in his favour. He was unable to do anything until the respondent submitted a full account from 1901, when the dealings between the parties commenced.

Mr. Close urged that on the replying affidavits the respondent should have an opportunity of putting before the Court the facts. Specific allegations had been made, which were of a fresh character.

Mr. Benjamin said that the affidavits were served on the respondent on Friday. All that the plaintiff wanted was that respondent should give him a full account from 1901.

Kotzé, J.: In this matter, in April of this year the Court granted an order against the respondent, by which he was ordered, first, to file a true and proper account of his administration of the affairs of the plaintiff, and also of all moneys and documents received by him in connection as agent for the plaintiff; secondly, to properly debate that account; and thirdly, to make payment to plaintiff of such sum of money as was found to be due, and to deliver all documents and papers belonging to the plaintiff. Now the applicant says that the respondent has failed to comply with that order; that he has handed him an account which is incomplete, and which does not disclose all the transactions, and that the account is out by about £1,600. On the other hand, Brand says that the account is a true one, and that there is a balance of something like £1,184 in his favour. After Brand had filed this account, about four days ago, Weidner filed a replying affidavit, in which he alleges that there are four specific sums of money received by Brand which he does not account for in the account he has furnished. The respondent asks for time within which to answer this affidavit, which introduced new and important matter, and it seems to me that reasonable time should be given for that purpose, because the account begins in January, 1902, and these four items all relate to transactions in June and August of the previous year. Now I must observe that I do not think this account is exactly the account that the order of Court calls for, and I do think that Brand should file a more specific account, showing distinctly all the items on the credit and debit sides. This account is not an account in the ordinary sense; it is only a memorandum. On the other hand, the Court does not presume that a person, failing to do a specific act ordered by the Court, intended to commit a contempt, of which there must be satisfactory proof. Under these circumstances, I see no reason why I should grant the application for the attachment of the defendant for contempt of Court, and I think he should have an opportunity of answering the affidavit. Therefore, the application should stand over, and he can file his affidavit in the meantime. The matter will stand over till the first day of next term.

[Applicant's Attorneys: Syfret, Godlonton and Low. Respondent's Attorneys: G. Trollip.]

Ex parte TEDBURY.

Mr. Russell moved for an order confirming the sale of certain property in which minor children were interested, in terms of the Master's report, and for leave to pass transfer. The Master's report was favourable.

Granted.

MELEKOV BROS. V. HIGGO.

Mr. Rainsford moved to have made absolute a rule *nisi* calling upon the respondent to show cause by the 18th May,

1903, why an interdict should not be granted restraining the respondent from molesting or interfering with the applicant, or his employees and assistants.

Granted

HILLS V. THE COLONIAL GOVERNMENT.

Mr. Close, for the applicant, moved for leave to appeal in this matter to the Privy Council.

Mr. Howel Jones, on behalf of the Government, said that he was instructed not to oppose the application.

Leave was accordingly granted.

Ex parte VAN DER MERWE.

Mr. Alexander applied for leave to transfer certain property, which had been sold to an executor.

Granted.

Ex parte MATFIELD.

This was a similar application, for an order confirming the sale of certain property to an executor.

On the motion of Mr. Bisset, the Court granted an order as prayed.

Ex parte WALPOLE.

Mr. Nightingale moved for an order authorising the Registrar of Deeds to issue certified copies of a certain deed of transfer and mortgage bond, which had been lost in course of transit through the post.

A rule *nisi* was granted calling on all persons interested to show cause on the 13th August why certified copies should not be issued, the rule to be published in a Port Elizabeth and a Cape Town paper.

WILLIAMS V. TABLE BAY HARBOUR BOARD.

Mr. Bisset applied, under Rule 25, to have judgment signed against plaintiff, who had not proceeded with her case within the specified time, and for costs.

An order was granted as prayed.

NDABA AND ANOTHER V. NZOBO AND OTHERS.

Mr. Benjamin moved for an order compelling respondents to hand over certain title deeds. The applicants desired to sell certain ground, of which they were part owners, but could not pass transfer without being in possession of the title deeds, which were in the custody of the respondents, who were also part owners. Respondents had had notice of this application.

The Court ordered the respondents to hand over the title deeds of the farms Polyglon and Simpson, situated in the district of Matiele, to the Resident Magistrate at Matiele, who is to transfer the same to the Registrar of Deeds at Cape Town, in order that transfer might be effected of two eleventh shares in each farm to the purchaser, Samuel Wm. Kirk, the respondents to pay the costs of this application.

Ex parte LOUWRENS AND CO. AND OTHERS.

Mr. Bisset moved for the appointment of Mr. Dirk Pearce as provisional trustee in the insolvent estate of Elias Block, and for leave to the trustee to sell certain property in the estate.

Granted.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

Ex parte HARRIS. { 1903 July 17th.

This was an application for leave to purchase a certain farm for £1,400 for George Hy. Harris, a minor, the son of the applicant, Fred. John Harris, and to pay a sum not exceeding £40 for necessary costs and transfer out of an inheritance of £1,540, standing to the minor's credit in the Guardians' Fund. Petitioner, who resided in the division of Aliwal North, considered the opportunity of purchasing the farm for his son a good one, as the farm was an excellent one, well watered, and sufficient for the purposes of starting a young farmer in an independent way. The Master did not exactly oppose the application, but he did not favour it because of the hypothetical contingency

that the boy might not wish to be a farmer when he grew up.

Mr. Close (for the applicant): There is no reason for the Master's opposition. This is a very satisfactory family arrangement, and the minor cannot possibly be prejudiced as the price of the property it is proposed to purchase is very reasonable. Numerous affidavits could be obtained to show that this is a good investment for the money.

The leave was granted as prayed.

Ex parte EDWARDS.

This was a motion for an order authorising the Master to distribute the estate of the late John Renny, or Rennie, who died intestate at King William's Town in 1888. The petitioner was Amelia Isabella Edwards, of South Hackney, London, and she claimed to be entitled to one-half of the sum of £3,000 now in the hands of the Master as belonging to the estate of the late John Renny: the children of her late sister, Elizabeth Francis Beamish, being entitled to the other half. The late John Renny was one of a family of eleven children of William Wood Mash Renny and his wife, of London. The parents died in the Marylebone Workhouse, and as far as petitioner knew, the whole of the members of the family were dead, except herself. Her sister, Elizabeth Francis, was married to one William Beamish, and she died in 1880. There was issue of the marriage several children, who survived her. Petitioner was born on the 1o March, 1825. Her brother, the late William Renny joined the 73rd Regiment of Foot, and came out to South Africa, and he died at King William's Town on the 4th August, 1888. The petitioner presented certificates accounting for the whole of the family, except the petitioner and the children of her late sister, and one William Henry Renny, who came out to South Africa after his brother, and transferred from the 33rd Regiment to the 73rd Regiment of Foot. His death was sworn to by a lady residing at Port Elizabeth.

Mr. Close moved.

De Villiers, C.J.: I do not think that the order should be granted at once. There should be ample time for other possible beneficiaries to come forward. The widest circulation should be given to a notice calling upon all persons concerned to show cause. There is certainly a strong *prima facie* case in favour of the view that the applicant and her sister's (Mrs. Beamish) children are the sole heirs, but it is possible that other heirs may come forward if it is extensively advertised, and ample time should be given for them to come forward. You may take a rule calling upon all persons concerned to show cause on the 1st November next why an order should not be granted as prayed, the rule to be published once in the "Government Gazette," once in the Cape Town English newspapers, once in a King William's Town newspaper, and once in the "Daily Telegraph," London, as I suppose that has the widest circulation of any newspaper.

Postea (November 2). The rule was made absolute. (See report under that date.)

Ex parte BRISENDEN.

Mr. Pyemont moved for an order confirming the sale by the petitioner, who was a minor, of his half-share in a block of property at Graham's Town.

The Master recommended the confirmation of the sale.

Order granted in terms of Master's report.

DUTTON AND CASTLE V. TABLE BAY HARBOUR BOARD.

Mr. M. Bisset moved for the rule *nisi* calling on the defendants to show cause why the plaintiffs should not be allowed to sue *in forma pauperis*, to be made absolute.

Order accordingly.

Ex parte LOUWRENS.

Mr. M. Bisset moved for the removal of the petitioner's name from the roll of attorneys and notaries, as petitioner, who was of Mossel Bay, desired to go to London, England, and intended to seek admission in the Inns of Court to qualify for the bar.

Application granted.

Ex parte GRAY.

Mr. Benjamin moved for leave to sue by edictal citation one Wintor, for

£288 6s. 5d., due for professional services, etc., and also to attach certain landed property at Woodstock belonging to the defendant, so as to found jurisdiction for the purposes of the action. The defendant had gone to New Zealand in consequence of ill-health, and petitioner had reason to believe that he intended to take up his permanent abode there.

Rule granted calling upon defendant to show cause on the 12th October.

Ex parte VENTER.

Legitimacy—Presumption—Children.

The presumption that children born in wedlock are the children of the husband is not rebutted by the wife's admission that they are not his children, or by the fact that she has been found guilty of adultery, or by the fact that at the time of their birth he was over eighty years of age, or by all these facts combined in the absence of any evidence of incompetency on his part or of non-cohabitation with his wife.

This was a motion for an order authorising the cancellation or amendment of a certain mortgage bond. The petitioner, who resided at Kraaifontein, in the division of Colesberg, obtained a decree of divorce against his wife on the ground of her adultery. Some time ago he passed a mortgage bond to one J. K. M. Venter, in favour of his children, to the amount of £800, that was to say, £100 each. When the divorce trial took place, the defendant admitted that two of the children were born to the man with whom she was alleged to have committed adultery. The petitioner now asked, seeing that he had ignorantly and wrongfully donated the sum of £100 each to the said two illegitimate children, that the bond should be amended so far as the illegitimate children were concerned, or otherwise to have the said bond cancelled, and have a mortgage bond passed simultaneously at his own expense in favour of the legitimate children for £600.

Mr. Burton moved.

[De Villiers, C.J.: This is a most extraordinary application to make—to propose to take away from the two children this property without giving them an opportunity of being heard.]

Mr. Burton: I feel that that is so.

De Villiers, C.J.: Besides, the petitioner has given it, the money is theirs; is it to be taken away from them because of their misfortune that they were born illegitimate children? We have nothing to do now with the woman, it is the two children. Every presumption is in favour of their being the petitioner's children, and I would not take her admission as proof that they are not his children. I could not set that bond aside without an action brought against these children to have it declared that they are not his legitimate children, and even then the difficulty would be how, after this property has been given to them, are you to take it away from them without any fault on their part?

Mr. Burton: There is no consideration. The consideration named by the donor was "natural affection," and he now finds out that he has been imposed upon and that the children are not his children. Under these circumstances it is not to be expected that he should feel the natural affection of a parent for them. At the same time, I fully feel the force of the objection raised by your Lordship, and cannot press this application strongly.

[De Villiers, C.J.: It may be unfortunate for him, but it is a serious thing to take away from people property like that which is vested in them. I think that an action should be brought to have this deed set aside, if it was obtained by the fraud of the mother on their behalf, and a curator would have to be appointed for these children, and evidence would have to be given clearly proving that this man, who was living with his wife at the time, was not the father of her children.]

Mr. Burton: The fraud of the mother might be very difficult to prove.

De Villiers, C.J.: It is quite impossible to grant this application. It is true that in the divorce proceedings against the applicant's wife she made a statement to the effect that he is not

the father of two of their children, but her statement cannot prejudice the rights of the children. The presumption is that these children, who were born in wedlock, are his children, and the clearest possible proof of incompetency or of non-cohabitation would be required to rebut that presumption. The applicant is not likely to be able to produce such proof, seeing that he himself recognised the two children as his and made the donation to them in the belief that they were his children. The adultery proved against the wife in the divorce proceedings was committed after the birth of the two children, but even if it had been committed before their birth the presumption would still be in favour of their mother's husband being their father. He is said to be over eighty years of age, but that fact is surely not sufficient to prove inability to procreate children, more especially in view of the circumstance that up to the present time he has recognised the children as being his. The children have had no notice of this application, and without the appointment of a *curator ad litem* to represent them it would be quite impossible to bastardise them even if they had received such notice. Without in the least implying that the plaintiff would succeed in setting aside the donation on proof of the illegitimacy of the children, I am clearly of opinion that, upon the facts before the Court, the applicant is not entitled to succeed.

[Applicant's Attorney: S. J. Mostert; Respondent's Attorney: G. Trollip.]

Ex parte GIBSON.

Mr. Close moved for the cancellation of an order of Court authorising the sale of property at the corner of Rose and Strand streets, Cape Town, to Skuys and Bank, for £6,300, by the executors of the estate of the late Thomas Short, and empowering the petitioner, who is secretary of the South African Association, to sell the said property by public auction or otherwise. Skuys and Bank assented to the application, and stated that they were totally unable to raise the purchase price.

Order granted as prayed.

Ex parte SMALL.

Mr. Pyemont moved, on behalf of the petitioner, as executor dative under the transfer to herself of property at Swellendam, sold by public auction for £227.

Order granted as prayed.

Ex parte ABRAHAMSON.

Mr. M. Bisset moved for an order authorising the amendment of a deed of transfer of property and certain mortgage bonds by the insertion of the correct name of the petitioner.

Order granted as prayed

Ex parte MANN AND OTHERS.

Mr. C. W. de Villiers moved for petitioners for leave to raise on a mortgage £1,000 on certain landed property belonging to the estate of which petitioners were executors testamentary, and in which estate certain minors were interested.

The Master did not oppose.

Order granted as prayed

BURNARD V. AFRICAN MERCANTILE COMPANY. { 1903. July 17th. „ 20th.

False representation—Prospectus of company—Taking shares of company—Companies Act, 1893, § 86—Rectifying register of shareholders.

The applicant, on the faith of a statement in the prospectus by a company to the effect that 20,000 out of 30,000 shares had been subscribed for, informed the secretary that he would take 1,000 shares, but, upon afterwards discovering the fact that only about 18,000 had been subscribed for, he refused to become a shareholder without having derived any benefit from the shares.

Held, *on an application for the rectification of the register that the applicant was entitled to have his name deleted.*

This was an application on notice, calling upon the respondent company to show cause why the applicant's name

should not be deleted from a list purporting to be a register of the members of the company.

The affidavit of Mel. Jacobus Burnard, the applicant, stated that his name appeared on what purported to be a register of the members of the African Mercantile Company, Ltd., of 69a, Bree-street, Cape Town, as the holder of 1,000 shares in the company. He had not applied for or been allotted any shares, nor had he made claim to any shares. His name had been placed on the register without his knowledge or consent. He had written, asking that his name should be deleted, but this was refused, and he had consequently been obliged to come to the Court with the present application. Deponent stated that owing to certain representations made verbally to him, and owing to the statements made in the prospectus of the company, he agreed to enter the service of the company as manager at a salary commencing at £600 a year, and 2½ per cent. commission on the net profits. It was stipulated that as a condition of his accepting the office, he should take 1,000 shares. To this he at first demurred, as he only desired to take 500, but he was informed by the secretary of the company, Mr. Du Toit, that it was an irrevocable condition of the articles of association that the manager should, in his own right, have at least 1,000 shares. If it had not been for the statement that 20,000 shares had been subscribed, he would have broken off all negotiations. It was stated in the prospectus that the 20,000 shares had been taken up. He subsequently accepted the management on the terms stipulated. He was in the service of the company from the 1st May until the 26th June, but had not been paid any salary during that time. During this period he was not at all satisfied with the way in which the company's business was conducted. No proper books were kept. He had complained to the managing director and secretary. No meeting of the directors had taken place to his knowledge, and he had repeatedly asked to have his appointment recorded in the minutes. The position became intolerable, and after taking legal advice, he decided to withdraw from the service of the company. The affidavit further set forth the circumstances of the establishment of the company, and alleged that certain things agreed upon between the partners of the original company in Holland had not been carried out. When the first prospectus was issued in February, shares to the amount of £20,000 were therein stated to have then been taken up, but in a subsequent prospectus, issued in June, it was stated that 19,650 shares had been taken. That included 2,500 shares alleged to have been taken by a Mr. Potgieter, which were repudiated by him, the applicant's 1,000 shares, and a large number of shares taken up since the first prospectus was issued. Applicant therefore contended that the statement in the original prospectus that 20,000 shares had been taken up was false. Further, four shares were unaccounted for in the register, which was contrary to the provisions of the law. He had demanded to see the register, but was first told there was none. Subsequently he saw the register, upon which his name appeared. Mr. Eloff, who was stated in the prospectus to be a director, had published a notice in "Ons Land," stating that he was not a director.

The answering affidavit of Mr. Gournay, one of the directors of the company, stated that, while the statement of Mr. Burnard that a condition of the articles of association that the manager should hold 1,000 shares was not strictly correct, the secretary, in stating this, was correct in substance, and acted *bona fide*, the directors having decided, at a meeting, that the manager should hold 1,000 shares. The affidavit denied the applicant's allegations in other details, and said that the statement in the first prospectus that 20,000 shares had been taken up was made *bona fide*, but a number of people who had promised to take up shares had failed to do so.

Mr. Alexander for the applicant; Mr. Burton for the respondent.

Mr. Alexander: This is an application under section 86 of Act 25, 1892. That section corresponds with section 35 of the English Companies Act of 1862. The English Courts have granted rectification of a list of shareholders on motion. See *Palmer's Company Precedents*, (part 1, pages 1,051 and 1,052).

[De Villiers, C.J.: Was the applicant induced to become a shareholder by misrepresentations in the prospectus?]

Yes; see section 10 of applicant's replying affidavit. Goerne admits that the number of shares named in the prospectus is incorrect. Even innocent misrepresentation may entitle us to have our name removed. Moreover, no specific shares have been allotted to us.

[De Villiers, C.J.: Mr. Burton, what have you to say about the errors in the prospectus?]

Mr. Burton (for the respondents): The whole question is, was Burnard induced by the offer of the managership of the company to take 1,000 shares? It was represented, no doubt by the secretary of the company, that it was a rule that the manager must hold 1,000 shares, and that representation was, I admit, incorrect; but the question is whether the applicant was thereby induced to take the shares. The evidence as to the meeting at the Hansa Hotel, on April 9, does not bear out the applicant's contention in the least. In paragraph 19 of his affidavit the applicant admits that he knew he would have to take 1,000 shares. He could not have been influenced merely by the statement in Du Toit's letter; as before that letter was written he had agreed to accept office on the terms offered, and was willing to take 500 shares. He then offered to take 1,000 if his salary was to be £600 instead of £500. To this condition the directors agreed. I submit that the applicant has not made out his contention that he was induced to take 1,000 shares by the offer of the managership. Before these shares had been taken he received the articles of association, and they would have shown him, even on a cursory inspection, that as manager he was not bound to take these 1,000 shares. He does not repudiate the transaction as to these shares till June 25. On several occasions Goerne asked for money due on these shares. On June 10 he objected to pay up—not because he had been induced to buy by false representation, but because he was not satisfied with the way the affairs of the company were being conducted. On June 26, he fully sets forth his reasons for leaving the company; and in these reasons he says nothing about having been induced by false representations to buy shares. Instead of that he complains of the prospectus and of the way the books were kept. Even supposing that the offer of the post of manager was a material inducement to the applicant to take 1,000 shares, can he, after lying by since April 11, now come forward and disavow what he has done. He was manager of the company, and in that capacity he had free access to all their books and papers. As to lying by, see *Buckley's Company Law* (6th edition, section 86, Notes). As to the number of shares (and this brings me to the applicant's next contention), the only question is whether he is, or is not a member of the company. He complains of the management of the company, but these complaints have nothing to do with this case. The applicant further complains that the prospectus states that 20,000 shares had been taken up, but it is clear that 19,650 had actually been subscribed for, and the difference between these figures is quite inconsiderable, and therefore if the statement as to the 20,000 shares was made *bona fide*, the Court will not relieve the applicant. I submit it was *bona fide*, for the explanation given by the respondents as to the discrepancy in these numbers is quite intelligible and satisfactory. Some of the applicants had failed to keep their promises, and hence the shares which had been assigned to them had not been subscribed for. As to cases in which, under similar circumstances, the Court has refused relief, see *Buckley* (p. 23), citing *Lyons' Case* (35 Bevan, 646).

[De Villiers, C.J.: In that case there was no statement that the 10,000 shares had been subscribed for.]

The argument there proceeds on the assumption that the prospectus stated that 10,000 had been subscribed for, whereas, in point of fact, only 850 had been subscribed for.

[De Villiers, C.J.: The question was whether the directors were justified in alloting shares before they had sufficient funds to carry on the business.]

I see that point, but in his note at the page I have quoted in *Buckley* the case of *Green v. General Assurance Co.* (18, L.T., 500) is cited, where relief was refused on the ground that shares had been issued as per prospectus, though some of these shares had subsequently been cancelled. The only question is, was the statement in the prospectus reasonably and fairly true If every slight error in a prospectus justifies a shareholder in claiming relief from his liabilities, no company would ever be promoted. At

all events, I submit that the Court will not decide a matter like this, where there is such a serious conflict of evidence, on motion.

Mr. Alexander (in reply): There are many misrepresentations in the prospectus. Some of these are admitted, while others are denied. There is no question of a discrepancy of some 350 shares in the number subscribed for. It is a question of a much larger discrepancy. In June there are said to have been 19 650 subscribed for, but in February the 1,300 Hope Town shares had not been subscribed for, nor had Burnard's 1,000, nor Potgietr's 2,500. The company say that, after certain persons had engaged to take shares, these persons withdrew. But all the company had to do was to accept their respective promises, and so bind them to their contracts. The prospectus ought not to have alleged that shares had been taken, if they had not been allotted and subscribed for. The first misrepresentation in the prospectus, therefore, was in respect of the number of shares subscribed for. This misrepresentation is even repeated in the second prospectus of June 25. There Burnard's and Potgieter's shares are represented as having been subscribed for. That hardly shows the *bona fides* of the directors, of which so much has been said. It is quite clear that this so-called register was compiled after the applicant had left the company, because when he left he was told that there was no register. Such a "register" is not even *prima facie* evidence of membership. See *Lindley on Companies* (I., p. 75-76), *Digest of English Case Law* (111, 14, 20). Again, the contract of the company with the applicant had not been concluded by April 9, for negotiations as to salary were going on after that. It was not true that there was any irrevocable article in the deed of association as to the manager holding 1,000 shares. It is not necessary that a person seeking to have his name taken off the list of shareholders should have been induced to place it there solely by misrepresentation. It is enough that the misrepresentation was one of the inducing causes. *Lindley* (p. 90), citing *Edgington* v. *Fitzmaurice* (29 Ch., 459), vide *Armison* v. *Smith* (40 Ch., 567), *Palmer's Company Law* (1901, p. 253). This is a much stronger case than that, for there the shares had actually been issued, here there is nothing to show that they had even been allotted. See, as to this, *Beran* v. *Adams* (22, L.T., 795). If shares have not been subscribed for it does not matter that they have been allotted. As to innocent misrepresentation, see *Palmer Company Law* (1901, p. 252), where he cites the case of *Smith* (2 Ch., 604, 615), *Reese River* (4, H.L., 79), and other cases. A register is no evidence unless it is kept as the Statute provides. This register has not been so kept. Counsel for the respondents again has said nothing about Eloff. A misrepresentation as to a director is a serious misrepresentation. *Palmer's Company Precedents* (I., 1052), *Anderson's Case* (17 Ch. D, 371), *Lindley* (I., 27), *Ex parte Land Credit Co.* (14 L.T., 1, 723).

[De Villiers, C.J.: But it is said that he is a director.]

He was not one in February when this prospectus was issued, and he afterwards publicly denied being a director. Why is there no affidavit from him? That misrepresentation alone would entitle the applicant to have has name struck off. Again, all contracts which have been entered into by the company should have been set out in full in the prospectus. It will not do to put part of a contract in the prospectus, and leave the rest of it in the articles of association. Here, in addition to £750, mentioned in the prospectus, Potgieter and Cilliers evidently received a large number of fully-paid-up shares, for which they paid nothing. The prospectus says nothing about this.

De Villiers, C.J.: This is an application to rectify the registrar of shareholders by striking out the applicant's name. The applicant relies upon several grounds, but it is only necessary to consider three of them. The first ground is that there was a false representation made to the applicant on behalf of the company as to the articles of association, that a statement was made—and it undoubtedly was made—that it was "an irrevocable article of our deed of association, that the manager must be in his own right the registered holder of at least 1,000 shares." This letter immediately preceded a telegram, which was sent by the applicant, for the shares, in which he said: "Will take 1,000, if salary commences £600, exclusive commission, and appointment to be for term, not otherwise." Mr. Burton

has contended that the representation, although untrue, was not material, and that this telegram shows that it was not material; that it did not operate on the plaintiff's mind to induce him to take these shares; but it does not follow that because the applicant made an addition to the terms upon which he would take these shares he was not influenced by so important a statement made to him by the secretary of the company. It appears to me that it was a very material statement, and that it had an influence upon the applicant in inducing him to take these shares. But if this question stood by itself, I should probably have been inclined to let the matter stand over in order to hear the evidence of the parties, and to ascertain to what extent this statement was material and operated on the mind of the applicant. But there is a second ground for this application, and that is the false statement as to the number of shares which had been subscribed for. Now, the statement was undoubtedly made in the prospectus—in the first prospectus—that over 20,000 shares had already been subscribed for, and that only 10,000 were now offered to the public. This was the statement made in the prospectus. The applicant positively states that before he agreed to enter the company's service he was assured that these 20,000 shares had been subscribed for, and that he accepted the statements in the prospectus in good faith. He says, "Had I had the slightest reason to believe otherwise, I would have broken off all negotiations at once." Now it does seem to me that this is a very material statement. It says that out of 30,000 shares, 20,000 had already been subscribed for. I cannot imagine anything more important to an intending shareholder than a statement of this kind, and if it appears that at such a time the number of shares subscribed for was less by at least 1,500 or 1,600 than the amount stated, I consider that a material misrepresentation, and that if it operated on the mind of a shareholder, he is entitled to have his name taken from the list. It is, however, contended that 19,650 had been subscribed, but that statement does not appear to be confirmed by the facts of the case. The 1,000 of the applicant had not been subscribed, and it would appear there were several other shares which had not then been subscribed. But deducting applicant's 1,000 there would be 1,350 short. In point of fact, I think that at that time the number of shares subscribed for had really been far short of that number. That, in my opinion, is a very material representation operating on the mind of the applicant, and I think the applicant is entitled upon discovery of the true facts of the case to ask that his name shall not remain on the register. The third ground relied upon is that there was a false representation, that Mr. Eloff was a director at the time when the representation was made. According to Mr. Goerne's affidavit there had been negotiations between the parties as to Eloff's position, but he does not positively state that Eloff really occupied the position of director until after these shares had been taken up by the applicant. Eloff himself caused an advertisement to be issued in "Ons Land" stating that he was not a director, and Eloff has not been called to state that he ever was a director. The fact that Eloff became a director after the shares were taken by the applicant does not, in my opinion, assist the respondent in any way. The statement at the time was incorrect. They may have thought that Eloff was at the time prepared to become a director, but upon the facts before the Court I am inclined to believe that Mr. Eloff was not a director and had not promised to be a director at the time when this statement was made. If this were the only issue in the case, I should have been inclined to let the matter stand over for further evidence; but on the second ground I am satisfied there has been a material misrepresentation in the prospectus as to the number of shares actually subscribed for, and I am of opinion that the applicant is entitled to the relief he now asks for. He asks that his name should no longer remain on the list of shareholders. The respondent says that there has been much delay and negligence, and that the applicant is not now entitled to relief. Well, it does not appear to me that there has been any such negligence. In the cases cited the conduct of the person has been such as to prejudice others, as for instance to induce them to take shares in the company, but in the present case it does not appear that the applicant's delay in taking these proceedings has in any way affected the rights of the com-

pany or induced anyone else to become a shareholder in the company. The applicant may have thought that it would be better for him to wait to see if the company would sue him, and he has certainly derived no benefit whatever from the fact of his name being on the register of shareholders. The main facts really are not denied, and seeing there has been this material misrepresentation, I am of opinion that the relief asked for should be granted with costs.

[Applicant's Attorney: F. van de Sandt Centlivres; Respondent's Attorneys: Michau and De Villiers.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.]

DAVIDS v. MURRAY. { 1903. July 20th.

Mr. M. Bisset moved for the personal attachment of the respondent for contempt of court for not complying with an order of the Court for the transfer of certain property situated in Beaufort West to the applicant.

The affidavits of the applicant and his attorney were put in, setting forth the judgment of the Court on the 14th April last for the transfer of certain ground in the town of Beaufort West. Proof of service was also put in.

The respondent appeared in person, and informed the Court he did not receive the summons in the original case. It was served on his wife, who was unable to give it to him in time to enable him to defend the action.

Mr. Bisset said the land was bought in 1895, and the sum of £35 then paid to respondent. Applicant had already built houses on the ground.

Respondent denied that he had been paid any money. Applicant started to build a wall on the ground, but he (respondent) stopped him.

De Villiers, C.J., said that the summons was served six weeks before judgment was granted.

An order was granted upon respondent to pass transfer within three weeks, failing which he will be committed to gaol for contempt, with costs.

Ex parte BERNADSKI.

Mr. Benjamin moved for leave to raise certain money on mortgage to pay off a certain acknowledgment of debt.

Granted.

Ex parte GREEFF AND ANOTHER.

Mr. Benjamin moved for leave to transfer certain property. The purchaser of the property was one of the executors in the estate.

Granted.

Ex parte BROWN.

Mr. C. W. de Villiers moved for leave to raise money on mortgage, the money to be expended in the improvement of property in which certain minors were interested. The Master's report was favourable.

An order was granted in terms of the Master's report.

Ex parte ALLMANN AND OTHERS.

Mr. Joubert moved for leave to pay out certain money. The applicants were executors in an estate of the late C. Allmann, who in her will decreed that specified shares in the estate should be paid to certain heirs upon their attaining the age of forty years. The heirs had been pressing the executors for payment of the money at once, and the executors had accordingly decided to bring the present application. The will directed that the heirs should be paid certain shares upon attaining the age of forty, and there was a further direction that in the event of any of the heirs dying before they received such portions, such portions should be divided equally between the surviving heirs. All the heirs consented.

De Villiers, C.J., said the testatrix had by her will postponed payment, and he did not think the Court was justified in hastening payment. No order would be made. Costs would come out of the estate.

Ex parte HEYMAN.

Mr. P. S. T. Jones moved for leave to sue by edictal citation for a decree of divorce.

De Villiers, C.J., said there was nothing in the petition to show that the Court had jurisdiction. The petition must be amended.

The matter was allowed to stand over.

BLOEMBERG v. BLOEMBERG.

Mr. Alexander moved for leave to the petitioner, the husband, to sue by edictal citation for divorce on the ground of adultery. Respondent was now living in Johannesburg.

Leave was granted to sue by edictal citation, returnable on the 31st August, with leave to serve intendit and notice of trial with the citation, personal service to be effected.

SUPREME COURT

[Before the Hon. Mr. Justice KOTZÉ.]

REHABILITATION. { 1903. July 21st.

Mr. Benjamin moved for the rehabilitation of J. F. Higgins. The creditors, he said, had agreed to a compromise. The trustee raised no objection.

Granted.

GENERAL MOTIONS.

FRIEDLAND v. LE ROOS.

Mr. Pyemont moved for leave to sign judgment against the plaintiff in default of filing declaration or making claim within the stipulated time.

Order granted.

Re THE PAARLSCHE LAND AANKOOP MAATSCHAPPIJ.

Mr. Benjamin, for the liquidator, presented the first official report, and moved for the usual order as to the time for inspection by creditors, and also for publication in "Ons Land," and local papers at the Paarl and Cape Town.

Order granted.

Ex parte THE CHAIRMAN OF THE BLAUWKLIP GARDEN CO., LTD.

This was an application for an order authorising the registration of certain property. The petition stated that the petitioner was one of a party of twenty-six coloured people in the district of Stellenbosch, who formed themselves into a company to acquire certain property. Property was purchased on behalf of the company by one Harry Thomas, who bought it in his own name, and the petitioner and his party subsequently brought an action in the Supreme Court to compel Thomas to render a true and full account of his administration of the property and of all moneys and securities received by him and all moneys disbursed on behalf of the said company. An order was made against the said Harry Thomas accordingly. The company, it was arranged, should not be registered until they had obtained property. The company consisted of poor coloured people. It was not registered until after the order had been made against Thomas. The petitioner sought an order authorising and requiring the Registrar of Deeds in Cape Town to register the transfer conveying the said land to the limited liability company. The Registrar objected on the ground that this property was bought before the parties were registered as a limited liability company.

Mr. Benjamin for applicant.

[Kotzé, J.: Is there any precedent for the view taken by the Registrar of Deeds?]

Mr. Benjamin said he did not think there was. The Registrar seemed to take up the position that the property was purchased by petitioners before they were a limited company, and now that they had formed themselves into a company it was necessary for them first of all to have the land passed to themselves in their personal capacity and then subsequently to the company. He did not think there was any precedent for such a view, in fact, there was a precedent which rather went to the contrary—the case of the *Union-Castle Company* (12, C.T.R., 26).

[Kotzé J.: In this matter it seems to me that the property was really bought for these poor people styling themselves the Blauwklip Garden Co., and under these circumstances it was purchased for

them, not individually, but in their aggregate capacity. Therefore, although it was quite right for the Registrar of Deeds to be zealous so far as the matter of transfer duty is concerned, still at the same time, I do not think there must be a transfer to the parties individually, and then afterwards to them as a company. This would put them to unnecessary expense, and there is no rule of law which requires such a proceeding. Under these circumstances, I will grant the order.

CONTAT'S COLLIERIES V. CONTAT.

Mr. Alexander applied on behalf of the applicant, Joseph E. Contat, for leave to appeal to His Majesty's Privy Council against a judgment of the Supreme Court.

Mr. Benjamin, for the respondent, said he was not instructed to oppose the application for leave, but he was instructed to oppose any application for stay of execution.

Mr. Alexander said he would take it that the usual procedure would be followed, and unless the Court said that execution was to be carried through the ordinary presumption would be that it was stayed.

[Kotzé, J.: It can only be stayed by giving proper security.]

Of course, we are prepared to give proper security.

Mr. Benjamin said it was necessary that the plaintiff should have the money to proceed with the liquidation of the estate, which was surrendered so far back as 1899, and there were a large number of creditors in the estate.

Mr. Alexander attributed the delay in liquidation to the plaintiff. The Supreme Court had only given absolution from the instance in the defendant's claim in reconvention, and if execution was not stayed the concurrent creditors would be paid before the appeal to the Privy Council would be heard.

Order granted as prayed.

Ex parte LIQUIDATOR OF DE JOND AND SONS, LTD.

Mr. Alexander presented the report of the liquidator, and moved for the usual order.

Usual order granted.

Ex parte DAVIDSON AND FRIEDLAND.

Mr. Benjamin moved on behalf of the petitioners for the registration of a notarial contract to carry out an agreement between the petitioners that their marriage should be without community of property, and that the marital power should be excluded. The petitioners were of the Jewish religion, and they went before the Resident Magistrate at Cape Town, thinking it was necessary to have the marriage registered before the R.M. In the meantime Davidson had seen a firm of attorneys with regard to executing an ante-nuptial contract, but had been delayed by not knowing the full name of the second-named petitioner. On the morning of the 15th inst., they applied before the R.M., and were, as they now learned, duly married, although, at the time of the ceremony, they did not understand that it constituted a form of marriage, but only understood that it was a form of registration of marriage. It was their intention to be married by the Jewish ceremony in August. They had consequently been prevented from executing an ante-nuptial contract without the consent of the Court.

Order granted as prayed.

STRYDOM V. THE UNIONDALE LICENSING COURT AND DASSENVILLE AND VAN ROOYEN. 1903. July 21st; " 28th.

New liquor licence—*Locus standi*—Local option clause, Act 25 of 1891, § 13—Memorial not signed by majority of registered voters—Voters' list.

A registered voter for Divisional Council purposes has, under the local option clause of Act 25 of 1891, a sufficient interest in the matter to entitle him to move the Supreme Court to set aside the granting of a new liquor licence granted by the Licensing Court for his district.

A new liquor licence can not be granted by a Licensing Court, unless a memorial in favour of the granting of such

licence, signed by a majority of registered voters, has been duly lodged with the Resident Magistrate, as required by section 13, sub-section 1 of Act 25 of 1891.

In ascertaining whether a majority of registered voters of the district have signed a memorial or memorials in favour of granting a new liquor licence, the names of persons who are admitted or clearly proved to be dead, or to have never existed, or to have been registered twice, should be omitted from the voters' list, but not also the names of persons who have removed from the district.

Gibson and Morgan v. Manley (*11 Juta 191*), *and* Potgieter v. The Barkly West Licensing Court (*7 H.C. 147*) *followed.*

This was a motion brought on behalf of Johann Andries Strydom, of Uniondale, for an order calling upon the respondents to show cause why certain proceedings of the Uniondale Licensing Court should not be set aside, and why a certain licence granted by the said Licensing Court on the 4th March, 1903, should not be cancelled on the ground that the memorial laid before the Magistrate was not signed by the requisite number of voters. The affidavit of the applicant stated that in March last Henry Dassenville and Van Rooyen made application for a licence in the district of Uniondale. Applicant took round a petition opposing the licence, and found on perusing the petition in favour of the licence that some twenty-two *bona fide* voters had signed both petitions, and, notwithstanding the fact that there was not the requisite majority, the licence was granted. The affidavit of one Rademeyer set out that seventeen of the signatures of those in favour of the licence were either those of dead people or they represented people who did not live in the district.

Mr. Burton for applicant; Sir H. Juta, K.C., for respondents.

Sir H. Juta: In this case the applicant has no *locus standi*. There is no appeal from the decision of a Licensing Court,, but the Supreme Court has held that it has power to set aside the proceedings of such court if they are illegal. *Riddesdale* v. *Hall* (2 Juta, 356). Under the old Licensing Ordinance, no appeal or review was allowed. The new Act does not say the same in so many words, but it has always been held that this rule still applies: a Licensing Court is not a judicial body.

[Kotzé, J.: Should the Licensing Court act arbitrarily, is there no remedy?]

Yes, the proceedings could be set aside as irregular. Here the licence was taken out in April. Over £400 had been spent on the premises, and yet the complaint did not come before the Court till July, and then only at the instance of a person who does not even allege that he has suffered any inconvenience or damage by the granting of this licence.

[Kotzé, J.: I understnd that a majority of the registered voters did not support the granting of the licence?]

There were 122 voters on the roll, and 54 were in favour of the granting of the licence. The Licensing Court struck off seventeen; some of these were dead, and others never existed. The question is as to whether the Licensing Court was bound by the voters' roll as to persons who had left the district before the roll was framed, but whose names nevertheless appear thereon. But there is the preliminary point that the applicant has no *locus standi*.

Mr. Burton (for the applicant): The case cited by respondent's counsel is not in point. Act 25 of 1891, section 13, introduces the principle of local option in respect of all new licences. See particularly sub-section (1). The Licensing Court cannot legally grant a new licence unless a memorial in favour of it has been signed by a majority of the registered voters. Since that Act was passed many applications have been made to this Court to set aside the proceedings of Licensing Courts, *e.g.*, *Gibson and Another* v. *Manley and Another* (11 S.C.R., 191). In that case the question as to the *locus standi* of the applicant was never raised, and the Licensing Court was held to be bound by the

voters' roll. So, also, in the case of *Potgieter* v. *Barkly West Licensing Court* (7 H.C., 141). There the application was based on the same grounds as in this case, and there again the question of *locus standi* was never raised. See also *Raubenheimer* v. *Parkins and Others* (12 Juta, 366). In the case cited on behalf of the respondent the Court refused to re-open the case, but this is not a similar case: here there has been irregularity from the very first.

[Kotzé, J.: Mr. Burton, before deciding on the preliminary point which has been raised, I would like to hear you on the merits.]

Mr. Burton here read the affidavit of the chairman of the Licensing Court.

[Kotzé, J.: How does the striking off of these names affect the question?]

If I can show that more than 108, instead of 106, persons signed this petition, that is quite sufficient for my case; and the chairman's own figures show this. In Raubenheimer's case the Chief Justice declined to take into account any inconvenience or loss to the licensee which might possibly happen to him from a refusal of the licence; so that consideration has nothing to do with the merits of the case. Here we have to deal with only a pure question of law, and the only question is, have the provisions of the Act been observed, or have they not? Schreiber in his affidavit says that Nos. 502 and 503 are one and the same person. He finds that seven persons named on the roll were dead. No doubt they were correctly struck off. Three persons had never resided in the district; six had left the district before the roll was compiled; and one was registered twice. That is, seventeen in all either could not vote or had no right to do so. The question is whether the Licensing Court had any right to strike off names of persons not before it, simply because there was some evidence to show that they had left the district. I submit they had not: a voters' list is inviolable; see section 17 of Act 40 of 1889.

[Kotzé, J.: Suppose the members of the Licensing Court knew that certain of these people were dead?]

If they were dead, of course they could not vote.

[Kotzé, J.: Suppose that others have removed from the district?]

In that case the Licensing Board is bound by the voters' roll. When once a man's name is on the roll, whether of Parliamentary voters or of Divisional Council voters, he can vote. See section 22, sub-section (2) and section 23.

[Kotzé, J.: Suppose that the total of signatories for and against the licence exceeds the number on the Divisional Council's roll, must not the Licensing Board go into the question of qualification?]

If people sign both memorials their names must be struck off both. In Gibson's case the Assistant Resident Magistrate accepted a certificate that twenty voters had left the district, and Buchanan, A.C.J., held that he was wrong in so doing, and that he was bound by the voters' roll. Again, sections 16 and 17 of Act 40 of 1889 make every owner liable for rates. Now, as far as this roll is concerned, Nos. 9, 10, and 16 are owners of property; so in their case the question of residence does not come into the case. If they were improperly removed from the roll, the question as to majority falls away. If the Licensing Court has power to strike off names of persons who have left the district, surely they can put on the names of persons who have come into the district since the roll was compiled. But the law will not allow them to do this. It has been said that dead men cannot vote; but living men can, even if they are resident in another district, provided their names are on the voters' roll, and I submit that the Licensing Court had no right to go behind that roll. Then, again, only ten names were struck off, on the ground that they appeared on both lists. In point of fact, some twenty names appear on both lists, though the initials are not always the same.

Sir H. Juta (in reply): I will not deal with my friend's third point. The Licensing Court held that only ten names should be struck off, on the ground that they appeared on both petitions, and the decision of that Court on this point is final. As to the Act 25 of 1891, we must read it either as it stands or in accordance with its real meaning and spirit. Section 13 of that Act seems to imply that the Licensing Court cannot under any circumstances remove any name from the roll, but that the roll must be taken as it stands. It is

admitted by applicant's counsel that that would be absurd. That Act introduces the principle of local option—that is, its chief object is to give the people of the district control over the granting of new licences. But suppose that half the people in the district were to emigrate, and that their names still appeared on the roll, that would put an end to local option. It is as impossible to get people thousands of miles away to sign a petition as it is to get dead people to sign, and therefore, if the Licensing Court may strike off the names of dead people, it may also strike off the names of absent people and of people who never existed.

[Kotzé, J.: May you strike off the names of dead people? The Act of 1891 says nothing about dead people.]

The judgment in *Potgieter* v. *Barkly West Licensing Court* (7 H.C., 141) decides that point. I admit the figures which have been given, and that if we had no right to strike off the names of absent people, we have not a majority. As to the question of *locus standi*, the case of *Riddelsdale* v. *Hall* (2 Juta, 356) shows that the Court could not go back on its own decision. Unless the applicant can show pecuniary damages, he has no *locus standi*. In this case there is no appeal or review.

[Kotzé, J.: In *Riddelsdale's* case the Court held that it had power to set aside illegal proceedings.]

Yes, but there we did not appeal; we asked to have the proceedings set aside. Here there is a similar petition. The Supreme Court cannot modify the decision of the Licensing Court; it can only set it aside as illegal, and therefore null and void.

Mr. Burton (on the merits) referred to the judgment of Solomon, J., in *Riddelsdale's* case. There is a clear distinction between a man who is dead, and is therefore no longer a voter, and a living man whose name is on the list, and who therefore is a voter.

Cur. Adv. Vult.

Postea (July 28th).

Kotzé, J.: This is an application for setting aside a certain new licence granted by the Licensing Court for the district of Uniondale to the respondents, Dassenville and Van Rooyen, on the 4th March, 1903. The applicant, who is a registered voter on the Divisional Council voters' list for the Ward Lower Long Kloof, in the district of Uniondale, complains that the memorial required by sub-section 1 of section 13, Act 25 of 1891, to be lodged with the Resident Magistrate in support of the application for a new liquor licence, was not signed by a majority of voters registered for the election of members of the Divisional Council for the Ward Lower Long Kloof. It appears from a printed copy of the voters' roll that there are 122 registered voters for the Ward Lower Long Kloof. The memorial in support of the granting of a new licence to Messrs. Dassenville and Van Rooyen was signed by 64 persons, whose names figure on the voters' roll. A counter-memorial against the application for the granting of the licence was signed by 40 persons, whose names are on the voters' roll. The applicant alleges that of these persons 22, whom he names, signed both memorials, but the Magistrate states that only ten persons appeared to have so signed. Consequently these ten names were struck out of both memorials, as directed by the Act, thus reducing the number of signatures on the memorial in favour of the application for a new licence to 54, and the number on the counter-memorial to 30. At the meeting of the Licensing Court, an affidavit made by M. A. Rademeyer was put in, to the effect that 17 persons appearing on the voters' list were either dead, non-existent, or had left the district long before the 23rd of December, 1902, when the voters' roll was framed. The Licensing Court acted on this affidavit, and, with the exception of the name of Cornelius C. Kritzinger, who was erroneously stated to have left the district, reduced the voters' list, by taking into account the names of the 16 persons mentioned in the affidavit, from 122 to 106. Accordingly, the licence was granted to the respondents Dassenville and Van Rooyen. The Magistrate also observes that the Licensing Court was unanimous in its decision, and did not by its action intend actually to revise the voters' roll, but considered it desirable in the interests of the public and of the registered voters in the said ward not to take the names of the sixteen persons into account in view of the fact that their death, non-existence, or removal from the district dated from a time prior to the framing of the roll and not subsequent thereto.

On behalf of the respondent, a preliminary objection was taken that the applicant has no *locus standi* in this matter, as he does not allege that he has some pecuniary or other valid interest at stake. In support of this the case of *Riddelsdell* v. *Hall* (2 Juta, 356) was cited. That was an application under the old Ordinance 9 of 1851, since repealed, which enacted that the decision of the Licensing Court shall be final and conclusive, and not subject to appeal or review by any other Court. The Supreme Court, however, held that it was not precluded by this provision from setting aside any proceedings which are illegal in their nature, but that it would only do so upon the application of persons who can show that they have some pecuniary or other valid interest in the decision. It is said that the present applicant does not possess any such interest, and is not therefore entitled to complain against any illegality committed by the Licensing Court. I cannot agree with this contention. The application is made under what is known as the "local option" clauses of the Act of 1891, the object of which is to leave to a large extent the question of the granting of a new licence to the voters resident in the district, and to give them an opportunity of expressing their wishes in the matter. Sub-section 1 of section 13 of this Act enacts that where an application is made for a new licence it shall not be lawful for the Licensing Court to grant the same, unless there shall be lodged with the Resident Magistrate at least four days before the meeting of such Court to consider such application a memorial or memorials, signed by a majority of the voters registered for the election of members of the Divisional Council within the limits of the Divisional Council district in which the premises proposed to be licensed are situated, approving of the issue of the said licence. If, therefore, there are no memorials showing that a majority of the registered voters of the district are in favour of the application for a new licence no such licence can be granted. The voters then have a direct interest in the matter of granting or withholding the licence, and if any illegality has been perpetrated by the Licensing Court in the granting of a licence it seems to me that any registered voter of the district is entitled to come to the Court and ask for the setting aside of the licence. He has, in other words, a sufficient interest for the purpose. Although the Act does not expressly enact that any registered voter shall have the right of bringing the proceedings of the Licensing Court in review before the Supreme Court, it is obviously in accordance with the policy of the "local option" clause that persons who are given certain rights should, if they consider themselves aggrieved by anything illegally done by the Licensing Court, have an opportunity of seeking a remedy against it in the Supreme Court. If this is not so, the Licensing Court may act in disregard of the express language of section 13, and of the wishes of the majority of the registered voters, and how is the illegality to be prevented or set aside? Now, the present applicant alleges that he is a registered voter for Divisional Council purposes of the district in question, and that seems to me to be a sufficient qualification to give him a *locus standi*. In *Potgieter* v. *The Barkly West Licensing Court and Another* (7 H.C., 147) the applicant was described as a resident of the district, and so, in *Raubenheimer* v. *Parsons* (12 Juta, 366), the applicants alleged that they were registered voters. Both these cases were decided under the option clause of Act 25 of 1891, and in both instances there was no allegation that the applicants had some pecuniary or other interest peculiar to themselves in the matter, beyond being resident or registered as voters in the particular district. In neither of these cases was the question of *locus standi* raised by counsel or the Court, presumably because, by the introduction of the local option clause, it was considered that the applicants did possess, to quote the words of the decision in *Riddelsdell* v. *Hall*, a sufficiently valid interest for the purpose. I am, therefore, of opinion that the objection against the right of the present applicant to make this application should not be entertained.

The next point to consider is whether the memorial in favour of the granting of the new licence to the respondents Dassenville and Van Rooyen was signed by a majority of the registered voters of the district or ward, Lower Long

Kloof. There are 122 names on the voters' list, and the memorial in favour of the licence was signed by 64 registered voters. By discarding and striking out the names of ten persons who had signed both this memorial and that against the granting of the licence, a method of procedure which is specially prescribed by sub-section 3 of section 13 of the Act, the number was reduced to 54. This, therefore, does not constitute a majority. The Licensing Court, however, accepted and availed itself of an affidavit by Mr. Rademeyer to the effect that of 17 persons whose names appear on the voters' list, 7 were dead, 6 were unknown or non-existent, 3 had long since removed from the district, and one name appeared twice on the list. Of these 17 the Licensing Court struck 16 off the list, thereby erducing the number of registered voters from 122 to 106, and held that, as the memorial in favour of the licence was signed by 54, there was a majority, and consequently granted the licence. But now the question arises whether the Licensing Court, in endeavouring to ascertain if a majority had signed the memorial in support of the application for a new licence, acted correctly in going behind the voters' list, or was bound to accept and abide by that list as framed? Two decisions were referred to during the argument bearing on this point. The first is the case of *Gibson and Morgan* v. *Manley* (11 Juta, 191), where this Court (consisting of Buchanan, A.C.J., and Upington, J.) ruled that the Acting Magistrate, who was the chairman of the Licensing Court, had acted wrongly in going behind the voters' roll, and accepting a certificate that twenty of the registered voters had left the district. He should have taken the list as he found it, and had no authority to revise it and strike off any names therefrom. This case was decided in 1894. In the following year the High Court at Kimberley, in *Potgieter* v. *The Barkly West Licensing Court*, held that the names on the voters' list of four persons, who were admitted to be dead, and of certain five persons twice registered, should be omitted from the list of voters, in ascertaining whether a majority had signed the memorial. Solomon, J., in giving the judgment of the Court, observed "the object of requiring these memorials is to ascertain the views of the majority of the voters in the district, who are presumed to have an interest in determining whether a licence should be issued or not, but, in the case of persons who are dead, neither can their views be ascertained nor their interests affected. It would be entirely at variance, therefore, with the policy of the Act to count such persons as voters, for as they cannot express their views in favour of the issue of a licence, the effect really is to throw their names on the side of those who object to the granting of the licence." In this view I entirely concur, and it seems to follow that if it is admitted, or there is clear proof that the names of persons who never existed appear upon the voters' roll, or that one and the same person has been twice registered, such names should be omitted in ascertaining whether the memorial contains the names of a majority of registered voters. In the present instance, while it may be taken as admitted that seven persons, whose names figure on the voters' list are dead, it is not admitted that six persons so figuring are non-existent, or unknown, nor that one and the same person appears twice upon the voters' roll. And here I must state that I do not attach much impotrance to the affidavit of Mr. Rademeyer, who identified himself with the respondents, Dassenville and Van Rooyen, by going about the district to obtain signatures on the memorial in support of the application for a licence, and who has also solemnly declared that C. C. Kritzinger, a registered voter, had left the district, which the Licensing Court found not to be the case. I am, moreover, bound by the decision of this Court in *Gibson and Morgan* v. *Manley* to the extent that a Licensing Court can not go behind the voters' roll and strike off from it the names of persons who are alleged to have removed from the district, for I agree with the remark of Solomon, J., that the decision in that case should be viewed in connection with the particular facts then before the Court, and should not be extended beyond that. Now, if the names of persons who are non-existent or are registered twice, as well as those of persons who are dead, can, for the purpose of inquiring whether an actual majority of voters has signed the memorial, be omitted from the voters' list, I am, in the present in-

stance, not satisfied that it has been sufficiently established that the persons alleged to be non-existent do not, as a matter of fact, exist. I may point out that even if this had been satisfactorily established in favour of the respondents, the figures would be as follow: Seven persons deceased, six never existed, and one registered twice = 14, which deducted from 122, the number of registered voters on the list, leaves 108, so that 54, the number of votes legally appearing on the memorial, does not constitute a majority. The Licensing Court has no doubt acted *bona fide*, and in what it believed to be the public interest, and the respondents Dassenville and Van Rooyen, who took out their licence in April last, have probably been put to some expense in opening a wayside hotel at Krakeel River, in the ward of Lower Long Kloof, but these are circumstances which cannot weigh against the express language of section 13 of the Act, which lays down in clear and peremptory language that it shall not be lawful to grant an application for a new licence, unless a memorial signed by a majority of the registered voters of the district has been lodged in support thereof. The application to have the licence set aside must accordingly be granted with costs against the respondents Dassenville and Van Rooyen.

[Applicant's Attorneys: Herold and Gie; Respondents' Attorneys: Walker and Jacobsohn.]

SUPREME COURT

[Before the Hon. Mr. Justice KOTZE.]

JONES V. PETERSEN AND CO. { 1903. July 22nd. „ 29th.

Infringement of trade-mark — Interdict — Action — Principles which guide the Court in granting an interdict to restrain the infringement of a trade-mark.

Where respondents, as agents of a principal residing in England, sold a certain medicine "Rheumaticide," which applicant complained was an infringement of his registered trade-mark "Rheumaticuro."

Held, *that as the respondents had sold both Rheumaticide and Rheumaticuro for the last 16 months, and alleged that no one had been deceived nor that applicant had sustained any loss thereby, and as moreover the respondents had not had sufficient time to communicate with their principal, who might have a good defence, no interdict should be granted, but that applicant, who under the circumstances had not produced evidence of deception, should be left to his remedy by action.*

This was an application on notice of motion brought by James Jones, of Long-street, Cape Town, against P. J. Petersen and Co., chemists, Cape Town, for an interdict restraining them from advertising, selling, or exposing for sale a certain medicine in a bottle covered with a coloured paper labelled "Rheumaticide," and thus infringing a certain registered trade mark of the applicant, "Rheumaticuro."

The affidavit of the applicant, James Jones, stated that he was carrying on business in Cape Town, and was the registered proprietor of a medicinal preparation named "Rheumaticuro," which had been registered as far back as April, 1885. A certificate by the Registrar was annexed certifying that James Jones, of Long-street, Cape Town was entered on the register of trade marks as the proprietor of the word "Rheumaticuro." The affidavit went on to state that thereafter, in 1899, the proprietor renewed the trade mark for a further period, and that he had a considerable sale for the said liquid and pills. About fourteen days or three weeks ago deponent saw for sale in Cape Town a medicine named "Rheumaticide," prepared by Messrs. Cornell and Co., said to be of Cape Town and Chicago, but belonging to London. Deponent had been informed that neither Cornell nor the Cornell Company carried on

business in this city, and that the word "Rheumaticide" was not registered as a trade mark. Applicant deposed that "Rheumaticide" was a colourable imitation of his own preparation, and was calculated to deceive the public. The said "Rheumaticide" was advertised by Messrs. P. J. Petersen, of Cape Town, and exposed for sale in their various shops. Deponent objected to the word "Rheumaticide," the vending of the preparation sold under which name, he asserted, would do him severe damage. An affidavit of the applicant's attorneys set out that in answer to their letter to the respondents, calling upon them to withdraw the article, they replied that they could not do anything in the matter without consulting personally the proprietors, Messrs. Cornell, who were domiciled in London.

The affidavit of Harry Evans set forth that respondents had had "Rheumaticide" for sale since the month of March, 1902, that the said "Rheumaticide" was not a registered trade mark in this colony, that he denied that the said word "Rheumaticide" was a colourable imitation of the word "Rheumaticuro," and calculated to deceive the public. The outside casing of the bottles and the bottles themselves were entirely different from those in which "Rheumaticuro" was put up, and could not for one moment be confused therewith, that the respondents had exposed for sale both "Rheumaticide" and "Rheumaticuro," and purchased from the applicant several hundred pounds' worth of this specific every year, and also advertised the same for sale in their price list, and that they had vended the specific "Rheumaticide" for sixteen months without applicants sustaining any loss.

Mr. Benjamin for the applicant, Sir H. Juta, K.C., for the respondent.

[Kotzé, J.: I understand you merely sell this "Rheumaticide" as agent?]

Sir H. Juta: Yes, we sell both of them.

The replying affidavit of the applicant stated that he took immediate steps to restrain the sale of the other specific when he found that the respondents were selling it.

Mr. Benjamin (for the applicant): The Acts 22 of 1877 and 12 of 1895 both deal with trade marks. Our trade mark was registered under Act 22 of 1877.

[Kotzé, J.: The question is, has there been any infringement of your trade mark?]

There has been a colourable imitation of it.

[Kotzé, J.: That is the whole point.]

As to this see *Sebastian on Trade Marks* (4th Edition, p. 135), and the cases there cited. Here the word "Rheumaticuro" is the only trade mark registered. The question is whether the word "Rheumaticide" is a colourable imitation of "Rheumaticuro," and is calculated to deceive.

[Kotzé, J.: The medicine is called "Jones's Rheumaticuro."]

"Jones" is not registered, and is not registerable.

[Kotzé, J.: Still, the question is whether the prefix "Jones'" helps to distinguish "Rheumaticuro" from "Rheumaticide." See *Eno* v. *Dunn* (63 L.T., 6), where see especially the judgments of Watson, L.J., and of Herschel, L.J. The case was taken on appeal to the House of Lords; Dunn applied for leave to register "Dunn's Fruit Salt Baking Powder" as a trade mark. The House of Lords refused the application, although his trade mark was for a baking powder, and "Eno's Fruit Salt" is a medicine.]

In that case the House of Lords held that Dunn's trade mark was calculated to deceive. That case goes much further than any ever decided in this Court.

[Kotzé, J.: Would any person going into a shop, and asking for "Rheumaticuro," be content to take "Rheumaticide"?]

I would submit so. There can only be one object in using a word like "Rheumaticide," and that object is to deceive.

[Kotzé, J.: Any chemist has a right to sell a remedy for rheumatism.]

Yes, but not under a name which is a colourable imitation of our trade mark. We have now been registered for five years, and under the Act of 1877 that is is conclusive evidence of our exclusive right to the trade mark.

Sir H. Juta (for respondent): This is a mere matter of evidence as to whether the word "Rheumaticide" is likely to deceive. We have acted as agents for both "Rheumaticuro" and "Rheumaticide" during the last sixteen months, and nobody has been deceived as to these

medicines. The get-up of the medicines is different, and it would not be so were there any intention to deceive. I cannot admit that we must take the registered word without any addition. Eno's case shows that the position of a man who objects to registration and that of one who complains of an infringement of his trade mark are entirely different. In the one case the onus is on the man who applies for registration; in the other it is on the person complaining of the infringement. The word "Rheumatic" is not registerable, nor is the word "Cure." Had there been any intention to deceive, the respondents would have sold their medicine as "Rheumatic-cure" with impunity. "Rheumatic" and "cure" are both common English words, and anybody has a right to use them as he pleases.

[Kotzé, J.: So "fruit" and "salt" are common English words.]

Yes, but the collocation of these words was unknown till Eno brought them together. "Rheumatic" and "cure" are quite common words, and although nobody can register them, anybody can use them.

Mr. Benjamin (in reply): See section 3 of Act 22 of 1877. I submit that a man could not use the word "Rheumaticure" if any damage were thereby done either to the public or to the owner of the trade mark "Rheumaticuro." Counsel for the respondents seems to confuse the provisions of section 9 of Act 22 of 1877 with section 2 of Act 12 of 1895 as to what words can be registered. Possibly "Rheumaticuro" could not now be registered, but the registration is not now attacked. See *Lockwood* v. *Foster*, cited in *Sebastian* (p. 190).

His Lordship said that but for the case in the House of Lords of *Dunn and Eno*, which he had not had the opportunity of reading, he should not have entertained much doubt in the matter, but he wished to read that judgment for himself, and he would therefore taken time to consider his decision.

Postea (July 29th).

Kotzé, J.: The applicant, who carries on business in Cape Town as the Rheumaticuro Company, complains that the respondents, by advertising for sale and selling a certain medicine, under the name of "Rheumaticide," are infringing this registered trade-mark "Rheumaticuro." It appears that the applicant in 1885 registered as a trade-mark under the Act 22 of 1877 a label with the word "Rheumaticuro," and that on April, 1899, his right to this trade-mark was extended for a further period of 14 years. The respondents, who are chemists in Cape Town, advertise and sell, as agents of one Cornell, residing in England, a certain medicine known as Cornell's "Rheumaticide," and have been doing so for the last sixteen months, although this fact only came to the notice of the applicant some three weeks ago. The respondents also purchase from the applicant his "Rheumaticuro" in large quantities, and likewise advertise and sell this specific. They allege that during the past sixteen months the applicant has sustained no loss whatever through their selling "Rheumaticide," and that no one has been deceived thereby. Both "Rheumaticuro" and "Rheumaticide" profess to cure rheumatism and kindred complaints. It is quite clear that a person is not allowed to sell an article of his own manufacture under the colour or pretence that it is the manufacture of someone else. Nevertheless, it is incumbent on the applicant, who seeks to restrain the respondents from advertising and selling "Rheumaticide," to show that they are exposing for sale and vending a cure for rheumatism under circumstances amounting to a colourable imitation of his registered trade-mark "Rheumaticuro." The onus of establishing that lies on the applicant. The test which applies in a case of this kind is whether an ordinary purchaser is likely to be deceived by the imitation of the trade-mark. This is a question of fact, depending on the circumstances of each particular case. From a comparison of the bottles in which both "Rheumaticuro" and "Rheumaticide" are made up, it is apparent that the colour of the outside casing is different; that of the applicant being black and grey with a human figure on it, and that of Cornell red and white without any figure or other device. The bottles themselves are of somewhat different shape, and the directions on the labels pasted on the bottles are different. The printing on the outside casing is likewise different, the one being in black letters, the other white. The chief resemblance is in the use of the word "Rheumaticide," which is somewhat similar to

"Rheumaticuro." Now, if the matter has to be decided by merely placing the two packages side by side, and judging from the outside apparances alone, quite apart from the use of the word "Rheumaticide," there would be considerable force in the contention that a purchaser would not be easily misled. But it seems to me that this would not be altogether a right way of regarding the matter. I must look at all the circumstances as a whole, including the use of the word "Rheumaticide." It has been argued, on the other hand, on behalf of the applicant, that the Court should set aside the external marks and appearances to which I have referred, and confine its attention merely to the employment of the word "Rheumaticide," for that, it is said, is such a colourable imitation of the applicant's trade-mark that its natural and probable tendency must be to deceive unwary purchasers, and cause them to believe they are purchasing "Rheumaticuro." In support of this argument reference was made to *Sebastian on Trade-marks*, pp. 136-7 (4th edition), and *Eno* v. *Dunn* (63, L.T.N.S., p. 6). In many of the decisions it will be found that, besides the similarity in the name, the article sold by the defendant was generally done up in a similar package, or with a similar label or device as the article manufactured by the plaintiff. But there are likewise several cases where the defendant, without actually copying the whole or a portion of the registered trade-mark, had employed a name, which, although somewhat different, was yet sufficiently similar in appearance or sound to the plaintiff's registered trade-mark to induce the Court to restrain the defendant from so imitating that trade-mark and infringing the plaintiff's right. Some of these decisions, including that of the House of Lords, in *Eno* v. *Dunn*, may have gone somewhat far in this direction, and I do not deem it necessary at present to consider any of them. Although actual deception need not be proved, that is to say that anyone has been deceived, still the Court must be satisfied that the reasonable probability is that purchasers will be misled before it will grant an interdict. I am at present not quite satisfied on this point. The affidavit of Mr. Evans states that the respondents annually purchase from the applicant large quantities, to the extent of several hundreds of pounds, of his "Rheumaticuro," and sell this medicine as well as "Rheumaticide," and that during the past sixteen months no one has been deceived thereby. Some consideration ought, I think, to be given to this circumstance, as showing that too much weight should not be attached to the mere use of the word "Rheumaticide." On the other hand, the applicant may be in a position to obtain and produce proof of actual deception. Again, these proceedings only commenced about three weeks ago, and the respondents have not had a reasonable time and opportunity of communicating with their principal, who resides in England, and who may have a good defence to the claim of the applicant. Under all the circumstances, I think it best that I should not now decide upon the rights of the parties, and that the matter should be left open. The applicant will then be at liberty to approach the Court again by action, and both parties will have an opportunity of placing more information before it. As the case stands at present, I am not prepared to grant the interdict. The application is refused with costs.

[Applicant's Attorneys: Van Zyl and Buissinné; Respondents' Attorneys: Silberbauer, Wahl and Fuller.]

SUPREME COURT

[Before the Hon. Mr. Justice KOTZE.]

REVIEW CASES.

REX V. JIMBOOY. { 1903. July 28th.

Theft of stock—Act 35, 1893.

The finding of some wool of a sheep, stolen by two other persons, in the fireplace of a hut occupied by them jointly with the accused, and the fact that some blood was found on an axe said to belong to the accused.

Held, *insufficient to sustain the conviction of the accused for theft of the sheep.*

Kotzé, J.: This is a case which came before me for review from the Resident Magistrate of Worcester. The prisoners were charged with the theft of a sheep, and the Magistrate convicted all three of them, and sentenced them to a year's imprisonment with hard labour, and fifteen lashes. Now, with reference to the first two accused, the evidence is very clear, and it shows that they actually stole the sheep in question; but, with reference to the third accused, Jimbooy, the evidence was that he occupied, with his wife, a certain hut, or cottage, and the other two accused, with their wives, lived with him, and they used a common fireplace, in fact used the house generally in common. In the fireplace was found some wool of this particular sheep, and an axe, which is said to have belonged to the third accused, was found outside with some blood on it, and upon these two facts the Magistrate seems to have come to the conclusion that Jimbooy, the third accused, must be taken to have been a party to the theft of the sheep. Now, the Act with regard to theft is that it must either be a case of stealing or attempting to steal, receiving stolen property, with guilty knowledge, or being in unlawful possession of property without being able to give a satisfactory account of such possession. The mere fact that a bit of wool of this sheep was found in the fireplace used by them all generally, and that there was some blood on the hatchet is not sufficient to justify the conclusion that the third accused was in possession of stolen property, and, therefore, he should not have been called upon for any explanation. His explanation is that he did not steal the sheep, the sheep was brought there by these two other men, and under these circumstances I think the conviction against Jimbooy should be quashed.

REX V. SWARTS. { 1903. July 28th.

Presumption of innocence.

Conviction of an accused by a Resident Magistrate set aside, there being on the evidence a reasonable doubt in favour of the accused.

Kotzé, J.: This is a case which came before me for review from the Resident Magistrate at Oudtshoorn. In this case it appears that Swarts, a young farmer, was in a certain store at Oudtshoorn, and had a purse of his own. While in the store making some purchases he appeared to have been in a hurry, and to have had a little to drink, more than was good for him, and a lady was also in the shop making purchases. She placed her purse on the counter, and went to another part of the store to make purchases. The clerk, seeing this purse on the counter, asked Swarts if it were his purse. He said "Yes," and put it in his pocket. He soon afterwards left the store. The lady then missed her purse, and inquiries were made, and it was ascertained that Swarts had gone off with this purse. A brother of the lady accosted Swarts, and asked him if he knew anything about it, and said that his sister's purse had been lost in the shop, and must be found, whereupon young Swarts immediately put his hand into his pocket and produced the purse, and said, "Is that the purse, I thought it was my own." The purse, on being examined, was found to contain £5, four 10s. pieces, and some silver, and not a single coin had been abstracted by Swarts from the purse, his explanation being that he was in a hurry, and the shopman asked him if it were his purse, and he put it in his pocket. The fact that none of the money disappeared is a very strong point in support of the presumption of Swarts's innocence, and under all the circumstances there seems to me to be such a reasonable doubt in his favour that I think the Magistrate should have given him the benefit of that doubt, and, consequently, the conviction will be quashed.

REX V. MPALA AND OTHERS. { 1903. July 28th.

Remit to new Magistrate—Act 3 of 1861, § 29—Plea of guilty—Evidence.

A Magistrate to whom a criminal case has been remitted for trial must, if not the same

Magistrate who took the evidence against the accused at the preparatory examination, take evidence de novo *against the accused as required by Section 29, Act 3, 1861, even where the accused pleads guilty.*

The Queen *v.* Strydom (*1 Juta 60*) *followed.*

This was an appeal against a sentence of the Resident Magistrate of Idutywa passed upon the appellants, Mpala and three others, for having contravened section 158 of Act 24 of 1886, the Transkeian Penal Code Act.

From the records in the Courts below it appeared that this case had been sent for review to the Chief Magistrate by error, and the sentence had been reduced. This had caused a delay in the proceedings, but owing to the difficulty of getting the records returned, the Crown did not raise any question with regard to the 41 days provided by Act 21 of 1876. The sentence passed upon the appellants was a fine of £50 each, or, in default, twelve months' imprisonment with hard labour. In the notice of appeal, three grounds were set out: (1) That the conviction and sentences were not supported by the evidence, and were contrary to law; (2) that the said sentence was excessive; (3) that the said proceedings were irregular and contrary to law.

Mr. Searle, Q.C., for appellant; Mr. H. Jones for the Crown.

Mr. Searle said that the main point that he intended to urge was that there was an irregularity in the procedure. Undoubtedly there was evidence on the record to show that these parties had taken part in an assault, but the ground on which he took objection was that, so far as the Magistrate was concerned who sentenced the prisoners, he had taken no proper evidence at all. He admitted that there was evidence to show that one was the leader, and the others were assisting. It was clear that the prisoners had no legal advice throughout. The preliminary examination, it appeared, was taken before Mr. Gilfillan, then the Resident Magistrate at Idutywa, on January 10, 1902, fifteen months before the prisoners were sentenced. On March 12, 1902, he took the remainder of the evidence for the prosecution. Then he adjourned the case *sine die*. It appeared from the record that small-pox broke out in one of the locations, accounting for all or part of the delay. Nothing further was done until December 1, 1902, when a new magistrate came on the scene—a Mr. J. P. Cumming. He recalled each witness, and read over his statement to him. The witnesses were asked if they adhered to these statements, and they said "Yes." Prisoners made statements, and on these the prisoners were committed for trial. The prisoners admitted that they had fought, but they did not admit that they were wrong. The statements of the four appellants were then put in, from which it would appear that Mpala's son, with the other three, proceeded to the complainant's kraal to demand damages for trespass of a number of horses. Twelve men were encountered at the complainant's kraal, and after a shot had been fired from their direction, a fight ensued, in which Mpala's men overpowered the others, and took from them their assegais and guns, but they took no clothes, as there was disease in the kraal. The accused were charged with assault to do grievous bodily harm and theft, under section 150 of the Transkeian Act, but the Solicitor-General remitted the case, under section 29 of Act 3 of 1861, on a charge of common assault, to the Resident Magistrate's, under his ordinary jurisdiction. They were each sentenced to pay a fine of £50, or twelve months' imprisonment. No witnesses were recalled, and no evidence was read over, and counsel submitted that in accordance with the section of the Act, it was imperative on a new magistrate to have heard *vive voce* evidence of some witnesses, and if it was the same magistrate, that the law did not allow him, when a prisoner pleaded guilty, to say that he was not going to read the evidence over again. It was just possible that the appellants, being ignorant natives, pleaded guilty to assault, thinking that the charge meant taking part in the encounter, and counsel contended that the whole thing had been a beer drink and a general fight.

Mr. Howel Jones said that it would be a grave miscarriage of justice if the conviction were quashed on the grounds put forward by counsel for the appellant. The examination held by Mr. Cumming was not a proceeding to which Act 3 of 1861 applied, as it was simply a continuation of Mr. Gilfillan's preparatory examination. It was not necessary that all the evidence should be given *vive voce*, and it was a matter of every day occurrence for a deponent to have his affidavit read over to him by a Magistrate, and to say that the adhered to the statement. It was provided in Act 3 of 1861 that if a case was remitted under Act 12 of 1860 the Magistrate need not necessarily take any evidence.

Mr. Searle (for appellant): The evidence given in the Court below was very vague. The Magistrate misinterpreted section 29 of Act 3 of 1861. He merely read over the evidence given to the witnesses at the preliminary examination, instead of taking their evidence afresh. In this he was wrong, as he was not the Magistrate before whom the original evidence had been taken. He had no means of weighing the evidence such as he would have had had he himself taken it. He took no evidence whatever.

[Kotzé, J.: If the evidence satisfied the Magistrate, can we override his decision?]

I submit the Court can do so. Here a Magistrate who had taken no evidence gives an opinion, and pronounces the maximum sentence of a year's imprisonment. My points are (1) the Magistrate should have heard the evidence for the prosecution, and (2) a man is not bound to lead his evidence twice over. It is true that the prisoners pleaded "guilty," but no corroborative evidence was called. See *Queen* v. *Damon Charles* (13 S.C.R., 78). There the prisoner had an opportunity of cross-examing; here the prisoners had none.

[Kotzé, J.: The record shows that the evidence against them was very strong.]

Possibly, but the Court had no opportunity of judging of that evidence. See *Queen v. Scelig* (4 H.C., 4), and *Queen* v. *Mahatis and Another* (reported in Vol. 6, "Law Journal, p 180), and *Queen* v. *Strydom* (1 Juta, 60). The Magistrate cannot sentence till some evidence has been taken, and the spirit of the Act is that the Magistrate who sentences must be the Magistrate who has heard the evidence, and not a Magistrate who has merely read it over.

[Kotzé, J.: You argue that if the same Magistrate who had heard the evidence had afterwards read it over, that the sentence would have been regular, but that if it is read over by another Magistrate the proceedings are irregular?]

Yes, that is my case.

[Kotzé, J.: Had the case been remitted?]

Yes, on January 7, 1903.

Mr. H .Jones (for the Crown): The Magistrate's (Mr. Cummings') was a preparatory examination, so Act 3 of 1861 does not apply to this case. The evidence at a preparatory examination need not be *viva voce*, though it must be on oath. Cumming was quite right in taking these statements without calling evidence. This case was tried under Act 13 of 1886, and therefore Act 3 of 1861 does not apply. The point of irregularity has been raised on behalf of the appellants, but the Court must be well satisfied that there has been a serious irregularity. In all the cases cited on behalf of the appellants the Magistrate did not sentence on the confession of the prisoner. It is true that Ordinance 72 of 1830 directs that no prisoner can be sentenced without evidence being led, but see section 29 of that Ordinance. See also section 265 of the Transkeian Ordinance. Here the prisoner pleaded "guilty," clearly understanding the nature of the offence to which he was pleading. If a prisoner pleads "guilty," he cannot be prejudiced by his plea being accepted.

[Kotzé, J.: There is no dispute as to there being an appeal from the Court of the Chief Magistrate to this Court?]

No, that has been decided.

Mr. Searle (in reply): A Magistrate must hear witnesses before he convicts. Section 7 of the Act 20 of 1856 says that witnesses must deliver their evidence in open court. In this case there is nothing to show that the Magistrate followed this rule.

[Kotzé, J.: It is not to be presumed that he did not. *Omnia quæ acta sunt presumuntur rite acta.*]

The onus to show that all due formalities had been observed is on the Crown. See *Queen* v. *Taylor* (2 Sheil, 291).

[Kotzé, J.: What if the prisoners plead guilty?]

Even in that case the Magistrate must hear some evidence. In Strydom's case this principle was broadly laid down, and the decision in that case has been often confirmed. Section 265 of the Transkeian Ordinance has been cited for the Crown, but that Ordinance is on the same lines as section 29 of Act 3 of 1861. If the Resident Magistrate, who has not heard the preliminary examination, tries the case on its being referred to him, still he must take some evidence.

Kotzé, J.: I am much indebted to the counsel who have addressed me in this matter for their learned arguments on both sides, which reduce the matter to a nutshell, and I do not entertain any doubt about my decision. It appears that the accused, who are now appellants, had a preparatory examination taken against them in the month of January last year by Mr. Gilfillan, the Magistrate at Idutywa. The preliminary examination lasted from time to time, and on the 12th March of the same year this preparatory examination was postponed *sine die*, apparently on account of an outbreak of small-pox in that neighbourhood. Meanwhile a new Magistrate had been appointed, Mr. Cumming, and he, in December of the same year, proceeded to take up the preliminary examination which had been postponed by Mr. Gilfillan some months before. After reading over the statements of the different witnesses whom Mr. Gilfillan had heard, he heard certain witnesses for the defence, and then committed the prisoners for trial. The papers came before the Solicitor-General in Graham's Town, and the Solicitor-General remitted the case to the Magistrate under his ordinary jurisdiction—that is Act 20 of 1856. The accused were then charged with assault under the ordinary jurisdiction of Act 20 of 1856 before the Acting Resident Magistrate, Mr. Cumming, and they all pleaded guilty. Now, it does not appear from the record that any depositions were then read over by the Acting Magistrate, nor that any evidence at all was taken by the Acting Magistrate, and it is argued by Mr. Searle that regard being had to what is expressed in section 29 of Act 3 of 1861, Mr. Cumming, being not the Magistrate who originally heard the witnesses for the prosecution, but a new Magistrate, could not, even supposing he had done so, read over the statements of the different witnesses, but had to take evidence *de novo*. There is a great deal of force in this contention, but Mr. Jones says that as the prisoners pleaded guilty, it was only necessary for the Magistrate to satisfy himself from the record that there was some evidence in support of the charge of assault, and he instances the case of a judge on circuit who does not take any further evidence, but just satisfies himself by referring to the preliminary examination in order to guide him in giving a proper sentence. But in answer to that, Mr. Searle says whatever the practice may be on circuit, or even in the Supreme Court during Criminal Sessions, so far as the Court of Resident Magistrate is concerned, we have an express provision under section 29, which enacts that when there is a remit not to the same Magistrate, but some other Magistrate, to try the case, then the witnesses must be called. There is the case to which he has referred me —*The Queen* v. *Strydom*—which clearly shows that even where there is a plea of guilty, the Magistrate is bound to take some evidence. This has been laid down so far back as 1868, and has been the universal practice of the Magistrate's Courts in the Colony since then. Besides, these natives, not acquainted with the nature and effect of legal proceedings, really may have meant by their plea of guilty that they had inflicted blows upon the persons who complained without intending to admit their guilt. I think the Court should not depart from the clear rule that has been the practice for years, as observed by the Chief Justice in the case of Strydom. Under these circumstances, I consider there was such an irregularity as necessitates the setting aside of the proceedings. Consequently, the conviction of accused by the Magistrate must be quashed.

[Appellants' Attorneys: Walker and Jacobsohn.]

REX V. TWALATINGA. { 1903. July 28th. Aug. 6th.

Criminal appeal—Plea of *autrefois acquit*—Evidence of accomplice.

The conviction of a prisoner, found guilty under Act 35 of 1893, of the theft of horses, the property of some persons unknown, by the Resident Magistrate, was set aside on review on the ground that at the trial the owners of the horses appeared to give evidence and no amendment of the charge had taken place. The prisoner was subsequently tried again for stealing the same horses, the property of certain persons set out in the charge. He pleaded autrefois acquit. *This plea was disallowed by the Resident Magistrate, and the prisoner was convicted and sentenced to imprisonment with hard labour.* Held, *on appeal, that the plea of* autrefois acquit *was bad.*

The Court is averse to accepting and acting on the uncorroborated evidence of an accomplice.

This was an appeal against a sentence of the Acting Resident Magistrate of Maclear, passed upon the appellant for having contravened Act 35 of 1893. Mr. Upington was for the appellant, and Mr. Howel Jones appeared for the Crown.

Mr. Upington said that in March, 1903, the appellant was charged with stealing a bay stallion, a dark brown stallion, and a bay mare, with a chestnut filly foal at foot. Prisoner, being arraigned, was found guilty of receiving four horses, knowing them to have been stolen, and sentenced to two years' imprisonment with hard labour. The conviction was quashed by the Chief Magistrate of East Griqualand, on review, the prisoner was liberated, re-arrested, and charged under a new indictment, and counsel contended that he could not again be tried for the same crime. The Magistrate, in his reasons, had evidently relied on the case of the *Queen* v. *Myers* (2 Juta, 219), but counsel submitted that in that case the prisoner was never placed in jeopardy by the first indictment, inasmuch as it was not stated where the transaction took place, and the Diamond Law at that time only applied to Griqualand West. In the present case the prisoner was tried and convicted on a valid indictment, and he could not have come forward afterwards, supposing evidence had been produced to support that indictment, and said that the indictment was bad. Unfortunately, the Chief Magistrate, in quashing the conviction, had endorsed it with the words "charge and conviction quashed," and the Resident Magistrate seemed to have been misled by the different phrase to that used in other cases.

Mr. Howel Jones contended that if the evidence adduced upon the second indictment was not sufficient to convict the appellant on the first that there was justification for sustaining the plea. The prisoner could never have been in jeopardy on the first indictment, because if the property belonged to another person it would be impossible to prove the charge against him. He contended that the charge was an entirely new one, and that the proof of the prisoner being in jeopardy was not whether he had been convicted or not, but whether he could be legally convicted. The prisoner's case was not prejudiced, because if the Magistrate had amended the indictment, he would have been convicted.

[Kotzé, J.: Does it appear from the record that it was known during the trial who the owner was?]

Mr. Howel Jones: Yes, my lord.

Mr. Upington having been heard in reply,

Kotzé, J., said that he would give his decision later when he had read through the record.

Postea (August 6th).

Kotzé, J.: The prisoner Twalatinga was charged before the Resident Magistrate of Maclear, on the 4th May, 1903, with theft, under Act 35 of 1893, as amended by Proclamation 109 of 1900, in that he did unlawfully steal certain four horses, to wit: (1) One bay stallion, the property of Noensani, and being at

the time of the theft in the lawful possession of Ndugcana, of Plaatjes Location; (2) one dark brown stallion, the property or in the lawful possession of the said Ndugcana; (3) a bay mare and chestnut foal, the property or in the lawful possession of Tonga, of the Engcobo district. The prisoner pleaded *autrefois acquit* to this charge. The Magistrate, after hearing evidence on this point, disallowed the plea, whereupon the prisoner pleaded "not guilty." Evidence was then taken in the usual way. The prisoner was found guilty of receiving the four horses knowing them to have been stolen, and sentenced to one year and nine months' imprisonment, with hard labour. From this conviction the prisoner now appeals to this Court, on the ground that the plea of *autrefois acquit* was improperly disallowed by the Magistrate. It, therefore, becomes necessary to inquire into the circumstances upon which this plea is based. It appears of record that on the 4th March, 1903, the prisoner was charged before the same Magistrate with contravening Act 35 of 1893, as amended by Proclamation 109 of 1900, in that he did unlawfully steal four horses, "the property or in the lawful possession of certain person or persons to the prosecutor unknown, but residing at the Ingudu, in the district of Engcobo, etc." During the course of the trial the natives Noensani, Ndugcana, and Tonga were called as witnesses, and proved that the ownership of the horses was in them. Although the owners of the horses had thus been ascertained, no amendment of the charge was applied for by the prosecuting officer nor made by the Magistrate. The prisoner, who had pleaded not guilty, was convicted by the Magistrate of receiving the horses, knowing them to have been stolen, and sentenced to be imprisoned and kept to hard labour for a period of two years. On the 16th March, 1903, the Assistant Chief Magistrate, on the authority of *Reg.* v. *Jack* (5 H.C. 496), set aside the charge and conviction on the ground that the Resident Magistrate had found the prisoner guilty of receiving stolen horses, the property of some person or persons unknown, when in fact the owners had appeared before him to give evidence at the trial, and no amendment of the charge was made.

It is clear that the four horses were the same in both instances, and this is admitted by the Crown. It is also clear that but for the setting aside by the Assistant Chief Magistrate of the first conviction of the prisoner this case would never have arisen. Now, whatever my own ruling may be when reviewing a conviction by a Magistrate under circumstances such as disclosed by the record of the first charge against the prisoner, I think that I cannot, for the purpose of this case, go behind the ruling or review by the Assistant Chief Magistrate. This being so, I must consider what is the effect of the quashing of the conviction by the Assistant Chief Magistrate. On behalf of the prisoner it has been argued that it amounts to an acquittal, and *The Queen* v. *Bense* (1 Juta, 90) was relied on in support of this contention. But on referring to the report of that case I find that it does not lay down anything so wide. It shows that where a conviction by a Magistrate has taken place, and such conviction has been set aside by a judge on review on the ground of the insufficiency of the evidence to support the conviction, the accused cannot be tried again for the same offence, and the plea of *autrefois acquit* under such circumstances will be good. The reason appears to be that a judgment or decision on the evidence or merits was given by the Judge, who set aside the conviction, and that is tantamount to an acquittal. But the result is not the same, where the conviction is set aside on appeal or review on the ground of informality or illegality. Thus, where an indictment charges an accused with stealing certain articles the property of A, and it appears that the articles are the property of B, the accused, unless the indictment is amended, cannot be convicted, and if acquitted he may be properly tried and convicted on a subsequent indictment for the theft of the same articles, the property of B. (*Reg.* v. *Green*), (Dears and B., 113); or, where the indictment does not disclose a crime, and the conviction is set aside on that ground, the accused may be charged again on a proper indictment (*The Queen v. Myers*. 2, Juta, 219). So where an accused is tried by a Judge, who is incompetent, and for that reason the proceedings are set aside, he may be lawfully tried again and convicted of

the same offence before a competent tribunal. (*The State v. Snuif*, 3, Off. R., Transvaal.) In all such and similar cases the accused was never in jeopardy, and the plea of *autrefois acquit* fails.

In the present instance the first conviction was set aside on the ground that, no amendment having taken place, the accused could not be found guilty on a charge which laid the stolen property in a person or persons unknown, when the owners were known. But as the setting aside of the first conviction does not, under the circumstances pointed out by me, operate as an acquittal, it does not prevent the prisoner from being put upon his trial again on a second charge of theft of the same horses, the property of certain persons who are specifically named and described. Were this otherwise, then, as observed by Coleridge, J. (*Reg.* v. *Drury*, 3, C. and K., 197), "it would be shocking to both justice and common sense that individual, who object only that they have been regularly found guilty of an offence on a lawful trial, but that there has been a mistake in the judgment pronounced, which judgment has on that ground been reversed, and can never be carried into effect, should therefore remain exempt from all punishment." I am accordingly of opinion that the plea of *autrefois acquit* has not been made good. It was pointed out during the argument that the Assistant Chief Magistrate quashed both the charge and the conviction, when the charge was *ex facie* a good and lawful one; but that circumstance can have no bearing on the result of the plea. Another point was urged that, so far as three of the horses are concerned, the evidence against the accused is that of an accomplice, who is not confirmed, and it was said that the Court will not accept the unsupported evidence of such a witness. No doubt Courts of Justice should be and are averse to acting on the uncorroborated testimony of an accomplice, and Judges almost invariably direct the jury not to accept such unsupported testimony; but still, the evidence of an accomplice is legally admissible. In the present case, however, the accomplice's statement is corroborated with respect to one of the four horses, and this places his evidence against the prisoner, so far as the other three horses are concerned, in a somewhat different light, for it tends to confirm what he has stated. I see no reason, therefore to disturb the second conviction on that ground. For the reasons I have given this appeal must be dismissed.

[Appellant's Attorneys: Fairbridge. Arderne and Lawton.]

REX v. MCDONALD. { 1903. July 28th.

Sale of liquor to natives—Trap—Corroboration — Credibility of witnesses.

This was an appeal against a sentence passed by the Acting Resident Magistrate of Mount Fletcher, on the appellant, for contravening section 30, of Proclamation 104 of 1903.

The appellant, one Annie McDonald, was charged in her capacity as executrix of the estate of John McDonald, under section 26 of Proclamation 104 of 1903; in that she, not being the holder of a licence, sold to a native detective a bottle of whisky, and under section 30 of the same Proclamation, with selling to a native without a permit. The accused was found guilty under section 30 of the Proclamation, and fined in £200, or three months' imprisonment, with hard labour.

The evidence given in the Court below showed that one Tongwango, a Basuto native detective, who acted as a "trap," was supplied with a bottle of whisky by the appellant. He brought the bottle to his master, Charles Forrester, the Acting Sub-Inspector of Licences, who waited on him about a mile from the house. Next day the bottle was handed to Mr. Garner, the Acting Resident Magistrate. The licence had not been renewed last year, and when the constable visited the premises he discovered empty bottles of the same brand. It was stated for the defence that the brand of "Heather Dew" was not on the premises, and the accused stated that she had seen the trap knocking about the house for some time, and that she threatened to throw him into the dam. The Magistrate, in his reasons, stated that the case resolved itself into a question of the credibility of the witness. The trap's evidence was given in a straightforward manner, and remained unshaken under cross-ex-

amination, and he was supported by Mr. Forrester. For the defence, the only possible line was that the liquor had been obtained beforehand, and there was an uncertainty about the statement of many witnesses, none of whom could explain why the particular brand of whisky was not in stock. The defence seemed to put stress on the Chief Constable's evidence that the brand was not in stock, but it might have been the last bottle. As the accused was negotiating for the sale of the premises to a firm of high standing, the penalty was inflicted under the second count instead of the first. Mr. Upington, for the appellant, contended that there was no proof of what was in the bottle at the time it was given to the trap, and there had been no evidence to show what had become of the bottle between the evening of the 4th and the 5th May last, and that the serious gulf in the case was sufficient to quash the conviction.

Mr. Howel Jones, for the Crown, said that if the contention of counsel for the appellant was material, the matter would have been thrashed out in the other Court. There were ample reasons to infer that the bottle contained whisky when it was officially sealed in the presence of the Acting Resident Magistrate, who would easily know his own seal. His learned friend might as well have contended that the bottle was not in the same condition, because the Acting Resident Magistrate had fallen asleep.

Kotzé, J.: In this matter I quite agree with Mr. Upington that the Court should be careful in accepting the evidence of a trap. It has always been the rule to exercise great caution in such cases, and the Court always requires corroboration of a trap's evidence. Now, it is said in the present instance, there is no proof of the sale of this bottle of liquor to the native trap, nor that it has been satisfactorily shown that the bottle which was produced in Court contained whisky at the time when the native got possession of it. It seems to me that the evidence of the trap in this case does not stand alone, and that he is corroborated in certain material respects. In the first place, Mr. Forrester, the sub-inspector, says that he watched him from a distance going to Mrs. McDonald's store, and that he had been away 20 or 30 minutes, when he came back with the bottle, which was unopened. Mr. Forrester then took possession of that bottle. The bottle was taken to Mr. Garner's office, and sealed there. Then Bellamy, the Chief Constable, says he received that bottle out of the safe of the Acting Resident Magistrate, and the bottle was then still unopened. The seal was broken, and the bottle opened in court. Mr. Forrester declared it was the same bottle, and it was found to contain whisky. While I agree that the Court should not draw strained inferences, I think a person of sound discretion would reasonably conclude from these facts that this bottle was the bottle which in the first instance was sold to the native and handed by him to his master, and that this bottle also contained whisky, because, when the master got it, it was not tampered with, but sealed up, and when the seal was broken in court the bottle contained whisky. The reasonable inference is that the bottle contained whisky when in possession of the native trap. That being so, I am satisfied there are other circumstances as well which show that the native is to be believed, and the Magistrate says that he carefully weighed the evidence, and as far as credibility goes, came to the conclusion that the witnesses for the Crown deserved every credence. Under these circumstances, I would not be justified in going behind the finding of the Magistrate and setting aside the conviction. It is true that the sentence seems somewhat high—a fine of £200 or three months' hard labour—but the proclamation under which Mrs. McDonald is charged imposes as a maximum penalty £500, or six months' hard labour for a first offence, the intention of the Proclamation evidently being to prohibit and put a stop, if possible, to the sale of intoxicating liquor to natives. The appeal must be dismissed.

[Appellant's Attorneys: Findlay and Tait.]

SUPREME COURT

Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZE.]

CONTAT'S COLLIERIES v. CONTAT. 1903. July 29th.

Kotzé, J., said that in this matter, which came before him a few days ago, the question was whether the Court was to stay execution pending an appeal to the Privy Council, or whether execution was to issue. He thought execution ought to issue, the liquidator to enter into proper security.

Mr. Alexander, for the defendant, said that when the original matter was before the Court, their lordships asked counsel to find out from the defendant where the £2,000 of the special account came from. A wire had been sent to the defendant, and he now asked leave to read the reply.

Mr. Benjamin, for the plaintiff, objected to any evidence being put in after judgment had been delivered.

Mr. Alexander said that the Court asked the defence to obtain the information.

His Lordship said he did not think that the Court wanted the information now. It would have been desirable at the proper time

Mr. Alexander explained that the parties had gone up-country, and there was delay in communicating with them.

Ex parte VAN DER BYL.

Mr. J. E. R. de Villiers moved for an order relieving Mr. Justice Hopley from trusteeship under the ante-nuptial contract of Pieter Gerard van der Byl (deceased) and Johanna van der Byl. It appeared that the application was brought at the request of Mr. Justice Hopley, on account of the difficulty which he had in carrying out his duties. He was at present in Europe, and when in this country, he was mostly engaged in Kimberley. It was proposed to appoint Mr. Harry Hands, of Cape Town, to act as co-trustee with the petitioner. The widow agreed to the proposal, and a letter was read from Mr. Justice Hopley intimating his desire to be relieved from the appointment.

An order was granted as prayed.

REX v. MATHEBUS. 1903. July 29th. " 31st.

Proclamation—aboriginal natives —Proclaimed areas—Section 21 of Act 28 of 1883—Kafir beer.

The Governor has no power to include in any area proclaimed under the 21st section of Act 28 of 1883 any town or tract of country mainly occupied by Europeans, but the fact that an area so proclaimed improperly includes any locality does not affect the validity of the proclamation in regard to other localities which were properly included.

The giving of Kafir beer to an aboriginal native in a proclaimed area constitutes a contravention of the 22nd section of the Act.

This was an appeal from a judgment of the Resident Magistrate of Komgha. In the court below the accused had been charged with contravening section 22 of Act 28 of 1883, under Proclamation No. 245 of 1900, page 2,158, by which the district of Komgha is proclaimed to be included in the area in which section 22 of Act 28 of 1883 is enforced by section 21, in that upon or about the day 19 , and at or near Woodford's farm, in the said district, the said Mathebus did wrongfully sell, supply, or give liquor—to wit, a can of Kafir beer—declared to be an intoxicant by section 31 of Act 25 of 1891—to one Kleinbooi, an aboriginal Kafir labourer, and one prohibited under the above Act and Proclamation.

The prisoner pleaded "Not Guilty." Judgment, "Guilty."

Sentence: Fined £5 or one month's imprisonment with hard labour.

The evidence taken in the court below was to the effect that there was a "beer drink" on June 2 at the hut of the accused. The accused, several women, and Kleinbooi were present. Other natives were in an adjoining hut belonging to the accused. There was Kafir beer in this hut, too. Kleinbooi

had a can of beer before him, and said he got it from the accused. The beer was not in the actual possession of Kleinbooi. The prisoner heard that accused had permission from the owner to make Kafir beer. Kleinbooi stated that he was in the hut of the accused when the police arrived. He had had some Kafir beer, and told the police that he got it from the accused. Witness was the only man present besides accused. The women present belonged to the house.

In the court below the accused excepted to the summons on the grounds (1) that Kafir beer is not liquor within the meaning of sections 21 and 22 of Act 28 of 1883, or of Proclamation No. 245 of 1900; (2) that the accused had the permission of the owner of the farm to make Kafir beer, and that in giving to his guest, who was also a relative, he was within his rights under section 7 of Act 28 of 1898.

These exceptions were overruled.

Mr. McGregor for the appellant; Mr. H. Jones for the Crown.

Mr. McGregor: See section 22 of Act 28 of 1883 as to prohibited areas and penalties. The words of the section are "sell," "supply," and "give." These words are all "*ejusdem generis*." "Give" may mean "give as a donation," or "hand over."

[De Villiers, C. J.: The clause says "save any liquor administered medicinally."]

That had not occurred to me.

[Kotzé, J.: The meaning of "give" must be interpreted by the context.]

Exactly, and see section 2, sub-section 2, and sections 67 to 69, which use the word "supply." There "supply" means for money in the way of trade. "Deliever" means "give," in the way of trade; so also in sub-section (5) of section 73. On the other hand, see section 89 of the Licensing Act of 1883, where "give" evidently means "give as a gift."

[De Villiers, C. J.: I do not quite see how the context implies that.]

Yes, there are the two clauses, one prohibiting selling, the other giving. See also section 13 of Act 28 of 1898. There "given or supplied" clearly means "given as a gift." As to the words "or otherwise," see *Electric Tram Co. v. Town Council of Cape Town*.

[Kotzé, J.: The words "or otherwise" are very wide.]

Yes, but they must be restricted by the context.

[De Villiers, C. J.: Then why is the word "give" used?]

It may be in order to prevent drink being given in exchange for something else (e.g., for empty bottles).

[De Villiers, C. J.: Then would a *pour boire* be prohibited?]

It might be because that is not a gift pure and simple. Then see section 7 of Act 28 of 1898. That section declares Kafir beer to be an intoxicating liquor, but nevertheless allows it to be made with the permission of the owner of the farm.

[De Villiers, C.J.: It may be lawful to make it and drink it, but it does not follow that it is lawful to sell it.]

No, not to sell, but you may give it, particularly to a guest. If a man may drink in his house, his guest may drink. Of course, that does not apply to what are known as "beer drinks," because there the drinking is not in the ordinary way of use.

[De Villiers, C.J.: You admit that that would be illegal?]

Yes, but there is a distinction between a beer party, and giving drink to a brother or a friend.

[De Villiers, C.J.: Does not Act 16 of 1891, which prohibits Intonjane dances, say something about beer drinks?]

I do not think it does, although I must admit that one of the chief reasons for prohibiting these dances was that they were intimately connected with drinking parties, but I cannot find any reference to beer drinks in the Act.

[De Villiers, C.J.: Yes, I know that that was the reason why these dances were prohibited; but if I may give a drink to a brother, why may I not give one to forty brothers?]

In that case the onus would be cast upon the accused to show that he was acting *bona fide*.

[De Villiers, C.J.: I do not see how we can interpret Act 28 of 1898, section 7, as altering the previous law. It does not follow that because a man may make Kafir beer, that he may therefore give it away.]

I cannot go so far as to argue that. My next point is one of constitutional law. By the schedule annexed to the Proclamation, the area proclaimed includes no less than eight field-cornetcies, and I submit that an area of that extent could not be legally proclaimed,

because it amounts to total prohibition. Section 2 of Act 28 of 1898 shows that the legislature did not contemplate total prohibition. Act 39 of 1887 exempts native registered voters from the incapacities imposed by the later Liquor Acts.

[De Villiers, C.J.: You contend that the area proclaimed is too wide?]

Yes, and that the proclamation is therefore *ultra vires*.

[De Villiers, C.J.: There is no evidence that natives have congregated in this district?]

No; and my point is that although an area within a district may be proclaimed, a whole district cannot be proclaimed. *McBeth and Others* v. *Ashley* (30 L.T.R., 310). This, a Scots appeal under the local Licensing Act, is valuable for the light it casts on the rules of interpretation. There it was held that the power to legislate for certain localities, within a district gave no power to legislate for the whole county, district, or borough.

[Kotze, J.: There the word "locality" was used. In our Act "areas" is spoken of in the plural. Why cannot a whole district be proclaimed?]

That point was touched upon by the Lord Advocate in McBeth's case. Here the Government has not taken areas one by one, but has proclaimed the whole district at once.

[Kotzé, J.: Could not the Governor proclaim a whole district under the Cattle Diseases Act?]

That depends upon the wording of the Act. In this case, "areas within districts" cannot possibly mean the whole district. A wide construction will not be given to any Act which tends to delegate the powers of Parliament to any one individual.

[De Villiers, C.J.: In the absence of evidence, must it not be presumed that the Proclamation is *intra vires*.

I am not arguing the question of evidence, but I do contend that evidence or no evidence this Proclamation is illegal on the face of it.

[De Villiers, C.J.: For aught I know, the whole district of Komgha may be an area where natives are congregated. If that be the case, surely the whole district can be proclaimed]

I submit not; that would be contrary to the terms of the Act.

[De Villiers, C.J.: Suppose the whole of the district of Komgha is a native location, what must the Governor do?]

He must go to Parliament for more extensive powers.

[De Villiers, C.J.: Might not the Government divide Komgha into two divisions, and proclaim them both?]

That might have been more satisfactory, but in point of fact he has not done so.

Mr. H. Jones (for the Crown): As to the Proclamation, section 21, gives the Governor power to define an area in a district. He has done so. He has defined the district of Komgha.

[Kotzé, J.: Must not all the defined areas be within one district?]

The language of the Act might have been clearer, but I take it that the Governor might proclaim an area consisting of half of one district and of half of a district adjoining thereto. It might have been better had the word "areas" in the plural, instead of "area" in the singular, been used. If the proclamation is invalid as to Komgha, the whole proclamation is invalid.

Mr. McGregor: I contend that the whole proclamation is invalid, but, of course, it is a very simple matter to reissue it in a valid form.

Mr. H. Jones: The argument for the appellant on the word "give" has no force. The argument as to words *ejusdem generis* clearly has no force where the words are evidently opposed to each other, *e.g.*, "sell" and "give." See section 73, sub-section (6), of Act 28 of 1883. There "sell" and "deliver" must be equivalent, if counsel for the appellant is correct, but the case of *Queen* v. *Robertson* (2 Sheil, 235) and *Rex* v. *Francis* (11 Sheil, 76) show that this is not so.

[De Villiers, C.J.: Under the Act 28 of 1898 a man may make Kafir beer: may he give his wife a drink of it?]

Strictly speaking, he may not, but I do not believe that any Magistrate would convict under such circumstances. This, however, is quite a different case; for here people were treated who did not belong to the family at all.

[Kotzé, J.: Suppose a native helps himself to Kafir beer which he has not made, is anybody liable?]

Somebody must have put it in his way with the intention that it should be drunk. It is difficult to draw the line in all cases.

Mr. McGregor: The case of *Queen* v. *Robertson* is not in point as interpreting sections 21 and 22 of Act 28 of 1883. The words "supply or give" were added to that Act some ten years after it was passed in its original form. If a principle leads to difficulties and absurdities, it stands self-condemned, and I submit that local administrators of the law should not be entrusted with what is practically equitable jurisdiction.

Cur. Adv. Vult.

Postea (July 31).

De Villiers, C.J.: The 21st section of Act 28 of 1883 enacts that "in districts where aboriginal natives of South Africa are located or resident, or are congregated upon public or other works or mines, the Governor may define areas within the limits of which it shall not be competent for any Licensing Court to authorise the grant of a licence for the sale of liquor, except with the permission of the Governor." It is clear that such areas should be confined to localities in which natives are actually located, resident, or congregated, and should not include towns or tracts of country occupied mainly by Europeans. It would be a complete evasion of the section of the Act to declare whole divisions as such proclaimed areas without a full inquiry as to whether every portion thereof falls within the requirements of the Act. On this point I cannot do better than quote the words of the Lord Chancellor (Cairns) in the case of *Macbeth* v. *Ashley* (30 L.T. Rep., 310), in a case where the question was raised whether magistrates who are authorised by Statute to vary the hours of opening and closing licensed houses in Scotland within any burgh were justified in passing a resolution to the effect that all the licensed houses in a particular locality, which, in fact, included all the licensed houses in the burgh, shoud be closed at ten o'clock at night. "Of this I am quite certain," said the Lord Chancellor, "that neither your lordships, nor any other Court, if they found that magistrates had, under the guise of exercising a discretion, taken portion after portion of their district, not with reference to the view of the particular wants or requirements of each portion they selected, in order, by degrees, to take possession of the whole of their district, and under the pretence of exercising a discretion for each portion, virtually to subvert and change the general rule laid down by the Legislature, your lordships would not be prepared to sanction, but would prevent the exercise of a power which was used in that way." The Government may be firmly convinced that whole divisions should be declared areas within which there should be total prohibition, but the Governor has no right or power to act on that opinion, except in the manner directed by Parliament. The Act provides for the definition of such areas within districts, but the proclamation lumps several districts together, and declares the territory comprising those districts to be an area under the Act. There is much force in the contention of counsel for the appellant that this procedure renders the whole of the Proclamation invalid, but upon the whole I have come to the conclusion that the conviction ought not to be disturbed, if the locality where the alleged offence was committed could legally have been included in the area. Upon this point there is unfortunately no information before the Court, and in the absence of such information, the Court would be justified in presuming that the locality is in a proclaimable area. The charge against the appellant in the Court below was that in a proclaimed area he had sold, supplied, or given Kafir beer to an aboriginal Kafir labourer. The evidence shows that on the day in question there was what is called "a beer drink," at which the accused gave a can of beer to another native, but nothing was paid for the same. The question is, whether in so doing the accused was guilty of a contravention of the 22nd section of the Act? That section enacts that, "save and except as to any liquor administered medicinally, no person shall sell, supply, or give to any aboriginal native any liquor within the limits of any proclaimed area." Mr. McGregor, in the course of his able argument, has contended that the word "give" should be construed by the light of the words "sell and supply" immediately preceding, and that there is no "giving" in terms of the Act, unless there is some consideration for the gift. The word used is a general one, and should receive a general construction, unless the Statute itself contains grounds for limiting its meaning. The fact that the word follows the words "sell and apply" does not constitute such a ground, more especially if other

portions of the Act show that the word was intended to be used in its general sense. I find that, with the exception of the sections dealing with natives and with children, the offence of selling liquor is alone declared punishable. In regard to children, the delivery of liquor is declared to be a contravention of the Act, and such delivery may take place without a sale. In the same way, I am of opinion the the giving of liquor to an aboriginal native within a proclaimed area constitutes a contravention of the 22nd section. The question next arises whether the passing of the 7th section of Act 28 of 1898 made any alteration in the law as to the liability of persons giving native beer to natives in any proclaimed area? That section makes it unlawful for any person to make Kafir beer on private property or on land hired from the Crown, without the permission of the owner or lessee, as the case might be, and it is contended that if a person has such permission, he may, after making Kafir beer, freely give it to others, provided only he receives no consideration for it. But, if before 1898 the giving of Kafir beer to aboriginal natives was prohibited, the Act of that year cannot be held to remove the prohibition, merely because the making of Kafir beer is placed under certain restrictions by that Act. The question, therefore, still remains, whether the 22nd section of the Act of 1883 contains such a prohibition, and, in my opinion, the language of the section is too clear to admit of any doubt. The result is a rather startling one, for the person to whom Kafir beer was given in the present case was a guest, and indeed a relative of the accused, and there is no evidence whatever that the so-called "beer drink" led to noise or disturbance of any kind. The case certainly illustrates the necessity of extreme care and caution in the definition of areas under the 21st section of Act 28 of 1883, for an illegal proclamation might have the effect of completely neutralising the objects which the Legislature had in view. In the case of *Sigcau* v. *The Queen* (12 S.C.R., 256), this Court refused to recognise the validity of a proclamation by which the Governor exceeded the powers conferred on him by an Act of Parliament, and the Privy Council fully supported the judgment of this Court. There the illegality was apparent on the face of the Proclamation, whereas in the present case it is just possible that the Proclamation may be valid so far as it affects the particular locality in which the alleged offence was committed. The presumption is in favour of such validity, and the appellant offered no evidence whatever to rebut that presumption. The locality where he committed the apparently harmless act of giving some Kafir beer to his friend is within the vast area comprised in the Proclamation, but he has failed to establish any ground for holding that it is not such a locality as the Governor could lawfully have proclaimed under the Act. The appeal must, therefore, be dismissed.

Kotzé, J., concurred.

[Appellant's Attorneys: Tredgold McIntyre and Bisset.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZE.]

REX v. ROSSOUW. { 1903. July 31st.

Theft—*Animus furandi.*

The taking of the goods of another does not constitute a theft if all the circumstances show that it was done without any animus furandi.

This was an appeal from a judgment of the Acting Resident Magistrate of Springbokfontein. The accused had been charged in the court below with having in March, 1902, stolen a wagon, the property of one Christian Brand, which had been left at Hytkoras in the care of one Jan Obies. From the evidence led in the Magistrate's Court it appeared that the accused and one Michael Coetzee, his father-in-law, had lived on the said farm Hytkoras until Coetzee joined the enemy. In March, 1902, Coetzee, accompanied by other armed men, arrived on the farm, and forced the ac-

cused to trek with them to Namies, threatening to shoot him in the event of his refusing to do so. Not having a wagon to trek with, he packed his household goods, and placed his family on Brand's wagon, and left with the Boer commando. He did not, however, join the commando, nor was the wagon at any time used for military purposes. With the exception of a few mats, the property of Coetzee, only accused's goods were placed on the wagon, and they were still there when the police came to Namies, after peace had been declared. At Pella the accused reported to the police officer that the wagon was one which had been left at Namies by the enemy, and on this representation obtained possession of it on payment of £5. The Acting Resident Magistrate found the accused guilty of theft, and sentenced him to pay a fine of £25, or, *in* default, to five months' imprisonment with hard labour. From this sentence the accused now appealed.

Mr. De Waal (for appellant): The prisoner does not deny that he took the wagon and that he put his furniture on it, but denies that he took it with the intention of appropriating it. Coetzee, his father-in-law, who was a rebel, and whose right to commandeer is not questioned, ordered him to remove the wagon to a place of safety. There is no evidence to contradict that. It may be that Coetzee, who was personally interested—Rossouw looked after 150 sheep of Coetzee's—acted beyond his powers, but that cannot affect Rossouw. True, the wagon was, as a matter of fact, not made use of by the enemy, but it was removed to a place where a body of the enemy were stationed, and might at any time have been used by them, when found necessary. Articles are frequently requisitioned during war for possible future use, or for the purpose of preventing them from falling into the hands of the enemy. Rossouw's failure to take the wagon back immediately after the cessation of hostilities to the place from whence he had taken it is consistent with the fact that the wagon was commandeered. If he had removed it, instead of leaving it with the other wagons left at Namies by the Boers, he would have acted as though the wagon were his own, and this would have been evidence of felonious intent. Had he intended to exercise dominion over it, he would have sold the wagon or fled with it, and not bought it, as he did. At most, the removal of the wagon from Hytkoras amounts to a *furtum usus*, which in our law is not an indictable offence.

[De Villiers, C.J.: Thereby he showed that he did not regard the wagon as his own.]

As to the purchase, he bought the wagon (which was an old one) for £5, and would he have bought it if he already regarded it as his own? I submit that in this case there was not even a *furtum usus*. See *Queen* v. *Fortuin* (1 Ap. C., 290), and *Queen* v. *Dier* (1 Ap. Rep., 290). I do not dispute that if the accused had wrongfully removed the wagon, a civil action might have been brought.

Mr. H. Jones (for the Crown): The prisoner had no right to take the wagon, and now he tries to shield himself under the ægis of Coetzee, but then Coetzee himself had no right to take the wagon. Coetzee was a rebel, and certainly he had no right to take goods for his own purposes. See *Rex* v. *Burns* (12 C.T.R., 882). The wagon was never used for military purposes, and was taken simply to cart away the goods of a private individual. Coetzee did not want the wagon, but he allowed the appellant to take it.

[Kotzé, J.: There is no evidence against Coetzee.]

The Magistrate finds that when the wagon was taken it was so taken with the intention of depriving the owner of it. The accused never sent the wagon back. There has never been a case in which a man has kept goods for a long period in which the Court has held that only a *furtum usus* had been committed. Here the accused kept the wagon for three months.

[Kotzé, J.: Namaqualand is not a very thickly populated district. He may not have been able to send the wagon back.]

But he kept his goods on the wagon. If A takes B's property, *prima facie* A is guilty of theft, and the onus is on A to show that he is not guilty. After peace the accused tried to buy the wagon, in order to make his title secure; but he obtained it under false pretences —by representing that it belonged to the enemy, whereas, in point of fact, it never did.

[De Villiers, C.J.: Oh, yes, it had been commandeered.]

But it was never used by the enemy.

[De Villiers, C.J.: That is quite immaterial.]

Then, again, £5 is a very small sum to pay for a wagon.

[De Villiers, C.J.: But you take his money, and then accuse him of stealing the wagon.]

Mr. De Waal was not called upon in reply.

De Villiers, C.J.: If the taking of the wagon had taken place under normal circumstances it would have been difficult to avoid the conclusion that the accused intended to deprive the owner of his property in the wagon, but the special circumstances of the case appear to me to show that there was no *animus furandi* on the part of the prisoner. There was a state of war, and the burghers of the Republics had invaded the district. The father-in-law of the accused joined the burghers, and forced the accused to take the wagon for the apparent purpose of preventing it from being made use of by the British troops. The accused himself, who seems to have thought that he was in danger from the British troops, took the wagon and placed his personal belongings in it, but he took an early opportunity of taking the wagon to Namies. When peace was proclaimed he took no steps to remove the wagon from Namies, nor did he conceal the fact of the wagon being there from the British authorities, but, on the contrary, he asked them to sell the wagon to him. It is said that he bought the wagon on a false representation, that it had been left derelict by the enemy, but the statement cannot be regarded as false, seeing that the wagon had been left by the enemy after having been in the possession of the enemy for some time. The authorities sold the wagon to him for £5, and after the money had been taken from him a criminal prosecution was instituted against him for the theft of the wagon. Under all the circumstances of this case, I am of opinion that there was no *animus furandi* on his part, and that the conviction ought to be set aside.

[Appellant's Attorneys: Michau and De Villiers.]

KROOMER V. LOBASCHER.

Mr. McGregor asked leave to move as a matter of urgency for an order restraining Messrs. Stamper and Zoutendyk from parting with the proceeds of a sale of the respondent's goods, pending the result of an action. The petition set forth that the action was for £500 damages for false imprisonment, and malicious prosecution, and that, owing to pressure during the term, it had been transferred from the 24th June to the 5th August. The respondent carried on business as a furniture dealer at Wynberg, and the petitioner had discovered that the contents of the shop were being sold by public auction by Messrs. Stamper and Zoutendyk. The defendant had no immovable property, and it was feared that he would leave.

De Villiers, C.J., said that the Court was of opinion there should be no order on the claim, but that some amount should be retained in the hands of Messrs. Stamper and Zoutendyk to meet the costs of the proceedings of the action. A rule would be granted, therefore, calling upon the respondent to show cause by the 5th August why the auctioneers, Messrs. Stamper and Zoutendyk, should not be ordered to retain the sum of £60 as part of the proceeds of the sale, to meet the costs of the action; the rule to be served on Messrs. Stamper and Zoutendyk, as well as the respondent, and to act as an interdict in the meantime; costs to be costs in the cause.

REX V. FLORIQUY. { 1903. July 31st.

Proclamation—Aboriginal natives—Proclaimed areas.

The Governor, by Proclamation, declared the districts of Victoria East and Stutterheim to be an area under the 21st section of Act 28 of 1883. At the date of the Proclamation the appellant was the holder of an unexpired licence for the sale of liquor in Alice without any condition as to the sale to aboriginal natives. The town of Alice, according to the record, is a seat of magistracy. The appellant having been convicted of illegally selling liquor to a native after the date of this Proclamation.

Held, *that the Governor had no power to include a town with a European population and a seat of magistracy in such an area, and that the conviction should be set aside.*

This was an appeal from a conviction of the Resident Magistrate of Victoria East, under section 22 of Act 28 of 1883, "in that he (defendant) did on or about the 8th June, 1903, at Alice, wrongfully and unlawfully sell, supply, or give to an aboriginal native within the limits of an area proclaimed by Proclamation 67 of 1903, dated May 26, and published in the 'Government Gazette' of the 2nd June, 1903, certain intoxicating liquor, viz., one bottle of Cape brandy, sold to one Charlie Currie, who is an aborginal native, within the meaning of the Act."

Mr. Burton (for the appellant) said that the conviction was objected to on two grounds. He submitted that the town of Alice was not a place where natives were located. The defendant kept an hotel in the middle of a town of the Colony. The Proclamation had attached to it a schedule which defined for prohibition purposes "an area in and comprising the districts of Stutterheim and Victoria East and limited by the boundaries of the respective districts." He contended that but for this Proclamation the appellant could not have been charged with committing a criminal offence. The Proclamation, he submitted, was too sweeping to be consistent with the powers given by the Legislature, and was *ultra vires*. The appellant was a European, and was proprietor of the Royal Hotel, in Wienand-street, Alice. Section 21 only gave the Government power to define areas within the limits of which it should not be competent for any Licensing Court to authorise the granting of licences. The proper construction of section 22 was that it should be read in conjunction with section 21, and the meaning clearly was that the sale of liquor to natives where a licence had not already been granted before any area had been proclaimed was prohibited, but where a man had got his licence, where the Licensing Court, acting legally within its powers, had granted him a licence, the Government could not proclaim an area, stopping at once licences which were already lawfully granted. He submitted that if this area were properly proclaimed even then the Proclamation did not affect this man's licence, which had been lawfully granted.

Mr. Howel Jones (for the Crown) submitted that under section 21 of the Act it was clear that the Governor could proclaim prohibited areas, and that that section provided for areas much larger than the location itself. He contended that the Governor had the right to prohibit any man, irrespective of whether he had been granted a licence by the Licensing Court or not, from selling liquor to a native. There should be a reasonable margin outside the location itself, so as to prevent the native from obtaining liquor. Take the natives at the Docks, for instance. He could see no reason why, under the Act, a certain area contiguous to the Docks should not be proclaimed, and any hotel within that area should not be prohibited from selling liquor to natives.

Mr. Burton was not called upon in reply.

De Villiers, C.J.: I have not much to add to the remarks which I made this morning in the case of *King* v. *Mathebus*. In that case there was no information whatever before the Court to enable it to decide whether or not the locality where the alleged offence was committed was a locality in which aboriginal natives are located or resident or congregated in the sense contemplated by the Legislature. In the present case it appears from the record that the offence is alleged to have been committed in the town of Alice, which is the seat of magistracy of Victoria East. It has been stated on behalf of the prosecution that there are natives congregated near the town, but that statement would be true in regard to every town—in every district of the Colony. Natives are congregated in large numbers at the Docks, and at Uitvlugt, near Cape Town, and if the contention of the prosecution is correct, the Governor would have the power to declare not only Cape Town, but the whole Colony to be an area within which it shall not be competent for the Licensing Court to authorise the issue of a liquor licence, except with the permission of the Governor. It may be very desirable that such a

power should be exercised, but if the Legislature had intended such a far-reaching result, it would have used very different language from that actually employed. The Licensing Courts are entrusted with large powers in regard to the granting and withholding of licences and the introduction of conditions into such licences. Among the conditions which they may impose is the very usual one that no liquor shall be sold to any aboriginal native. Where this condition is imposed the applicant for a licence may, of course, reconsider his application, and if the condition would be too burdensome, he would not take out the licence, for the payment of which a considerable sum is required. But if no condition whatever is imposed, and the money is paid by him, he is justified in believing that during the period for which he has paid his licence money no fresh condition shall be imposed upon him. The appellant applied for a licence for the sale of liquor in the town of Alice, and as no restriction was placed on the sale of liquor to natives, he paid the amount of licence money, of which the revenue has had the benefit. One may regret that any revenue should be derived from such a source, but that consitutes no reason for doing injustice to individuals. If the proclamation is valid any European resident in the two districts thereby proclaimed as an area would be liable to a very heavy penalty for giving a glass of beer to any native within such area. If the proclamation is valid, so far as it affects the town of Alice, the appellant would, before the expiration of the period for which he has paid his licence money, be deprived of a right for which he has paid full consideration. It is, moreover, by no means clear that the Licensing Court would have the power to grant him a fresh licence for the following year, even with a condition that he shall not sell liquor to aboriginal natives. I am clearly of opinion that a town like Alice, with its admittedly European population and seat of magistracy, does not constitute a locality which may lawfully be included within any area proclaimed under the 21st section of Act 28 of 1883, and that the conviction must be set aside.

[Appellant's Attorneys: Michau and De Villiers.]

SUPREME COURT

Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D) and the Hon. Mr. Justice KOTZE.]

ADMISSION. { 1903. Aug. 1st.

Mr. M. Bisset moved for the admission of James Henry Versfeld as an attorney and notary.

Application granted.

Mr. Benjamin moved for the admission of Hubert Bowyer Sampier as an attorney and notary.

Application granted.

Mr. Close moved for the admission of Alfred James Wadeson as a translator in the German, Dutch, and Italian languages.

Application granted.

PROVISIONAL ROLL.

ASTROP V. DAY.

Mr. Upington moved for provisional sentence upon a promissory note for £100, and for judgment for £500, being the amount of a dishonoured cheque, with interest and costs of suit.

Order granted as prayed.

SEDGWICK AND CO. V. HARCOURT.

Mr. Upington moved for the final adjudication of the defendant's estate. The provisional order was granted on the 18th July, 1903.

Order granted as prayed.

VAN REENEN V. WIGGINS.

Mr. De Waal moved for a decree of civil imprisonment of the defendant. On the 16th May, 1903, a writ was issued for the sum of £25 5s. and £10 9s. 8d. costs. The defendant had tendered part payment, leaving £28 11s. still due.

Order granted as prayed.

LETTMANN, LANDSBERG AND OTHERS V. BLOMSON.

Mr. Alexander moved for judgment under Rule 329d, for the sum of £16 4s.,

with costs of suit, and asked that a provisional claim be allowed to stand over till Thursday next.

Order and application granted.

ALTIE V. HADIE.

Mr. Benjamin moved for provisional sentence on a certain promissory note for £325.

Mr. Close, for the defendant, read the latter's affidavit, in which he denied that the mark affixed to the note was his. The plaintiff was indebted to him in the sum of £226, being the balance of the purchase price of certain property. An affidavit by one of the witnesses to the document was also read, in which it was set forth that the plaintiff promised to pay the defendant £25 for re-writing the document.

Mr. Benjamin read the answering affidavit of the plaintiff, in which he denied that he was indebted to the defendant in the sum of £226. He admitted that he owed him £26. When the defendant signed the promissory note he was perfectly well aware of the nature of the document. Counsel also put in the affidavit of Mahomed Isaacs, another witness to the note, which also set out that the defendant was perfectly acquainted with the contents thereof.

Mr. Close pointed out that the defendant had entered an appearance to the illiquid claim, and it might be convenient to fix the same day for the hearing of the present motion.

Allowed to stand over accordingly.

RICHARDSON V. ROBERTS.

Mr. Upington moved for provisional sentence upon a certain promissory note for £30, with interest from April, 1903. There was another matter pending against the same defendant, in which there was an application for provisional sentence upon a judgment of the Resident Magistrate's Court. The provisional sentence was asked for the purpose of having the defendant's landed property declared executable, at the suit of another plaintiff. Under the circumstances, counsel applied, under Rule 36 of Court, to have the property declared executable.

After the hearing of *Cloete* v. *Roberts*. the order was granted as prayed, and the property declared executable.

CASTLE WINE AND BRANDY CO. V. BLOMSON.

Mr. M. Bisset moved for provisional sentence on promissory notes of £100, £305 19s. 7d., and for judgment, under rule 329d, for £21 4s. 8d, being an amount of money due.

Provisional sentence granted, but judgment refused on the other claims, on the ground of insufficient notice.

STEER V. HANSEN.

Mr. M. Bisset moved for provisional sentence for the sum of £150, with interest from the 15th November, 1902, at the rate of 6 per cent., being the amount due on a certain mortgage bond, and for the property specially hypothecated to be declared executable, with costs of suit.

Order granted as prayed.

PHILLIP BROS. V. SUTTON

Mr. Buchanan moved for the civil imprisonment of the defendant on an unsatisfied judgment for £34 17s. 3d., and £6 5s. 2d. costs, for money lent and advanced and goods sold and delivered. The matter was formerly before the Court and allowed to stand over for an affidavit from the defendant, which now set forth that he was a watchman in the Customs Department, and that he had no means of satisfying the debt. He had a wife and six children and could not possibly pay more than £1 per month in liquidation of the debt. The allegation that he had other means was untrue. Counsel read the affidavit of the plaintiff's attorneys, and said that he was instructed that the property had been settled on his wife in 1899, and the debt was incurred in 1897.

Order granted as prayed.

SHUR AND ABRAHAMSON V. STROUD.

Mr. Benjamin moved for provisional sentence on a promissory note for the sum of £33, with interest and costs of suit.

Order granted as prayed.

CLOETE V. ROBERTS. { 1903. Aug. 1st.

Interest — Usury — Provisional sentence.

Provisional sentence granted for the amount of a promissory

power should be exercised, but if the Legislature had intended such a far-reaching result, it would have used very different language from that actually employed. The Licensing Courts are entrusted with large powers in regard to the granting and withholding of licences and the introduction of conditions into such licences. Among the conditions which they may impose is the very usual one that no liquor shall be sold to any aboriginal native. Where this condition is imposed the applicant for a licence may, of course, reconsider his application, and if the condition would be too burdensome, he would not take out the licence, for the payment of which a considerable sum is required. But if no condition whatever is imposed, and the money is paid by him, he is justified in believing that during the period for which he has paid his licence money no fresh condition shall be imposed upon him. The appellant applied for a licence for the sale of liquor in the town of Alice, and as no restriction was placed on the sale of liquor to natives, he paid the amount of licence money, of which the revenue has had the benefit. One may regret that any revenue should be derived from such a source, but that consitutes no reason for doing injustice to individuals. If the proclamation is valid any European resident in the two districts thereby proclaimed as an area would be liable to a very heavy penalty for giving a glass of beer to any native within such area. If the proclamation is valid, so far as it affects the town of Alice, the appellant would, before the expiration of the period for which he has paid his licence money, be deprived of a right for which he has paid full consideration. It is, moreover, by no means clear that the Licensing Court would have the power to grant him a fresh licence for the following year, even with a condition that he shall not sell liquor to aboriginal natives. I am clearly of opinion that a town like Alice, with its admittedly European population and seat of magistracy, does not constitute a locality which may lawfully be included within any area proclaimed under the 21st section of Act 28 of 1883, and that the conviction must be set aside.

[Appellant's Attorneys: Michau and De Villiers.]

SUPREME COURT

Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D) and the Hon. Mr. Justice KOTZE.]

ADMISSION. { 1903. Aug. 1st.

Mr. M. Bisset moved for the admission of James Henry Versfeld as an attorney and notary.

Application granted.

Mr. Benjamin moved for the admission of Hubert Bowyer Sampier as an attorney and notary.

Application granted.

Mr. Close moved for the admission of Alfred James Wadeson as a translator in the German, Dutch, and Italian languages.

Application granted.

PROVISIONAL ROLL.

ASTROP V. DAY.

Mr. Upington moved for provisional sentence upon a promissory note for £100, and for judgment for £500, being the amount of a dishonoured cheque, with interest and costs of suit.

Order granted as prayed.

SEDGWICK AND CO. V. HARCOURT.

Mr. Upington moved for the final adjudication of the defendant's estate. The provisional order was granted on the 18th July, 1903.

Order granted as prayed.

VAN REENEN V. WIGGINS.

Mr. De Waal moved for a decree of civil imprisonment of the defendant. On the 16th May, 1903, a writ was issued for the sum of £25 5s. and £10 9s. 8d. costs. The defendant had tendered part payment, leaving £28 11s. still due.

Order granted as prayed.

LETTMANN, LANDSBERG AND OTHERS V. BLOMSON.

Mr. Alexander moved for judgment, under Rule 329d, for the sum of £16 4s.,

with costs of suit, and asked that a provisional claim be allowed to stand over till Thursday next.

Order and application granted.

ALTIE V. HADIE.

Mr. Benjamin moved for provisional sentence on a certain promissory note for £325.

Mr. Close, for the defendant, read the latter's affidavit, in which he denied that the mark affixed to the note was his. The plaintiff was indebted to him in the sum of £226, being the balance of the purchase price of certain property. An affidavit by one of the witnesses to the document was also read, in which it was set forth that the plaintiff promised to pay the defendant £25 for re-writing the document.

Mr. Benjamin read the answering affidavit of the plaintiff, in which he denied that he was indebted to the defendant in the sum of £226. He admitted that he owed him £26. When the defendant signed the promissory note he was perfectly well aware of the nature of the document. Counsel also put in the affidavit of Mahomed Isaacs, another witness to the note, which also set out that the defendant was perfectly acquainted with the contents thereof.

Mr. Close pointed out that the defendant had entered an appearance to the illiquid claim, and it might be convenient to fix the same day for the hearing of the present motion.

Allowed to stand over accordingly.

RICHARDSON V. ROBERTS.

Mr. Upington moved for provisional sentence upon a certain promissory note for £30, with interest from April, 1903. There was another matter pending against the same defendant, in which there was an application for provisional sentence upon a judgment of the Resident Magistrate's Court. The provisional sentence was asked for the purpose of having the defendant's landed property declared executable, at the suit of another plaintiff. Under the circumstances, counsel applied, under Rule 36 of Court, to have the property declared executable.

After the hearing of *Cloete* v. *Roberts*. the order was granted as prayed, and the property declared executable.

CASTLE WINE AND BRANDY CO. V. BLOMSON.

Mr. M. Bisset moved for provisional sentence on promissory notes of £100, £305 19s. 7d., and for judgment, under rule 329d, for £21 4s. 8d, being an amount of money due.

Provisional sentence granted, but judgment refused on the other claims, on the ground of insufficient notice.

STEER V. HANSEN.

Mr. M. Bisset moved for provisional sentence for the sum of £150, with interest from the 15th November, 1902, at the rate of 6 per cent., being the amount due on a certain mortgage bond, and for the property specially hypothecated to be declared executable, with costs of suit.

Order granted as prayed.

PHILLIP BROS. V. SUTTON

Mr. Buchanan moved for the civil imprisonment of the defendant on an unsatisfied judgment for £34 17s. 3d., and £6 5s. 2d. costs, for money lent and advanced and goods sold and delivered. The matter was formerly before the Court and allowed to stand over for an affidavit from the defendant, which now set forth that he was a watchman in the Customs Department, and that he had no means of satisfying the debt. He had a wife and six children and could not possibly pay more than £1 per month in liquidation of the debt. The allegation that he had other means was untrue. Counsel read the affidavit of the plaintiff's attorneys, and said that he was instructed that the property had been settled on his wife in 1899, and the debt was incurred in 1897.

Order granted as prayed.

SHUR AND ABRAHAMSON V. STROUD.

Mr. Benjamin moved for provisional sentence on a promissory note for the sum of £33, with interest and costs of suit.

Order granted as prayed.

CLOETE V. ROBERTS. { 1903. Aug. 1st.

[Interest — Usury — Provisional sentence.

Provisional sentence granted for the amount of a promissory

note with interest at 25 per cent. as stipulated for in the note, the defendant raising no objection and the amount of interest claimed not exceeding the capital.

Mr. Upington moved for provisional sentence on promissory notes for the sum of £25, with interest at the rate of 6 per cent., £42, with interest at the rate of 25 per cent. from the 7th April, and for the sum of £11 10s., being the balance of a certain unsatisfied judgment of the Resident Magistrate's Court. There was also an application that certain landed property belonging to the defendant should be declared executable, but, with regard to the interest at the rate of 25 per cent., counsel said that he would leave that entirely in the hands of the Court.

De Villiers, C.J.: The defendant raises no objection to the payment of 25 per cent. as stipulated for in the promissory note, and in the absence of such an objection the Court may assume that sound reasons existed for such a high rate of interest. I fully agree with the remark made by Watermeyer, J., in *Dyason* v. *Ruthven* (3 Searle, 312), that "If any stipulation of interest be attacked as liable to reduction, on the ground of usury or extortion, this can only be done by offering proof of the usury and extortion in the particular case." It might have been different in the present case if the amount claimed had exceeded the capital, but only four months' interest is claimed in the summons, and provisional sentence must be granted accordingly.

PHILIP BROS. V. SNAEDER.

Mr. Benjamin moved for the provisional order for the sequestration of the defendant's estate to be made final.

Order granted.

GARLICK AND CO. V. HARTS.

Mr. J. E. R. de Villiers moved for the provisional order of sequestration of the defendant's estate to be made final.

Order granted.

PURCELL AND OTHERS V. BOND.

Mr. Close moved for the final adjudication of the defendant's estate.

The provisional order was granted on the 18th July.

Order granted.

HUGHES V CLIFFORD.

Mr. Benjamin moved for provisional sentence on certain taxed bills of costs for £61 1s. 9d. and £32 18s. 8d., less £69 paid on account.

Order granted as prayed.

ILLIQUID ROLL.

ST. FRANCIS' CONVENT V. FITZGERALD. { 1903. Aug. 1st.

Mr. Russell moved for judgment under Rule 329d for £40 5s., for the tuition of the defendant's minor daughter.

Order granted as prayed.

TOWN COUNCIL V. CHRYSECOS.

Mr. Schreiner, K.C., moved for judgment upon default of plea for the sum of £89 18s., with costs of suit.

Order granted as prayed.

LEVYNS AND SON V. SCHENELZER.

Mr. Benjamin moved for judgment under Rule 329d for the sum of £100.

Order granted as prayed.

ASTROY V CHETTY.

Mr. Upington moved for judgment under Rule 329d on a promissory note for the sum of £310.

Order granted as prayed.

REMINGTON TYPE WRITING CO. V. BOLTSOM.

Mr. Benjamin moved for judgment under Rule 329d, for the sum of £72 7s. 6d., being the purchase price of certain goods.

Order granted as prayed.

COLONIAL GOVERNMENT V. PLUMBY.

Mr. Schreiner, K.C., moved for judgment in default for the delivery of 16 rails or payment of the sum of £35 10s 9d.

Order granted as prayed.

ESTATE PARSON V. PARSON.

Mr. Searle, K.C., moved for judgment in default for the payment of the balance of the assets of the estate and for an account to be filed within the usual time.

Order granted as prayed.

PHILLIP BROS. V. FREDERICKS.

Mr. Benjamin moved for judgment under Rule 229d, for the sum of £72 9s. 1d., being the balance of the purchase price of goods sold and delivered.

Order granted as prayed.

HUMAN V. VAN DER BYL.

Mr. Russel moved for judgment under Rule 329d, for the sum of £72 11s. 9d., being money lent and goods sold and delivered, with interest and costs of suit.

Order granted as prayed.

MCCLELLAN V. ROODE AND ANOTHER.

Mr. P. Jones moved for judgment under Rule 329d, for an order calling upon the defendants to pass transfer of certain property.

Order granted as prayed.

BOYD V. SAMSODIEN.

Mr. De Waal moved for judgment under Rule 329d, for the transfer of certain property, and for the sum of £750, being the balance of the purchase price of certain property.

Order granted as prayed.

ROBERTSON AND CO. V. HUGO.

Mr. M. Bisset moved for judgment under Rule 329d, for the sum of £11 5s., for goods sold and delivered, with interest *a tempore morœ*, and costs of suit.

Order granted as prayed.

COLTON AND CO. V. BOAS.

Mr. Nightingale moved for judgment under Rule 329d, for the sum of £52 10s. for goods sold and delivered.

Order granted as prayed.

KATZEN V. MOORE BROS. { 1903. Aug. 1st.

Mortgage bond—Three months' notice—Provisional sentence.

To a claim for provisional sentence for the capital of a bond the defence was raised that the three months' notice had been given before the expiration of a year from the time when the interest began to run. The interest was payable half-yearly, and three months' notice was given so as to require payment of the capital after the first six months had expired. Provisional sentence granted.

Mr. Schreiner, K.C., moved for provisional sentence upon a mortgage bond for £900, with interest from the 1st January, 1903. The bond had become due primarily by reason of three months' notice having been given calling up the bond, and also by reason of the non-payment of interest due half-yearly on the 30th June last.

Mr. Buchanan, for the defendant, drew attention to the fact that the summons claimed that it was due on account of three months' notice having been given, but the summons did not claim it due by reason of the non-payment of the interest, which had not been paid on account of the dispute in this case as to whether plaintiff could call up the bond within a year. The affidavit of the defendant, Albert Moore, set forth that he admitted the due execution of the mortgage bond for £900, but denied that the plaintiff had any right to give three months' notice. On the 3rd October, 1902, he bought a property at Diep River, and scarcely a month after the bond had been registered he received notice from the plaintiff to pay the sum. Defendant repudiated plaintiff's right to call up the bond for twelve months.

The affidavit of the plaintiff stated that it was made quite clear to the defendant that he could call up the bond at any time he wished to do so. There was never any suggestion that the plaintiff was not within his right.

Mr. Buchanan submitted that the bond should be taken in the same way as a

promissory note, payable on demand, that the clause must be read with the whole meaning of the bond, and that at least one 30th June and one 31st December must elapse before the bond could be called up. Counsel contended that as the insurance was payable yearly, and the bond was a reasonable security, the clause was qualified.

Mr. Schreiner, K.C., said that if the plaintiff had sued before the 30th June the case of Wainwright quoted by his learned friend would have been against him. The plaintiff was entitled to ask for the terms of the bond, and custom would not go against the explicit terms of the contract.

De Villiers, C.J.: The case in the Eastern Districts Court is not applicable, for there interest was payable yearly, and a full year had not expired at the time at which payment was demanded. In the present case the interest is payable half-yearly, and a full half-year had expired at the date fixed by the notice. The plaintiff was entitled to ask for payment of the capital on giving three months' notice, and as he has given the notice, he is entitled to provisional sentence.

On the application of Mr. Buchanan, stay of execution was granted for fourteen days to allow the defendants to enter into a new bond.

[Plaintiffs' Attorneys: W. E. Moore and Son; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

GENERAL MOTIONS.

PIENAAR V. WEITZ. { 1903. Aug. 1st.

Sir H. Juta, K.C., asked leave to move as a matter of urgency for an order calling upon the respondent to show cause why this case should not be postponed until November next. The affidavit of the defendant, Francis Weitz, of Ceres, stated that he was sued for £84 7s 6d., alleged to be the balance of the purchase price of certain sheep. His plea set up an agreement with the plaintiff whereby the latter agreed to accept £51 in full settlement, and as a satisfactory price for the sheep. In view of the fact that there would be a direct conflict of evidence, the evidence of one A. Snyman, at present in the Transvaal, would be material. His wife also had been in bad health, and it was essential that she should take a sea voyage. The transaction took place in 1901, and the plaintiff's summons was only filed in June, 1903. Since 1901 the plaintiff had never made any application to the defendant.

Mr. Burton, for the respondent, opposed the application, and put in the affidavit of William Krige, the plaintiff's attorney, of Ceres, which stated that the plaintiff lived fully ten hours' drive from the village, and that no post would reach him for many days. The plaintiff had made all arrangements for his witnesses, and Snyman had no knowledge of the case, and the defendant had ample time to communicate with him.

Application granted, the defendant to pay the costs of the postponement.

DE WAAL V. DE WAAL.

Mr. De Waal asked leave to move as a matter of urgency for an order calling upon the respondent to show cause why a *curator bonis* should not be appointed. The affidavit of the respondent's wife, Winifred Rachel de Waal, stated that the respondent, Dr. Gideon de Waal, of Colesberg, was squandering his money in a most reckless fashion in drink, and that it was necessary to have someone to look after him.

De Villiers, C.J.: Will he squander much between this and Monday morning?

Mr. De Waal: I think so, my lord.

An order was granted calling upon the defendant to show cause, by the 5th August, why his brother should not then be appointed curator bonis, and why the rule should not then be made absolute.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

DAY V. DAY. { 1903. Aug. 3rd.

This was an action, brought by the plaintiff (the husband), now residing in

the division of Victoria West, against his wife, for the restitution of conjugal rights, or failing compliance, for divorce. Mr. Buchanan appeared for the plaintiff, and the respondent was unrepresented.

The plaintiff stated that he was married to the respondent in community of property at Bloemfontein on the 14th June, 1898. They lived together at Heilbron until September, 1899, when the plaintiff was compelled to take up arms by the late Free State Government on the outbreak of the war. His wife went to live with her mother at Bloemfontein. On the cessation of hostilities he again saw his wife at Bloemfontein, but she declined to go and live with him. He had received an offer at Victoria West from Mr. Van Heerden, which he had accepted, and he was now farming in that division. He had repeatedly asked the defendant to return to him, but she had refused to do so. She had been residing in Durban, Natal, but had recently come to Cape Town.

A decree of restitution of conjugal rights was granted, calling upon the defendant to return or to receive her husband on the 31st August, failing which a rule would issue calling upon the defendant to show cause on the 4th September why a decree of divorce should not be granted, with forfeiture of benefits of community, the rule to be served personally.

Postea (September 15th).

The Court granted a decree of divorce.

BARLOW V. BARLOW.

Mr. Alexander moved for an order removing this case for trial to the Circuit Court at Oudtshoorn. The defendant was in default, and on the 8th June last the plaintiff was granted leave to sue her husband by edictal citation. The notice of trial was personally served on the defendant, and he had hitherto failed to enter an appearance, and plaintiff petitioned, in order to save expense and inconvenience, that the case might be transferred for trial to the Circuit Court in the district of Oudtshoorn.

Order granted as prayed.

HICKMAN V. HICKMAN. { 1903. Aug. 3rd.

Adultery — Non-access — Non-cohabitation.

The plaintiff did not cohabit with or even have access to the defendant, his wife, for two years, at the end of which time she gave birth to a child.

Held, *that this constituted sufficient proof of adultery.*

This was an action, brought by Walter Thomas William Hickman, of Kimberley, against his wife, Annie Maud Hickman (born Mustin), for divorce on the ground of her adultery. Mr. Upington appeared for the applicant, and the respondent was unrepresented.

Charles W. H. Smith, clerk in charge of the marriage registers, Colonial Office, gave evidence as to the registration of the marriage.

The plaintiff, an engine driver in the employ of De Beers at Kimberley, said he was married in community to the defendant at Queen's Town in October, 1891. After having been a year at Queen's Town, they removed to East London, and afterwards went to Bloemfontein. In 1896 they quarrelled about his wife going to a dance; he would not consent to her going. He went on duty that night, and found that she had gone to town. She would not come home, and he took the child away. She remained in Bloemfontein for a few days, and then she went to East London against his wish. He then went to Kroonstad, where she returned to him about eight months afterwards. He subsequently sold his effects, and sent his wife and children to her mother at East London. He went to Kimberley to look for work, and he sent money to his wife regularly. In 1898 he heard that she had gone to Natal. He remained at Kimberley, and had his children with him there, but sent them away on the investment of the town. After the siege he went to East London, and subsequently saw his wife in King William's Town. She was accompanied by a child, which she admitted she had had to a man named Evans in Natal. He could not sue then for divorce, because he had no money. He received a letter from her. In September, 1902, he heard

further information about her, and in May of this year he instituted proceedings against her. The children were still with their grandmother, Mrs. Mustin. His wife subsequently wrote from Potchefstroom to his solicitors, asking for particulars of the case.

De Villiers, C.J.: The Court always exercises the utmost care in cases where the birth of a child after a period of non access on the part of the husband is relied on as proof of adultery, seeing that a judgment against the wife has then practical effect of declaring the child to be illegitimate. Certainly, there are circumstances in this case which would justify the Court in accepting plaintiff's testimony as sufficient proof of adultery, because, according to his uncontradicted evidence, he had no access to his wife from 1897 to 1900, and in June, 1900, he found his wife with a child apparently about eight or nine months old. She was suckling the child, which could not have been twelve months old, and, as he had had no access to his wife since 1897, and this child was born some couple of years after his last access, that would be conclusive proof of adultery. A decree of divorce will be granted, with forfeiture of benefits of community, the plaintiff to have custody of the children, with the usual order as to reasonable access being given to the defendant.

WIGGETT V. OOSTHUYSEN.

Mr. Searle, K.C., moved for an order calling on the respondent to show cause why this action should not be removed for trial to the Circuit Court at Mossel Bay. The petition of the defendant set out that both parties resided at Mossel Bay, and that, on account of the late arrival of the steamers in Cape Town, it would be necessary to bring all the witnesses down a week before the trial of the case. His wife was in bad health, and if the application were allowed, it would considerably lessen the expense.

Mr. Buchanan (for the respondent) opposed the application, and put in the affidavit of the plaintiff's attorney, which stated that it would be very inconvenient for a material witness, George Brown, of Mowbray, to come to Mossel Bay. The action turned upon a question of account, and involved a matter of either £100 or £67.

[De Villiers, C.J.: It certainly seems more convenient to have the case tried at Mossel Bay. There is only one witness residing here.]

Mr. Buchanan: It might be entirely a matter of convenience.

De Villiers, C.J.: the balance of convenience seems to be in favour of Mossel Bay, and the case is not of such importance as to require three judges to decide it. The case will be removed to Mossel Bay, and the costs will be costs in the cause. If the parties wish to save the expense of a fresh application for a commission, the Court will make the order at once, and will order the evidence of George Brown to be taken on commission, Mr. Van Zyl to act as commissioner.

WAR DEPARTMENT V. WRIGHT.

Mr. Upington moved for judgment, under Rule 329d, for £76 10s. 3d., value of certain rations, forage, and foodstuffs supplied by the plaintiffs to the defendant.

Judgment as prayed.

WAINER V. SNAEDER.

Mr. Alexander moved, under Rule 329d, for delivery of a certain mortgage bond for £750, of which the plaintiff was the legal holder, by virtue of a certain concession.

Judgment as prayed.

DE WET V. BOTHA.

Mr. Benjamin moved for provisional sentence for £3,061 1s., together with interest on the sum of £3,000 from the 31st May, 1903, under certain conditions of sale. The plaintiff, Isabella Catherina Johanna de Wet, was the vendor of certain erven, with buildings thereon, situate at Worcester, offered for sale by auction by Mr. J. J. Theron. The conditions of sale were that the purchaser must pay 2 per cent. of the purchase price to the auctioneer as commission, expenses of transfer, and so on. The conditions having been read over at the sale, the property was put up, but declared not sold at £2,701. It was later in the day sold to Mr. Botha for £3,000, under the conditions of sale, with certain amendments as to possession and so forth. The plain-

tiff sought provisional sentence for £3,000 purchase price, £60 being 2 per cent. of purchase price due to the auctioneer as fees, and £1 1s. conditions of sale, and also interest from the 31st May on the purchase price, plaintiff tendering transfer.

Sir H. Juta, K.C., read the defendant's affidavit, which was to the effect that he did not dispute the sale of the property to him by the plaintiff for £3,000, but he repudiated liability for the auctioneer's commission and conditions of sale, £61 1s. He went late to the sale, and he saw the property withdrawn at £2,701, which was his bid, following a bid of £2,700, which had been made by someone else as a blind. He afterwards entered into negotiations with the plaintiff for the purchase of the property, and after some bargaining, he agreed to buy at £3,000. He did not agree to pay the auctioneer's commission, and, in fact, nothing was said at the time about it. Theron took no part in the transaction. Deponent did not buy under the fall of the hammer. The bargain was one purely and simply between the plaintiff and himself direct. He subsequently went down to the auctioneer's offices at the request of Mr. Theron, jun. He was not a man of letters, and he signed a document that was put before him without understanding its meaning. He signed the document in good faith, wherein he agreed to discharge auction dues. If he had known that he would have to pay commission he would not have bought the property at the price. He considered that he was duped into signing the document, as he should not have signed it if he had known its stipulations.

Mr. Benjamin read the affidavit of Mr. Theron's son, who was acting as his father's manager, in which he stated that he distinctly remembered the defendant being present at the sale when the conditions were read over. He emphatically denied that the defendant was duped into signing the conditions of sale. He denied that defendant made a legal tender. A corroborative affidavit was also sworn by a wagon builder at Worcester.

Counsel having been heard in argument on the facts,

Cur. Adv. Vult.

Postea (August 10th).

De Villiers, C.J.: In this case the plaintiff is clearly not entitled to commission, and provisional sentence will, therefore, be granted for the amount of £3,000. The plaintiff will pay all costs incurred subsequent to the date of tender.

HILLS V. COLONIAL GOVERNMENT. { 1903. Aug. 3rd.

Award of arbitrators—Costs.

This was an application for judgment in terms of a certain award of referees, to whom certain accounts between the applicant and the respondents had been referred by judgment of the Court in March last. The report set out that the referees found that the actual cost incurred in the construction of the railways taken over by the Government, viz., the Oudtshoorn-Klipplaat line, the Somerset East-Fort Beaufort line, and the Fort Beaufort-King William's Town line, including buildings, plant, and material, subject to certain suspense accounts, amounted to £1,153,283 7s. 4d. The payments made to the contractors on account amounted to £1,005,232 14s. 1d. The moneys retained by the Government from time to time amounted to £70,689 14s. 5d. The latter amount covered retention money on the work done up to the 12th May, 1902, when the Government took over the works. Certain amounts had been expended by the Government since the 12th May, 1902, in making good certain faulty work at various points on the lines, and these amounts the referees considered should be recovered from the retention money. One item of £851 15s. 11d. called for special comment. In 1898, under an award in arbitration between the estate of the late Sir Andries Stockenstrom and the contractor, the latter was empowered to acquire from the estate whatever land was necessary for railway purposes at Bedford. For some reason not explained he omitted to acquire all the lots necessary, and at some later date the land not so taken was sold for the estate named. The Government had since to expropriate this land, and the price in advance of the original cost, viz., £98 4s. 1d., should be charged against the retention money. It was impossible to prepare a complete list of the London

accounts, but all Colonial accounts were passed that were in order. The suspense account consisted of: (a) unpaid wages; (b) unpaid salary; (c) unvouched amounts, London accounts, which might be added to "actual cost"; and (d) unpaid London account, which might be excluded from "actual cost." They submitted as fair to both parties that the unpaid wages should be paid by authorised agents of the Government, or both parties. Although the contractor's representatives had been asked to supply the necessary details of the unvouched expenditure of the London account they had so far failed to do so, and that had been placed to the suspense account. The parties to whom payments were made were solicitors, or agents, acting solely in the interests of the contractor in the negotiations with the Government in connection with alterations in the contract. They held that there was every presumption that these charges were for the benefit of the contractor, and on these grounds they were of opinion that they should not be allowed, but Mr. Roy held that they were part of the actual cost. The item of £1,135 9s. 6d. for passenger traffic should, in accordance with a former agreement, be handed over to charities. The balance due to the contractor was £76,225 9s. 4d.

Mr. Searle, K.C. (with him Mr. Close), for the applicant. Mr. Schreiner, K.C. (with him Mr. McGregor), for respondent.

Mr. Searle, K.C.: All the referees are agreed that the Government should pay out the claims of all the employees. That will make £95,000 to be added to the £76,000 for actual costs. Then the law costs incurred in negotiating these contracts ought not to be struck out, though possibly they might be reduced.

[De Villiers, C.J.: What about the charges for Urquhart and Ainsley?]

Urquhart is a fully qualified engineer, who stayed out here for a year supervising the work. He also gave evidence at the trial. Ainsley was out in the Colony for six months, and negotiated the second contract. I submit that the payments made to both these gentlemen were part of the actual costs. The referees want the opinion of the Court as to these actual costs; but it is quite a wrong principle that the Government are not liable for services from which they have not derived any actual benefit. Since office charges have been allowed, exchange has been allowed, and even the London charges have been allowed, I would submit that a reasonable sum should be allowed for the salaries of Urquhart and Ainsley. Again, as to the question of interest, the Court said that interest was not to be allowed; but the report (at p. 15) shows that it has been allowed to the extent of £8,152 under various items. Over £2,000 of this was for overdrafts. So, also (at page 30), some £34,921 are allowed for interest, of which a considerable sum was on overdrafts. I take it that when the Court refused to allow interest it meant interest on capital, not such as would be charged by the bank in the ordinary way of business. The Government claimed £70,000, and now refuses to pay us the £100,000 which it clearly owes us. I submit that the Government should pay costs.

Mr. Schreiner, K.C. (for the Government): The award of the referees includes costs incurred in London and in this colony. Paragraph 7 of the Report includes certain charges in respect of land which the contractor is bound by his contract to transfer to Government. Subject to these remarks, I am not prepared to oppose judgment for £76,000. As regards the items on which the referees have not reported in favour of the Government, the plaintiff has nothing to go upon. It is for him to obtain a judgment of Court for such sums as he alleges to be due. As to the £19,000, the referees decline to report upon that. I would suggested that some person connected with the Court should have £19,400 deposited with him to meet any claim in respect of wages.

[De Villiers, C.J.: Why not deposit that sum with the Government?]

We have no special knowledge of what wages are due, and I would submit that if further information is required the matter should be referred back to the referees. Take, for instance, the case of the claim of Orpen, the surveyor; we are quite willing that he should sue the Government, but we must be put in the position of the contractor, so that we may have his defences. The claim as to the £76,000 is common cause, and it would hardly be fair to refer that back. The arbitrators crave the direction of the Court as to other four items. The Court can remit the whole matter back

to the arbitrators. The contractor owes a number of debts (*e.g.*, in England), and we want to be sure that the money due to these creditors will not be applied to some other purpose.

Mr. Searle (in reply): The arbitrators were unanimous that the £19,404 could be dealt with under par. 3 of the report. As to wages due, we will give all the information we can. It may be that many of those to whom wages are owing will never come forward to claim them, and, of course, the Government will benefit by that. I would suggest that the matter be referred to Mr. Tippets.

[De Villiers, C.J.: He could hardly act for both parties.]

Well, then, I would suggest that the matter should be referred back to the arbitrators. In reference to the £6,000 the arbitrators ask the direction of the Court. We have no objection to being ordered to give transfer of the land in question. As to the £4,000 (item 3 of expenses), that is money most of which has been paid out, and it is therefore not on the same footing with unpaid wages.

Mr. Schreiner: With regard to the £19,000, there are many claims for wages, and I would ask that if the Government undertakes the administration of this estate, it should be allowed reasonable expenses.

Mr. Searle: I do not object to that, but would suggest that judgment should be given for £148,050, and also for the £70,000 retention money. Annexure D shows a balance of £223,310. That balance they have now reduced to £148. The matter of the retention money was to be a question of set-off (see sections 47 and 49 of the Contract of July 4, 1900). The real question is as to the £10,000 forfeit. As to the costs, they have been enormously and unnecessarily increased by a count on which counsel for the Crown was not even heard. I submit that the plaintiff should get half his costs. The whole of the first count of the declaration, as to the particulars of the breach of contract, was given up.

Mr. Schreiner: I join issue with applicant's counsel. The bulk of the costs was not incurred in respect of the first count. We had to go into the claim in reconvention at great length. It is a good principle that if a plaintiff succeeds in recovering a large sum, the defendant should bear the brunt of the costs.

De Villiers, C.J.: According to the referees' report, there is due by the defendant the sum of £76,225 9s. 4d. This sum is arrived at by finding that the actual cost of the works was £148,050 13s. 3d. From that amount are deducted two items: Retention money, £70,689 14s. 5d.; and an amount of passenger traffic receipts, not due to the Government or belonging to the contractor, but in the hands of the contractor, £1,135 9s. 6d., leaving a balance of £76,225 9s. 4d. But then there are certain items which the referees have placed in the suspense accounts. With regard to (d), in the opinion of the Court there should be no judgment for the plaintiff in respect of that amount. The matter was referred to the referees, and a majority of the referees, after very careful inquiry, have given a definite decision on that point. The referees' statement is as follows: "The subdivision of the suspense account consists of items for which full details are not forthcoming and in regard to which we are unfortunately unable to report with complete unanimity. Acting on the principles by which we have been guided through our investigation, two of us maintain that to be consistent, we cannot allow these items to form part of the actual cost. The parties to whom the payments were made are solicitors or agents, acting solely in the interests of the contractor in the negotiations with the Government, in connection with the several alterations in the contracts. We hold that there is no presumption that these charges were 'for the benefit of the Government,' but that there is every presumption that they were for the benefit of the contractor. On these grounds, we are of opinion that they should not be allowed. On the other hand, Mr. Roy is of opinion that legal and other charges incurred by the contractor in drawing up with the Government the different contracts for the building of these lines, form an essential part of the actual cost." The view taken is a correct one, and therefore nothing should be allowed in respect of (d). In regard to the items (a), (b), and (c), it is admitted they are owing, but the contractor cannot recover anything in respect of them unless he can prove they form part of the actual cost, and

have actually been paid by him. The suggestion of the referees seems to me a reasonable one, that the money should not be at once paid by the Government to the plaintiff, but that it should be held over by the Government for the purpose of being paid to the persons to whom the amounts are due. It appears to the Court, in giving judgment for £76,225 9s. 4d., that it should be an understanding that the defendant in his capacity as Commissioner of Railways undertakes the liability in respect of items (a), (b), and (c), to pay the same or such portion thereof he should find to be due, not exceeding in any case £19,404 1s. 9d., £99, and £4,426 18s. 3d., respectively. On the question of costs there is no doubt that plaintiff has succeeded on the main question. In consequence of that decision, a very large balance is found to be in favour of the plaintiff. No doubt the plaintiff had raised certain questions upon which he has failed, but on the main question he has succeeded. I do not consider that the other count adds very materially to the costs, and upon the whole it is only fair that the Government, having failed upon the main question before the Court, and the plaintiff, having succeeded in obtaining a large balance in his favour, the ordinary rule should be applied that the unsuccessful party should pay the costs, including the referees' fees. There will therefore be judgment for £76,225 9s. 4d., with costs, to include the referees' fees.

[Applicant's Attorneys: Tredgold, McIntyre and Bisset; Respondent's Attorneys: Reid and Nephew.]

AFRICAN BANKING CORPORATION V. CAPE JUNCTION RAILWAYS. { 1903. Aug. 3rd.

Interdict.

The Court granted an interdict restraining the Colonial Government from paying over to the respondents any portion of a sum of money which the Court had found to be due to the manager of the Grand Junction Railways, pending an action to be brought by the applicants to recover certain moneys alleged by them to be owing to them by the respondent.

Sir H. Juta, K.C., for the applicants, moved for an order restraining the Colonial Government from paying over the money to the respondents awarded to them in their action against the Colonial Government, pending the institution of an action. Counsel put in the affidavits of the joint managers of the African Banking Corporation, which set out that £59,384 had been advanced to the partnership, for which debentures issued by the Grand Junction Railways had been pledged as security. It was contended that, by virtue of the said debentures, the claim should rank as preferent.

Mr. Searle, K.C., for the respondents, put in the affidavit of the respondents' attorney, which set out that he was unable to communicate with the said Hills, and that the applicants had had ample time to institute proceedings. It would be most unfair to the other creditors to withhold the money. Counsel suggested that a receiver should be appointed to deal with these claims.

Mr. Searle, K.C.: We admit that the applicants have a claim, but say that they have no preferent claim, and we object to the case being hung up until preference is established. The money has been placed in the hands of the Registrar.

Sir H. Juta: There is nothing to prevent an application to-morrow to order the Registrar to pay out this money.

[De Villiers, C.J.: When can you bring your action?]

In the November term.

[De Villiers, C.J.: Can you not bring it on in August?]

Yes, if the defendants will waive their rights as to notice of set down.

Mr. Searle (in reply): A large quantity of goods are in the hands of the Sheriff, and expenses are running up. We want to release these goods, and there should be a distribution among the creditors, unless the plaintiffs are prepared to go to trial this term.

De Villiers, C.J.: For the present, it is only necessary to make an order restraining the Government from paying any portion of the judgment in the last case until August 31 next. In

the meanwhile, the applicants will proceed with their action, and they will do so in as speedy a manner as possible. Then the Court can decide upon the question of interest. By giving this order, we do not wish to prejudice the rights of the Government in regard to interest. Costs to be costs in the cause.

Ex parte COOTE.

Mr. M. Bisset moved for a rule *nisi* to be made absolute granted under the Derelict Lands Act.

Granted.

Ex parte ROBERTS.

Mr. Benjamin moved that a rule *nisi* be made final granted under the Derelict Lands Act.

Granted.

WALTERS V. WALTERS.

Mr. Gardiner moved for a decree of divorce and the custody of the minor children under the marriage, and for an order calling upon the defendant to show cause why he should not pay £4 a month for the maintenance of children. Personal service had been effected of the order of Court, granted May 19, directing the defendant to return to his wife. The defendant had failed to comply with this order.

Decree granted.

RAPLEY V. RAPLEY.

Mr. Upington moved for a decree of divorce. The respondent had failed to comply with an order to make restitution of conjugal rights.

Granted.

LYONS V. THORNTON.

Mr. Close moved for the making absolute of the rule *nisi* granted on July 3, 1903.

The rule was granted for the purpose of restraining the respondent from parting with certain furniture. Judgment had been entered, but the respondent was in default.

Granted.

REHABILITATIONS.

Ex parte DU TOIT. { 1903. Aug. 3rd.

Mr. M. Bisset moved, under section 117 of the Insolvency Orders, for the rehabilitation of Gideon Johannes du Toit. The estate was surrendered on the 19th February, 1900, and the necessary number of creditors had consented to the discharge.

Granted.

Ex parte OLIVIER.

Mr. Benjamin moved for the rehabilitation of Gert Cornelius Olivier. The estate was voluntarily surrendered in November, 1884. The trustee's report was favourable.

Granted.

Ex parte LOUBSER.

Mr. M. Bisset moved for the rehabilitation of Gerrit Jacobus Loubser. All the creditors had signified their consent to the discharge.

Granted.

Ex parte RATTRAY.

Mr. Benjamin moved for the rehabilitation of Wm. Patrick Rattray. The estate was surrendered in March, 1895, when the proven debts amounted to £590, and the assets, £51. There was a passage in the trustee's report that he was unable to trace any dealings of the insolvent, who kept no books.

Leave was granted to apply again in three months.

Ex parte RAUTENBACH.

Mr. Benjamin moved, under section 107, for the rehabilitation of G. F. Rautenbach. All the creditors had been paid in full, but the vouchers had not yet been returned.

Granted, subject to the production of the trustee's report.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

MUNRO V. COLONIAL GOVERNMENT. { 1893. Aug. 4th.

Sir H. Juta, K.C., moved for a date to be fixed for the trial of this action, which was for damages for injuries sustained by a railway accident.

Mr. Schreiner (for the Colonial Government): It is only a question of amount; there is a tender, my lord.

The case was set down for trial on Wednesday, September 2, costs to be costs in the cause.

Ex parte LOUWRENS.

Mr. M. Bisset moved for the rule *nisi* relieving petitioner from a trusteeship and granted on July 7 to be made absolute.

Rule made absolute accordingly.

Ex parte BARNES AND ANOTHER.

Mr. Buchanan moved on behalf of petitioners for an order authorising the Registrar of Deeds at King William's Town to register transfer of certain property, in which certain minor children were interested, valued at £300, in the estate of the late David George Barnes, of which petitioners were executor and executrix respectively.

The Master recommended that transfer be granted.

Order granted as prayed.

Ex parte MCMILLAN.

Mr. Buchanan moved on behalf of the petitioner for leave to pass transfer of property in Griqualand East, held at present in trust for his minor son, Richard H. McMillan. The petitioner had settled upon his son a property originally valued at £300. He had had the option of purand he had decided to take up this option. He wished to sell the property, which he formerly gave to his son. The said property was now of the value of £600 and he also wished to apply this £600 towards the purchase of the farm Balmoral for £2,040 6s. 8d., and make up the remainder of the purchase price by donating that sum to his son, and having the farm registered in the name of his son.

The Master recommended that the prayer of the petition be granted, on the understanding that the interests of petitioner's creditors be safeguarded.

Order granted in term of Master's report, empowering the petitioner to pass transfer, subject to the Master being satisfied that the petitioner's creditors, if any, would not be prejudiced by the proposed transfer.

BOBBINS V. LE ROUX.

Mr. Upington moved for an order to compel the defendant to remove certain building and other material deposited by him upon a certain lane at Rondebosch, alleged to be the property of the applicant, to call upon him to show cause why he should not be restrained from using such lane and trespassing thereon in the future, and also why he should not pay the costs of the proceedings. The matter, said counsel, had already been before the Court, and was standing over pending the production of certain documents.

Mr. C. W. de Villiers appeared for the respondent.

The Chief Justice said the case should come before the Judge who had the matter before his originally.

REWN V. REWN.

Mr. Buchanan moved for a rule calling upon respondent to show cause why applicant should not be granted leave to sue *in forma pauperis*.

A rule was granted, returnable on the 27th August.

MOTHULI V. MOTHULI.

Mr. Pyemont moved for leave to applicant to sue his wife, who was resident in the Orange River Colony, by edictal citation for restitution of conjugal rights, failing which, for divorce.

The application was granted, personal service to be effected, the citation being made returnable on the 27th August.

Leave was also granted to serve intendit and notice of trial with the citation.

STYERS V. STYERS.

Mr. Alexander applied for leave to applicant, Martha Styers, to sue *in forma pauperis* for divorce. Counsel said applicant was not in court. She lived at De Aar, and could not come to court owing to the cost.

De Villiers, C.J., said the Court had said that in these cases the application should be personally made. Applicant could apply at the next Circuit Court.

FEITELBERG AND GOTTCHALK V. DU TOIT.

Mr. Close moved for leave to sue by edictal citation. Respondent was last heard of in Pietersburg, Transvaal.

The application was granted, personal service to be effected, with leave to serve intendit and notice of trial with citation. The citation was made returnable on the 27th August.

Ex parte KETS.

Mr. C. W. de Villiers moved for leave to sue by edictal citation for balance of certain money due on property purchased by respondent, Arnold Marrival, whose present whereabouts were unknown.

A rule was granted, returnable on the 12th September, personal service to be effected, otherwise service by publication in the "Gazette" and in a Cape Town English newspaper. Leave was granted to serve intentit and notice of trial with the citation.

BYDIEN V. ESTATE SAMAO. { 1903. Aug. 4th.

Fraud—Relief—Prescription.

A person who has been defrauded is not deprived of his right to relief by reason of thirty years having expired since the fraud was committed, provided that this action is brought within a reasonable time after discovery of the fraud.

This was an application to have made absolute a rule *nisi* granted in chambers for an interdict restraining the respondent from transferring certain premises situated in Castle-street, and restraining them from parting or dealing with the proceeds of the sale of same, pending an action to be instituted by the applicant. The affidavit of the applicant stated that he intended proceeding with an action to set aside a transfer and sale on the ground on fraud and forgery, alleged to have been committed in connection with a sale and transfer to the late Samao thirty-four years ago, the applicant being a minor at the time. Certain other affidavits set forth in detail the circumstances connected with the sale and transfer in respect of which fraud was alleged. The affidavit of respondents stated that the sale was a public one. In a replying affidavit, applicant alleged that the sale was privately made. It was further stated on affidavit that respondents were about to leave for Mecca.

De Villiers, C.J.: In this case it would not be right for me to say anything at the present stage that would prejudice either party to this suit. The charges made against the late Samao are very serious. They are charges of fraud, forgery, and duress, and some *prima facie* evidence is given on affidavit in support of these charges. If the charges are true, the plaintiff would not be deprived of his right to relief by reason of thirty years having elapsed since the fraud was committed, provided, of course, his action is brought within a reasonable time after discovery of the fraud. (See *Voet*, 4, 1, 20.) This is not a case in which the rights of *bona fide* purchasers would be affected, for the action is brought against the executors of the very man who is alleged to have committed a fraud on the plaintiff. More than that I do not think I ought to say at the present stage. I think that no prejudice can be done if the defendants are interdicted from parting with the proceeds of this sale. The second sale appears to have been fair, full notice has been given of it, and the price is admitted to be a fair one. It is right, therefore, that transfer should go through, and should not be interdicted; but as to the proceeds of that sale, I think the respondent should be interdicted from parting with them. The costs of this application will be costs in the cause.

The judgment of the Court will be in the following terms: Order granted re-

straining the purchaser of the property in question from paying the proceeds thereof to the respondents, and ordering payment thereof to Mr. G. W. Steytler, in his capacity as secretary of the Colonial Orphan Chamber, who will retain the same, pending further order of Court. Costs of this application to stand over.

WALKER V. WALKER.

Mr. Benjamin moved for leave on behalf of petitioner (the husband) to sue by edictal citation for divorce, on the ground of his wife's adultery. Counsel said that the respondent had given birth to two illegitimate children, and was now supposed to be in England.

Leave granted, personal service to be effected if possible, failing which one publication in the "Daily Telegraph," London, the return day to be November 1.

HYMAN V. HYMAN.

Mr. P. S. T. Jones moved for leave on behalf of the husband to sue by edictal citation for divorce, on the ground of his wife's adultery while living in a house of ill-fame in Buenos Ayres. The defendant, it appeared, belonged to Newark, New Jersey, and the parties were married in America. The plaintiff had been residing in Cape Town at least three years, and carrying on his trade as a carpenter.

Leave was granted, personal service to be effected if possible, failing which publication in a newspaper circulating in Newark, New Jersey; November 30 being fixed as the return day.

Ex parte VAN ROOYEN.

Alteration of surname—Rectification of transfer.

The applicant having changed his name after land had been transferred to him, applied for a rectification of the transfer in the Deeds Office.

Held, *that he was not entitled to the assistance of the Court.*

Mr. C. W. de Villiers moved for an order authorising the amendment of certain deeds of transfer, altering the name of the applicant from David Reiters to David van Rooyen. The petitioner was resident in the native section of Tembuland. It appeared that his father had been a slave in the Cape district, and his name was changed by his master. The applicant had only recently ascertained from his grandfather what his real name was.

De Villiers, C.J.: It would be a very serious precedent if the Court granted this application. At the time when the transfer was passed the applicant's name was Ruyters. He subsequently changed his name to Van Rooyen, and he now asks that the transfer deed be amended accordingly. There appears to be no necessity for granting the application, for if he wishes to deal with the property he has merely to do so under his former name, adding, if necessary, the fact that he is now called by another name

Ex parte METERLEKAMP.

This was an application for leave to transfer certain property. The petition set forth that petitioner was was the sole trustee and only creditor in the insolvent estate of one Van der Walt. Certain land belonging to the insolvent had been twice submitted for sale by public auction, but the highest bid made was £400. Petitioner desired to purchase the property for £420, and asked the authority of the Court to the transfer to himself of the property. A sworn appraiser stated on affidavit that £420 was a fair price. Mr. Benjamin moved.

[De Villiers, C.J.: In what paper was the sale advertised?]

Mr. Benjamin said he had no information on this point.

De Villiers, C.J.: The Court must have better information. A trustee, in seeking the authority of the Court to buy property in an estate, must bring clear proof that every effort had been made to get the very best price. The advertisements of the sale should be produced, so that the Court might be able to see whether they were in a form likely to attract the attention of purchasers. The matter will stand over for further information.

Ex parte REID.

Mr. Bisset moved for leave to transfer certain property. Petitioner was the executor testamentary in the estate of the late Henry Reid. All the children consented.

The application was granted.

Ex parte MULDER.

This was an application for the appointment of a *curator ad litem* to represent the estate of the late Stephanus Fourie. The petition stated that the applicant was desirous of bringing an action against certain parties for declaration of rights, and it was necessary, in order to have the record complete, that the estate of Fourie should be joined as a defendant in the action. The executor in the estate had died. Petitioner suggested the appointment of Mr. Timothy Smith, attorney, Oudtshoorn, as curator *ad litem* for the purposes of the action.

Mr. Burton for applicant.

De Villiers, C.J., said that the matter had better stand over in order to give the Master an opportunity of calling a meeting of the next-of-kin with a view to the appointment of an executor.

The application was ordered to stand over.

ESTATE ANTHONISSEN V. NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA, LIMITED.

This was a motion on behalf of the petitioner, Daniel Brown, the executor dative of the late John Edward Anthonissen, for an order compelling the defendants to pay a certain policy of insurance. It appeared, from the affidavits of the petitioner and others, that the late Mr. Anthonissen formerly resided at Port Elizabeth, and that in November last he removed to Alexandria. He was drowned on the 2nd January this year while bathing at Alexandria. The deceased had been insured with the defendant company for £300, all the necessary premiums had been paid, and the policy was in force when he met with his death, but although diligent search had been made, petitioner was unable to trace the said policy, and he verily believed that it had been lost or mislaid. He had applied to the Port Elizabeth office of the company, but payment of the policy was refused unless an indemnity were given to the company against the claim of any one in legal possession of the said policy. Petitioner had no reason to believe that the said document had been ceded or otherwise dealt with.

On the motion of Mr. Gardiner, a rule was granted calling upon all persons concerned to show cause on the 31st August why respondents should not be authorised and ordered to pay the amount of the policy to the applicant, rule to be published once in the "Government Gazette," and twice in Port Elizabeth newspapers, and served on the agent of the respondents at Port Elizabeth.

Postea (August 31st). The rule was absolute.

THERON V. THERON.

Mr. Burton moved for the appointment of a commission to take the evidence of the petitioner and of the Dutch Reformed minister at Calvinia in an action brought by the petitioner against her husband for the restitution of conjugal rights, failing which a decree of divorce. Petitioner resided at Vlokfontein, about 33 miles from Calvinia, she was poor, no appearance had been entered in the suit for the defence, and it would be convenient if a commission were appointed.

Order granted as prayed, the Resident Magistrate of Calvinia being appointed to take the evidence of the petitioner and of the minister of the Dutch Reformed Church on commission.

Ex parte MURRAY.

This was an application for the appointment of a *curator bonis* to take charge of the estate of Lionel Brough Steary.

The affidavits filed on behalf of petitioner showed that Steary had received sums of money from England, and that there were at present remaining in the hands of Mr. Brady, attorney, certain moneys to which he was entitled. Steary had given way to intemperate habits, was wholly negligent in regard to his presonal habits and appeared unfit to take care of his property. He had been squandering his

money. The petitioner was the Mayor of Swellendam, and he was prepared to act as *curator bonis* pending the appointment of a *curator ad litem*, for the purpose of having Steary declared unfit to manage his own ffairs. During the last three months Steary had nearly lost his sight.

Mr. Benjamin moved.

De Villiers, C.J.: It looks to me to be merely a case of intemperance and prodigality.

A rule was granted calling upon Lionel Brough Steary to show cause on the 20th August why he should not be declared incapable of managing his own affairs, and why John Watson Murray should not be appointed curator of his property, pending a further order of this Court.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE]

WOLFF V. RUDWICK. { 1903. Aug. 4th.

This was an action to recover the sums of 16s., £93 6s. 9d., and £131 10s., in connection with certain work on property in Canterbury-street and at Sea Point, which the defendant undertook to complete.

The declaration shewed that the defendant undertook to do certain work in Canterbury-street and Sea Point for a contract price of £417 8s. The sum of £418 4s. had been paid, and the work was not completed. The 16s. was in respect of an excess on the Canterbury-street, and the non-completion of the work there amounted to £131 10s. £216 19s. 6d. had been paid in respect of the Sea Point property, which was £93 9s. 6d. in excess of what the plaintiff was liable for

Mr. Benjamin for plaintiff. Defendant in default.

Abraham Woolff, plaintiff, identified the contracts that had been entered into with the defendant, and produced his books showing the amounts on each occasion that had been received and initialled by the defendant.

Judgment as prayed.

GARVIE AND CO. V. WRIGHT AND DONALD. { 1903. Aug. 4th. " 5th.

Offer to sell—Acceptance—Option to buy—Consideration.

A promise to keep open an offer to sell for a certain time is not binding in law if no consideration is given for the promise, but it has the effect of an offer to sell, which can be withdrawn at any time before acceptance, and the acceptance of which before withdrawal within a reasonable time concludes a contract of sale.

The acceptance must be upon the same terms as the offer.

On the 24th April the defendants gave the plaintiffs the option of buying their shop until Monday, the 29th of April, at 12 o'clock. No consideration was given by the plaintiffs. The offer was accepted by the plaintiffs before noon on Monday.

Held, *that although the defendants were not bound to keep open the offer till Monday, the contract of sale was concluded upon the acceptance of the offer before its withdrawal upon the conditions upon which the offer had been made.*

This was an action brought to enforce the performance of a certain contract of sale entered into between the plaintiffs and defendants, or £250 damages for failure on the part of the defendants.

The declaration set forth that the defendants carried on the business of the Falcon Ironworks, in Sir Lowry-road. On the 24th April last Walter William Wright and James Garvie agreed that the latter should have the option of purchasing the business for the sum of £400, and a certain quantity of steel for a further sum of £25, and plaintiffs claimed that, by virtue of the agreement, they could exercise their option up to noon on the 27th April, 1903. The

plaintiffs adhering to their right, gave notice of their intention, and tendered payment of £400. Plaintiff claimed (a) that on their tendering £425, the engineers' shop should be delivered up to them; (b) £250 damages; (c) alternative relief; (d) costs of suit.

The plea admitted the option, but stated that no consideration was given for it, and the defendants denied dealing with the firm. Garvie offered £100 down, and £300 per post-dated cheque.

The replication set out that the agreement between Garvie and Wright was on behalf of the respective firms. The post dated cheque was offered in order that the defendants might have a chance of producing the inventory.

Mr. M. de Villiers for the plaintiff; Mr. Searle, K.C. (with him Mr. Russell) for the defendants.

Charles Houston Griffiths, accountant in the Standard Bank, at Woodstock, said that if the firm of Garvie and Co. had drawn a cheque on the 27th April last for £425, it would have been met.

Cross-examined by Mr. Searle: He could not produce the pass-book, and books of account. The cheque would have been met, although the plaintiffs had not sufficient funds in the bank at the time. They had only opened an account with the bank a short time previously.

James Garvie, plaintiff, said that he was partner with Mr. Haggar in an engineering firm in Sir Lowry-road. In consequence of information received from Mr. Bultitude he proceeded to see Mr. Wright on Friday, 24th April. Wright said that he was preparaed to take £400 for the business, and £25 for a quantity of steel. Wright gave witness a written option at that price until Monday at noon. Wright agreed to give thirty days' credit on the quantity of steel. On the following Saturday witness and Mr. Haggar went to see Mr. Wright about the completion of the contract on Monday. Mr. Wright seemed pleased that the matter was being settled up. At that time Mr. Wright was out on bail on a criminal charge brought against him by the Tramway Company. Satisfactory arrangements were made at the bank to meet the cheque on Monday morning. When the plaintiffs saw Wright on Monday he said that his partner wanted £425 down. The inventory was not forthcoming, and witness offered £100 down to bind the bargain, and £300 on production of the inventory. Wright refused the offer, and witness further offered £100 down and a post-dated cheque for £325, but Wright said he would rather see Donald. Donald said that his brother had the inventory upcountry, and then asked for £450, which witness refused. Donald asked time to see his father, and then witness left the shop, and consulted his solicitors. He would rather have taken the business at £450 than have his damages of £250 awarded.

Cross-examined by Mr. Searle: He had negotiations about the premises in March, when the price asked for was £625. It was untrue that witness drew out of an agreement at that time. It was understood at the time that it was to be a cash transaction. He would not be sure that the first mention of credit for the steel was made on the Saturday. Mr. Wright did not say that if the cheque was cashed at the bank he would be quite satisfied. The cheque would have been cashed at the bank, although there was not sufficient cash there to his credit.

Re-examined by Mr. De Villiers: Eventually he would have accepted the place without an inventory.

Thomas Henry Brown Gibson, manager of the Standard Bank, at Woodstock, said that he remembered the plaintiffs calling at the bank on the morning of the 27th April between ten and eleven o'clock. The defendant's place was about ten minutes distance. Had a cheque been presented for £425 it would have been met.

Cross-examined by Mr. Searle: He had sufficient guarantee for the overdraft. Garvie and Haggar opened an account that morning.

James William Haggar, partner in the plaintiff firm, said that he found from the books of the defendant that he was barely turning over £75 a month, and Wright attributed it to the falling off from the Tramway Company. Witness was present when Mr. Garvie told Mr. Wright that the contract would be fulfilled on Monday for £425. Wright said that he was glad it was settled, and it was arranged that Donald should be present on Monday morning. Wright promised to have the inventory on Monday morning, and when witness and Garvie kept the appointment Wright said that Donald wanted it to be a cash transaction

and no credit was to be given for the steel. A cheque was offered to Donald for £425, but it was refused on the ground that it was too cheap, and Donald, after speaking of giving the business to a brother in Australia, asked for £450, which was refused. Donald then said he would like to see his father about it, and subsequently the matter was put into the lawyer's hands. If any cheque had been presented at the bank it would have been cashed.

Cross-examined by Mr. Searle: He went into partnership with Mr. Garvie on the Monday morning they visited Wright. On the previous Saturday Mr. Garvie raised the question of having credit on the purchase of the steel. There was no mention of paying by instalments on the Saturday, and Mrs. Wright was not present at the time the affairs were being discussed. Mr. Garvie said on the Monday that he would give £100 down, and the remainder on production of the inventory, and subsequently he offered a cheque for £425, which Wright could not accept without consulting Mr. Donald. To his knowledge there was no mention of a post-dated cheque. Witness could not have made any agreement on the Friday if he only went into partnership on the following Monday. Their turnover was £700 in three months, on which they should have made about 20 instead of 5 per cent.

Re-examined by Mr. M. de Villiers: He went to Mr. Wright's on the Saturday because he had decided to go into partnership. Wright was well aware that they were partners. The money would have been at the bank on the production of the inventory.

For the defence, Mr. Searle called Walter William Wright, who stated that he had carried on business with Donald for about eighteen months. Witness conducted the negotiations with Garvie. Witness considered the previous transaction of £625 as settled, and the plaintiff failed to keep the contract. Garvie knew exactly what was in the shop. Witness gave Garvie the option before Bultitude, and made it clear that it was for cash. On the following Saturday Garvie offered £100 down in cash, and post-dated cheque for the following Tuesday. There was no mention of an inventory. Nothing was mentioned about the inventory at the time he signed the option. At a quarter to twelve on Monday, Haggar and Garvie came to witness's shop. Garvie offered £100 on account, a post-dated cheque for £300, and terms for the steel. Witness consulted Donald, and it was then past noon. Witness said he would accept a cheque for £425 if they would assure him that it would be met. Donald refused to accept anything but cash. The following Tuesday a boy from the plaintiff's attorney brought a cheque for £425, which was refused.

Crossexamined by Mr. M. de Villiers: When Garvie came on Monday morning he said that he had come to exercise his option. Witness was prepared to go to the bank with Garvie. Next day the cheque for £425 was tendered through the plaintiff's attorneys unconditionally. He was anxious to get money to defend the criminal proceedings against him. Mr. Donald said that he would accept £450.

Re-examined by Mr. Searle: There was more business when Garvie entered into the agreement on the first occasion.

David Donald, partner in the defendant firm, said that he first saw the plaintiffs in connection with the sale on Monday, 27th April. He saw Garvie and Haggar about twenty minutes past twelve. Witness refused to give any terms, and held that it must be cash. Garvie then made the offer of a post-dated cheque for the full amount. They never produced any cheque. As far as he knew, nothing was said about an inventory at all.

Thos. Hawkins said that last April he was a collector for Mr. Wright. On April 27 he remembered Mr. Garvie offering two post-dated cheques, and Mr. Wright refused, saying that it must be a ready-money transaction.

Martha Louisa Wright, wife of the defendant, said that she remembered Mr. Garvie asking her husband if he would accept £100 on Monday, the balance on Tuesday, and terms for the steel. Mr. Wright said that he would have to consult Mr. Donald.

Counsel were then heard in argument on the facts.

Cur. Adv. Vult.

Postea (August 5):

Maasdorp, J.. The plaintiffs sue the defendants for the delivery of the possession of an engineer's shop, including the goodwill, tools, machinery belonging to the same, and a quantity

of steel, tendering to pay them the sum of £425, being the purchase price thereof, or in case the defendants fail to make delivery, to claim £250 as damages suffered by them through breach of contract. It appears that on the 24th of April, 1903, the defendants agreed to give to Garvie "the option of buying their shop until Monday, 27th, at 12 o'clock, at a price of £400, and steel to be taken over by him at £25." The plaintiffs allege that on the 25th of April Haggar entered into partnership with Garvie, and they together, under the firm of Garvie and Co., exercised the option, and bought the property. The defendants in their plea allege that they contracted with Garvie, and deny that they in any manner dealt with the plaintiffs as Garvie and Co. It may be well to dispose of that point first. It appears from the evidence that after Garvie had secured the option, he and Haggar entered into partnership on the 25th of April, and went together on that day and on the 27th to transact the further business with the defendants, and they say they were recognised as being jointly interested in the concern. I think this point is established in the plaintiffs' favour by their evidence, and by the letter of the defendants of the 28th of April to the plaintiffs' attorneys, in which they write: "In reply to yours, re Messrs. Garvie and Co., for the option of engineer's shop at £425 cash,—The said Messrs. Garvie and Co. did not offer us cash, but a post-dated cheque for £400, and wanted terms for the £25 for steel, which we decline to accept." The next point raised by the defendants is that no consideration was given for the option. Upon that point, I may say I am of opinion that, in the absence of consideration, the defendants were not bound to keep the option open until noon on Monday, but that it still amounted to an offer to sell, the acceptance of which within a reasonable time and before it was withdrawn by the defendants would conclude a contract of sale. Upon the question of reasonable time, I think we may take it that, within the contemplation of the defendants themselves, as expressed in the agreement, any time up to noon on Monday would have been reasonable. Then the question remains, whether the plaintiffs closed with the offer before it was withdrawn. The plaintiffs say they went to see Wright on Saturday, and Garvie told him they had decided to buy, but asked for three months' credit for the £25 for the steel, and that Wright consented to that. Wright told them that he had seen the landlord of the shop, and the lease was all right. They requested Wright to have the inventory of the articles in the shop and the contract ready by Monday. It was proved that on Monday they made arrangements at the Standard Bank for a credit in their favour, to enable them to draw on the bank for £425, and immediately after they went to see Wright. They told him they accepted his offer to sell, and upon his informing them that the inventory was in the possession of Donald, Garvie offered to pay £100 in cash, and the remaining £325 upon receipt of the inventory. Wright objected to this, and said Donald wanted the whole sum of £425 paid in cash. Thereupon Garvie offered to give a cheque for the whole amount, but Wright said they should go and see Donald. This they did, and after some talk Donald refused to sell, and said he would take £450 for he property. Garvie then offered him a cheque for £425, and upon his refusing to take it, the plaintiffs went immediately to consult their attorneys. The plaintiffs say the interviews with the defendants took place before noon on Monday. The defendants, on the other hand, say that at these interviews the plaintiffs, instead of closing with their offer, which was to sell the property for £425 cash, offered them £100 cash, and the balance to be paid by a post-dated cheque. If that were so it would not have amounted to an acceptance of the option, and the defendants would have been justified in crying off the transaction. Wright says that at the interview with Donald he was still prepared to take £425 cash, and offered to take a cheque if it would be cashed at the bank, and that Donald also said he would take cash. Nothing was then said about its being past twelve o'clock, and too late to exercise the option. The defendants say the plaintiffs left without offering either a cheque or cash. Now it is quite certain that the plaintiffs were anxious to buy the property, for they went on the same afternoon to their attorneys, who wrote insisting that the contract should be carried out, and it was also quite certain that

after having made the arrangements with the bank they were in a position to pay cash. There was, therefore, no conceivable reason why they should have taken up the attitude ascribed to them by the defendants. I think the true state of the case is correctly set forth in the letter written to the defendants by the attorneys of the plaintiffs on the 27th of April, shortly after the above-mentioned interview, where they write: "The option expired at noon to-day, and our clients instructed us to state that at 11.30 to-day they called at your premises, gave notice of their intention of exercising the said option ,and tendered you their cheque for £425 in payment, which you for some reason or other unknown to our clients declined to accept." If this cheque was tendered it must, under the circumstances, be taken as a good tender of the money, as no objection was taken to the form of the tender, and Wright said he would have taken a cheque if it would be cashed at the bank. Upon this evidence I come to the conclusion that the plaintiffs not only accepted the offer to sell before noon on Monday, but tendered the price, and in so doing went further than it was necessary for them to go to conclude the sale. The plaintiffs, being prepared to pay the purchase price, are now entitled to delivery of the property, or to damages. It would be difficult in this case to decree specific performance, especially when we remember that there may be difficulty about the lease. The landlord was represented by Wright in April to have consented to the lease passing to the plaintiffs, but no order of the Court would affect him now. Under the circumstances the plaintiffs are entitled to damages for breach of contract. The evidence as to damages is of a very speculative character, but there is some proof that the plaintiffs had a fair prospect of making from £30 to £40 a month out of the business, and defendants admit that they sometimes made as much as £50 a month, but they say that their profits varied. The plaintiffs have hitherto failed to secure other suitable premises, but then they have made no great effort to get them. I think we should allow the plaintiffs damages for a period of two months, in which they might reasonably have been expected to make other suitable arrangements for carrying on their engineering business, and that the sum of £70 would be a fair award as damages.

Judgment is given for the plaintiff for £70. with costs of suit.

Kotzé, J., concurred.

[Plaintiffs' Attorneys: Michau and De Villiers; Defendant's Attorneys: Friedlander and Du Toit.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZÉ.]

KROOMER v. LOBASCHER. { 1902. Aug. 5th.

Malicious prosecution—False imprisonment — Malice — Reasonable and probable cause—Setting the law in motion.

The plaintiff went in the absence of defendant into a room occupied by him and a woman who lived with him as housekeeper. He induced the woman to leave the place, and according to his own admission assisted her to carry articles out of the room without enquiring whether they belonged to the defendant. Amongst other things he carried off an accordion belonging to the defendant. The woman informed the defendant that plaintiff took the accordion after he was told it belonged to the defendant.

Held, *in an action for malicious prosecution and false imprisonment that the defendant, in charging the plaintiff with theft of the accordion, had set the law in motion, and was responsible for the prosecution. That under the circumstances he had not acted with malice or without reasonable and probable cause. That he was not liable for false imprisonment,*

because the police, upon receiving the charge of theft, arrested and imprisoned the plaintiff instead of taking out a summons for his appearance.

This was an action brought to recover £500 damages for false imprisonment and malicious prosecution.

The declaration set out that the plaintiff was a wholesale baker, carrying on business at Plumstead, and the defendant a furniture dealer in Wynberg. On the 3rd April the defendant had the plaintiff arrested and falsely imprisoned on a charge of theft of the defendant's accordion. The plaintiff was imprisoned until the next day, when the charge was withdrawn before the Resident Magistrate. By reason of the acts of the defendant, plaintiff had suffered damages in his character, and he claimed £500 damages alternative relief, and costs of suit.

The plea admitted the formal allegations, but set out that on the 28th March, 1903, the plaintiff wrongfully and unlawfully took and removed from Simon's Town an accordion, the property of the defendant, and two rings, the property of a nurse. The plaintiff caused the defendant to be arrested on a charge of assault, and the latter denied that he caused the plaintiff to be imprisoned. The plaintiff was not imprisoned for a day, as he was liberated on bail shortly after he was arrested.

The replication was general.

Mr. McGregor for plaintiff. Mr. Benjamin for defendant.

Hessel Kroomer, plaintiff, said that he was a wholesale baker, carrying on business at Plumstead. Helena Kinser had been living with him until early in March. Witness read a letter from a Mr. Robert Smith, law agent, Wynberg, dated the 20th March, warning him against trespassing on Lobascher's property, and stating that if he caused any further annoyance, legal proceedings would be instituted. Helena Kinser went to Simon's Town, and on the 23rd March witness went and asked her to come back. She agreed to do so, and they returned in the train. Kinser brought some parcels. In the train, witness gave the accordion to the stationmaster at Plumstead. At Wynberg Kinser went into Mr. Lobascher's place, and did not come out. Lobascher had a room at Simon's Town, and went out there every night. When they returned to Wynberg, Kinser told witness to wait until she returned from Lobascher, but she remained there. Witness afterwards called the same evening for the accordion, and obtained it. On the 1st April witness received a letter from Mr. Bailey, attorney for the defendant, demanding payment of £6 for the accordion. Witness gave this to Mr. Duncan, his law agent. Before he saw Mr. Duncan, he saw Helena Kinser. She handed over to him two rings, which he took with him. In reply to the letter of the 1st April, Mr. Duncan replied repudiating any liability. On the 3rd April Lobascher assaulted him in the public street, and called him a thief, accusing him of stealing an accordion and some rings. Witness called for the police, and the constable told them to come to the station, the constable walking alongside. No policeman accompanied Lobascher. At the police station Lobascher said nothing about stealing rings but charged him with the theft of his accordion. Witness said he knew nothing about Lobascher's accordion. Lobascher mentioned Kinser, and the latter was sent for by the police. There was a conversation between Lobascher, Kinser, and the police, which witness did not hear. Lobascher again charged him with the theft of the accordion, and the police informed witness that he was in custody on a charge of stealing Lobascher's accordion. Witness said he knew nothing about it. He was locked up until next morning. Witness had to pay his legal adviser to defend him. He lost £22 to £25 through not being able to bake that night, and he also lost customers. Altogether he had lost quite £100.

Cross-examined by Mr. Benjamin: It was not a fact that he hired a room from Miss Kinser's mother. Witness hired the house from a Chinaman. Witness told his attorney that he got the accordion from the girl. He could not say whether the defendant or the police sent for the girl. Witness did not snatch the rings off the girl's finger. When Lobascher came up to assault him witness blew a whistle, and brought the police. Both of them went to the police station, where

the defendant charged witness with theft. The accordion was returned to Lobascher. Witness helped the girl to take the parcels from the defendant's rooms at Simon's Town. He could not sell stale bread, and all his baking for Saturday was disposed of at two shillings a bag.

Re-examined by Mr. McGregor: He lost custom through his failure to supply bread on that Saturday morning. The accordion was deposited with the station-master in order to bring the girl back.

[Kotzé, J.: According to your evidence you were not the attraction, but the accordion.]

David Pew, formerly acting station-master at Plumstead, said he saw the plaintiff one day coming from Simon's Town. The plaintiff was accompanied by a lady. Witness received from him an accordion. It was arranged that he should keep the instrument till plaintiff called. He did not know who took it away, but it was gone the following day. The lady appeared to be satisfied with what took place.

John Blake, cab proprietor and driver, at Wynberg, spoke to a certain day in April when the defendant came to the plaintiff in the street at Wynberg. He saw defendant go to the plaintiff's cart, and heard him say, "You thief, you stole my two rings," and the defendant wanted to pull him off the cart. One of the parties called a policeman, and they went to the police station. He heard the defendant accuse the plaintiff of having his accordion. Witness was sent to Kroomer's house for the instrument. The police searched Kroomer, and locked him up. Witness offered bail, but it was refused.

Cross-examined by Mr. Benjamin: He did not hear anything that took place between the parties. He did not hear Kroomer charge Lobascher with assaulting him.

J. Chiet, partner of the plaintiff, said he remembered hearing in April last that his partner was locked up. He went and asked the police what the bail was, but they declined to accept bail. He handed over the accordion.

Robert Duncan, law agent, Wynberg, said he was consulted by plaintiff as to a letter he had received from Mr. Brady on behalf of defendant. He afterwards went to the court in April, and saw his client, who was placed in the dock on a charge of theft of an accordion. Witness then said he appeared for the prisoner. Mr. Smith, a law agent, practising at Wynberg, said he wished to withdraw the charge on condition that the prisoner do not trespass on his premises. Mr. Williams, the Magistrate, asked Mr. Smith who he appeared for. Mr. Smith replied that he appeared to assist in the prosecution. The Magistrate said he could not recognise such assistance, and he turned to the Inspector of Police, and asked him whether he intended to go on with the case. The inspector said that he did not, as the complainant withdrew, and the prisoner was discharged.

Cross-examined by Mr. Benjamin: Witness received the rings, one of which was returned.

For the defence, Mr. Benjamin called the defendant,

Leopold Lobascher, who stated that he was an auctioneer, carrying on business in Wynberg. Helena Kinser was attending to him in March, when he was laid up at Simon's Town with malarial fever. In March the girl came from Simon's Town to Wynberg, and reported to witness that the plaintiff was insisting on her leaving the defendant. She said that the plaintiff took the accordion away from the defendant's room. When witness accosted the plaintiff about the accordion, he merely put his foot on the step of the car, and then the defendant blew a whistle and attracted a crowd. They went up to the police-station, and the plaintiff charged witness with assault.

Cross-examined by Mr. McGregor: He was surprised when he heard that Miss Kinser had lived with the plaintiff. Kroomer used to ring the bell for hours while witness was laid up with malarial fever. After that witness got his law agent to write the letter about trespassing. He had never seen the plaintiff's carts until this incident. Witness was not annoyed at the plaintiff trying to see Miss Kinser. Witness was told by Miss Kinser that the plaintiff took the accordion from the defendant's room at Simon's Town. On being told by Miss Kinser that there would be trouble, the plaintiff said that it was all right, and he could pay any expense. Witness was excited when he accosted the plaintiff, but he did not call him a thief. Miss Kinser told witness that the plaintiff had forced the rings from her finger. The policeman said that if witness would not go up to

the police-station, he would take him there. He never mentioned a word about the accordion and the rings until they got to the police-station. Sergeant Parks asked him if he was the owner of the accordion, and then asked him to sign a paper. He did not remember whether he charged Kroomer or not, but he told the sergeant that the plaintiff had stolen or taken the accordion from his room. He said nothing about the rings until he got up to the police-station, where he told Sergeant Parks about the accordion also.

Helena Kinser said that she knew the plaintiff, who had a room in her mother's house. The plaintiff never paid the rent of the house. From February she acted as housekeeper to the defendant. She remembered the plaintiff at Simon's Town asking her to come back to Wynberg. From February to March the plaintiff had boarded with witness's mother. At Simon's Town the plaintiff took the accordion from the defendant's room. The plaintiff forced the two rings from her finger, and said he would not return them, except she returned to him. Witness told the sergeant at the police-station what the plaintiff did.

Cross-examined by Mr. McGregor: The plaintiff was boarding at her mother's house during February and March. At Simon's Town witness followed the plaintiff to the station in order to get the accordion. The plaintiff paid for her ticket. When the plaintiff took the rings, witness asked the defendant to get the rings back for her. She asked the defendant to complain to the police that the plaintiff had taken the rings.

Mr. McGregor (for the plaintiff): This is an action for false imprisonment and malicious prosecution. In the case of malicious prosecution it is necessary to prove malice and absence of reasonable and probable cause. Not so in the case of false imprisonment: that is really a species of assault.

[Maasdorp, J.: You contend that the prosecution was carried on by the defendant, and that it is for him to prove the absence of malice, and that he had reasonable and probable cause for prosecuting?]

If he had not reasonable and probable cause, the Court will presume malice; but here we have direct evidence of malice. We have only to consider in what relation the woman stood to the two men. After she had left the plaintiff and gone to live with the defendant the plaintiff still wanted her to talk to him, and wanted her to return. The defendant's evidence is not such as the Court will regard with favour. It is very improbable that the defendant knew nothing about the plaintiff and the previous relations of the woman with him, or that he did not know that the defendant had a bakery at Plumstead. Defendant's attorneys' letter to plaintiff is a very ordinary letter, and simply asks him to return certain articles, threatening legal proceedings should he fail to do so. Defendant subsequently assaults plaintiff in the public street, and it is very important to note that the very day before this assault Eleanor had spoken to defendant about plaintiff having taken her ring, and had suggested that plaintiff should communicate with the police. Defendant's story is that plaintiff attempted to drag him off his horse, and then defendant shouted for the police, and complained of the assault. The plaintiff gave his evidence very fairly, and his is the more probable story. Defendant, however, corroborates plaintiff in all important particulars. His memory, however, seems to be very defective. He does not even remember whether he gave plaintiff in charge or not. But surely if he accused the plaintiff to the police of having stolen his property, that was equivalent to giving him in charge. He waited at the police-station to see plaintiff locked up, and appeared in Court the next morning to give evidence for the prosecution. His actions show that he did not believe that plaintiff intended to steal the accordion, for he was willing to withdraw the charge on certain conditions. As to the presumption regarding reasonable and probable cause, see *Rademeyer* v. *Van der Merwe* (12, S.C.R., 450). As to damages, we have evidence that the plaintiff lost heavily by being locked up, and by being thus unable to attend to his business. He also lost customers by being unable to supply them on the Saturday. We do not ask for vindictive damages, but I submit that we are entitled to substantial damages.

[Maasdorp, J.: If the Court holds that the prosecutor was justified in prosecuting, how can he be guilty of false imprisonment?]

He is if he acted unlawfully; and he did so, as he ought to have taken out a summons.

[Kotzé, J.: The whole question is, whether the defendant had reasonable and probable cause for his action.]

I submit not. He should have followed the ordinary course of procedure by taking out a summons.

[Maasdorp, J.: Is it always necessary to take out a summons?]

In a case like this it certainly is. See *Rudolmeyer* v. *Van der Merwe* (12, S.C.R., 450), and cases there referred to. If a man summarily arrests another on a charge of theft he does so at his own risk.

[Maasdorp, J.: What risk does he run if he has reasonable and probable cause to believe the accused guilty?]

The risk that his suspicions may prove to have been unfounded, and then he will be liable in an action for false imprisonment. See *Encyclopædia of the Laws of England* (Vol. 5, p. 312) as to the burden of proof in malicious prosecution and in false imprisonment. In the latter it is for the defendant to prove the absence of malice; in the former it is for the plaintiff to prove malice.

[Maasdorp, J.: Usually false imprisonment has nothing to do with malice.]

I would compare such a charge with one of libel; both are *injuriæ*, and in both cases if a man pleads privilege he must disprove malice.

[Kotzé, J.: If the defendant acted lawfully your whole case falls away?]

Yes, that is so, but that only brings me back to the question, was he acting legally? My point is that my client was acquitted by the Magistrate, and is therefore an innocent man. What right had defendant to lock up an innocent man? As to the illegality of defendant's action, see *Warner* v. *Riddiford* (4 C.B.N.S., 180).

Mr. Benjamin (for defendant) was not called upon.

Maasdorp, J.: The plaintiff in this case claims damages from the defendant in this action for malicious prosecution and false imprisonment. The first point in issue between the parties is raised by the denial of the defendant that he instituted the prosecution, or that he is responsible for the criminal proceedings that were taken. Before going into the evidence on that point, I may refer to the law that bears upon the subject. Clerk in his work on torts says that a person who simply makes a candid statement of facts to a Magistrate without formulating any charge is not responsible for the consequences or for any step the Magistrate may deem fit to take. But if an actual charge is made, a prosecution is thereby instituted. In this case I am of opinion upon the evidence that the defendant did not merely give a general statement of facts which were within his knowledge, and leave it to the police to draw their own conclusion as to whether a crime had been committed or not, but he made a definite charge in saying that the plaintiff had stolen his accordian. Upon making that charge he set the law in motion because he must have known that the police would immediately take action, and that action would result in a prosecution, but I go further, and say that it was his intention that the prosecution should proceed, because we find that he was aware steps were taken in the case, and upon the day that the trial was to come on he was there, and instructed his agent to withdraw the prosecution on certain conditions. If he was under the impression that it was within his power to withdraw the prosecution it must have been on the ground that he was well aware that he had instituted that prosecution. Upon that evidence I come to the conclusion that the defendant set the law in motion, and he is responsible for the prosecution. Upon that the plaintiff grounds an action for malicious prosecution and false imprisonment. It is necessary for the plaintiff to prove in respect of his claim upon the ground of malicious prosecution that the defendant acted maliciously, and that he acted without reasonable and probable cause. Having all the facts now before us, and without too critically going into the question as to whether the burden of proof lay upon the plaintiff or the defendant, we are now able to decide whether the defendant acted with or without reasonable and probable cause. If we take the facts as narrated to us by the plaintiff himself, it is certainly a question whether, upon that only, we should not be justified in coming to the conclusion that the defendant did not act without reasonable and probable cause, but that he had reasonable and probable cause for his action. The plaintiff told us he went to a room occupied by the defendant

at Simon's Town, where he found a person he was living with with the defendant, and who, we may take it, was in the service of the defendant. He proceeds to assist her to carry away a number of articles out of that room, and he has told us that he carried away the articles without knowing whether they belonged to the defendant or not, and, as it so happened, among the articles was an accordion belonging to the defendant. Upon these facts alone, if this had come to the knowledge of the defendant, I am not sure that the defendant would not have been justified in coming to the conclusion that this man had clandestinely appropriated his property. But the facts rather came to the defendant's knowledge in another form. The complaint was made by this girl Kinser, who was in his room at Simon's Town, that the plaintiff had been to the place, and had, against her will, taken the accordion, which she had told him at the time belonged to the defendant. That certainly increases the suspicious nature of the action of the plaintiff. The defendant, thereupon, having been informed that his property had been taken away, instructs his attorney to claim £6 for the accordion, and the answer is sent by the defendant's attorney, in which he says: "I am instructed by the defendant (that is the plaintiff in the present case) to deny any liability." That is another circumstance which doubles the suspicion, because not only was the property carried off, but there is a denial of any liability in the matter. That would justify the owner in concluding that the accordion was unlawfully appropriated by the person making that denial. Under all the circumstances of this case, I think, considering the relationship that existed between the plaintiff and the defendant, that the defendant had reasonable and probable cause for coming to the conclusion that the plaintiff had unlawfully removed his property, and under circumstances that would constitute a theft. Now, when it is once decided that a person instituting a prosecution had reasonable and probable cause for taking the steps which he did take, then whether he acted maliciously would in no way affect the case. I would, nevertheless, refer to this question of malice for the purpose of ascertaining if it throws any light on the rest of the case. It has been proved that the plaintiff was an utter stranger to the defendant. He did not know of his residence; he did not know of his business, and he had never seen him before. This girl, who seems to have been on familiar terms with the plaintiff, and afterwards went to the defendant, says that the defendant was not at all acquainted with the plaintiff, and that she never told him of the relationship between them. I am quite prepared to believe that, under the circumstances the girl on ceasing her relationship with the plaintiff and going to live with the defendant would conceal the intimate terms she had been on with the former. I am satisfied there could not have been any active malice on the part of the defendant against an utter stranger. When the case closed I was satisfied that as no malice had been proved, and that as the defendant had reasonable and probable cause for the action, it was not necessary to call upon counsel for the defendant. Thereupon, a further question was raised by Mr. McGregor, and that was to the effect that in respect of the claim for false imprisonment, certain other considerations arose affecting the decision of that question; and he bases his attitude on the contention that even if a charge of theft could have been laid against the plaintiff in this case, that he should not have been arrested, and even if a prosecution was justifiable, it should have been commenced by summons, and not by arrest. Well, he has cited no law which makes it compulsory for persons to proceed by way of summons. Under all the circumstances, I think the police acted in the ordinary course, and they acted in a manner which was justifiable by law. The defendant did not instruct them what course to take, but, having laid the charge of theft, they took the usual step, and arrested the plaintiff, and the charge being justifiable under the circumstances, the arrest is also justifiable, and the question of false imprisonment falls to the ground. I am of opinion that there should be judgment for the defendant, with costs.

Kotzé, J., concurred.

[Plaintiff's Attorneys: Michau and De Villiers; Defendant's Attorney: C. Brady.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.].

PROVISIONAL ROLL.

LEE, SON AND CO. V. HEDDLE BROS. 1903. Aug. 6th.

Mr. Buchanan moved for judgment on certain bills of exchange accepted by the defendants. A consent paper had been filed by the defendants agreeing to judgment.

Judgment in terms of consent.

JAGGER AND CO. V. JACKSON AND LEVITT (trading as Empire Furnishing Co.).

Mr. Upington moved for the final adjudication of the defendants' estate.

Order granted as prayed.

FISK V. COLLARD.

Mr. Van Zyl moved for provisional sentence for £65 sterling on a mortgage bond, due by reason of the non-payment of interest, with interest at the rate of 6 per cent. from the 1st January, 1903; also for £50 on a mortgage bond, due for a similar reason, and also costs of suit.

Order granted.

WAKELIN AND ANOTHER V. FROST.

Mr. Buchanan moved for judgment for £51 4s., due from the defendant by virtue of certain conditions of sale in the purchase of certain land at Hout's Bay at public auction by the defendant from the plaintiff, with interest at 6 per cent. from the 11th December, 1902, and costs of suit.

Order granted.

BRUCE V. SALODIEN.

Mr. Buchanan moved for provisional sentence for £1,400 upon a mortgage bond, together with interest at the rate of 6 per cent. from the 1st January, 1903, and also for the land specially hypothecated to be declared executable.

Mr. Alexander, for the defendant, said he had only just been instructed, and the affidavits had not yet been prepared. He was instructed to point out that there was nothing in the summons to allege why the bond had become due, and, again, notice could not be given of the bond within twelve months of August, 1902.

[De Villiers, C.J.: The summons says by reason of the non-payment of interest.]

There is nothing in our summons to show that. I do not know what the defence is precisely, but I understand that the defendant said that he had handed over the interest to an agent to be paid to the plaintiff.

De Villiers, C.J.: You should state what your defence is; provisional sentence will be granted, with stay of execution for a week.

SMIDT V. SMILES.

Mr. Alexander moved for provisional sentence for £250 on a promissory note, with interest from the 1st January, 1903, and costs of suit.

Order granted.

ESTATE SPANIER V. LE SUEUR.

Mr. Upington moved for a decree of civil imprisonment against the defendant upon an unsatisfied judgment of this Court, under which £160 11s. 11d. was due. It appeared that the defendant was a Civil Servant at Graaff-Reinet, that he had offered to pay £5 a month, and that he had stated that his salary was reduced during the operation of martial law at Graaff-Reinet. Counsel suggested that the instalments should be fixed at £10 a month.

A decree of civil imprisonment was granted, to be suspended if the defendant paid £5 a month until the capital and interest were discharged, the first payment to be made on the 1st September.

FRANK V. BLACK.

Mr. M. Bisset moved for provisional sentence for £231 14s. 9d., upon a promissory note, together with interest from the 14th May, 1903, and costs; also for provisional sentence for £98 on a cheque signed by the defendant in favour of the plaintiff, with interest from the 22nd July, 1903, and costs.

Order granted.

LUYT V. HOUGH. { 1903. Aug. 6th.

Consideration—Promise to extend time of payment—Defence.

The defendant, being indebted to the plaintiff in the sum of £225, offered to pay £100 in cash and to give a promissory note for the balance, which offer the plaintiff accepted. Thereafter the defendant tendered £100 in cash and a promissory note made by himself, but the plaintiff refused the tender and sued the defendant for provisional sentence. The plaintiff held no security for the original debt.

Held, *that as the tender was in terms of a definite agreement between the parties, the plaintiff was not entitled to provisional sentence.*

Mr. M. Bisset moved for provisional sentence on a good-for for £25, given by the defendant, J. P. Hough, of Ceres, and payable on demand, interest to be at the rate of 6 per cent. The summons also claimed a sum of £200 5s. 9d. for goods sold and delivered, but (said counsel) he was informed that that matter would form the subject of a subsequent action.

Mr. Upington, for the defendant, said that on the 30th June the local attorney of the defendant wrote to the plaintiff's attorney stating that he would be prepared to pay him £100 on the 31st prox., and give him a promissory note for the balance, payable on the 20th December. Correspondence read by counsel showed that the plaintiff raised some objection to this course, as defendant did not propose to have this promissory note backed by independent security.

De Villiers, C.J.: It seems to me reasonably clear that the demand made on the 26th June on behalf of the plaintiff for £225 5s. 9d. includes the good-for of £25 which is now sued for, and the defence raised is that in respect of that claim of £225 5s. 9d. there was a clear agreement between the parties to give the defendant further time for payment upon certain terms. The defendant's attorney, on receipt of the letter, writes as follows: "Mr. J. P. Hough has instructed me to acknowledge receipt of your letter of the 26th, and in reply thereto to state that he will be prepared to pay you £100 on the 31st prox., and to give you a promissory note for the balance payable on the 20th December, 1903. Kindly acknowledge receipt of this and reply." The reply stated that the plaintiff was prepared to accept this offer. Here, therefore, there is a clear agreement to accept a deferred payment, and the only question is whether the promissory note here clearly means a secured promissory note, a promissory note with the name of an endorser, or the promissory note of the defendant himself. Clearly it can only mean the defendant himself. If it had been intended that there should be security it would have been stated. There was no surety for the good-for, at all events it was without any endorser, and if the parties had intended that this promissory note which was to be given should be a promissory note with security, or with an endorser, they would have said so. There was no consideration for the promise to extend the time made, and on the principle laid down in *Malan* v. *Secretan* (Foord 94) the Court should not render any assistance to the plaintiff in receiving judgment for a debt the payment of which he has definitely pronounced to defer. The defendant has tendered the part payment which under the agreement he has promised to make, and provisional sentence must be refused, with costs.

[Plaintiff's Attorneys: Faure and Zietsman; Defendant's Attorneys: Moore and Son.]

SPENGLER V. FIELD.

Mr. De Waal applied for provisional sentence for £51,356 on two mortgage bonds, and for property specially hypothecated to be declared executable.

Granted.

ARDERNE AND CO. V. DU TOIT.

Mr. Bisset moved for provisional sentence on a promissory note for £152 17s. 4d.

Owing to a defect in service, the matter was ordered to stand over until the 9th August.

Postea (August 13th): Judgment was granted as prayed.

MACLEOD V. CONRADIE.

Mr. Van Zyl moved for provisional sentence for £120, and for property specially hypothecated to be declared executable.

Granted.

LITMAN, LANDSBERG AND CO. V. BLOMSON.

Mr. Alexander moved for provisional sentence on a cheque signed by defendant in favour of plaintiffs for £36 11s. 4d.

Granted.

ILLIQUID ROLL.

WHITE BROS. V. KELYNACK. { 1903. Aug. 6th.

Mr. Alexander moved under Rule 329d for judgment for £154 8s. 11d., money lent and goods sold and delivered.

Granted.

VAN RYN WINE AND SPIRIT CO. V. BLOMSON.

Mr. Buchanan moved for judgment under Rule 329d for £24 10s. 9d., balance of price of goods sold and delivered.

Granted.

MONS V. LE ROUS.

Mr. Buchanan moved for judgment under Rule 319, in default of plea, for £790 13s., balance of purchase price of certain sheep sold and delivered.

Granted.

BANK OF AFRICA V. BLOMSON.

Mr. Bisset moved for judgment for interest on an overdraft and costs. The principal amount had been paid.

Granted.

CASTLE WINE AND BRANDY CO. V. BLOMSON.

Mr. Bisset moved for judgment under rule 329d for £21 4s. 8d., for goods sold and delivered.

Granted.

REHABILITATIONS.

Mr. Buchanan moved for the rehabilitation of James Edward Taylor.

Granted.

Mr. Alexander moved for the rehabilitation of Christopher Adrian (or Alwyn) Potgieter.

Granted.

GENERAL MOTIONS.

Ex parte KEMP. { 1903. Aug. 6th.

Mr. Bisset moved for a rule cancelling a certain mortgage bond. The bond was passed in favour of one John Fuller, who subsequently became insolvent, having previously ceded the bond to the firm of Enfeller and Otto, 19 years ago. No interest had been claimed on the bond, and the whereabouts of either member of the firm of Enfeller and Otto were not known. The bond was informally ceded by Fuller, the document not being registered. Fuller renounced interest in the bond, which was now in the possession of the executor of the estate of the late Jacob Francois Cloete, who was one of the subsequent purchasers of the property.

A rule was granted calling on all persons interested to show cause on the 27th August why the bond should not be cancelled as prayed, the rule to be published once in a Cape Town Dutch newspaper and in a Cape Town English newspaper, and to be served on the executor of the estate of the late Jacob Francois Cloete.

Ex parte DYER AND WIFE.

Mr. Buchanan moved for leave to execute a contract after marriage to have the force and effect of an ante-nuptial contract. The parties were domiciled in England at the time of their marriage, but married in order to come out to Cape Colony, and to be domiciled here thereafter. At the time of the marriage they were informed that the marriage would be subject to the Married Women's Property Act as far as the property in England was concerned, but that as regarded other property they would require to take legal advice in this colony. They wished now to have a contract registered in this colony, excluding community of property.

De Villiers, C.J.: An order will be granted authorising the Registrar of Deeds to register a contract carrying out the agreement of the parties before marriage in the terms proposed.

ESTATE YOUNG V. MEYERS.

On the motion of Mr. Russell, leave was granted to attach certain property *ad fundandam jurisdictionem*, and to sue by edictal citation, returnable on the 12th October, the citation to be served by registered letter, posted to the defendant's address in Nyassaland, and to be published in the "Gazette," if any published in Nyassaland.

Postea (October 12).

Mr. Buchanan moved for provisional sentence on a mortgage bond, sued upon by virtue of this edictal citation. The summons asked for provisional sentence for the sum of £724 3s. 4d., with interest at the rate of 6 per cent. per annum. There was also a claim for £68 4s. 6d., for quitrent, and other taxes due on the property, but this appeared to be money expended for the purposes of the defendant.

Provisional sentence granted on amount of bond.

MEDALLIE AND SCHIFF V. ROUS. 1903. Aug. 6th. „ 17th.

Deposit—Bailment—Sale by depositary — Negligence — Damages.

It is no valid defence to an action by a depositor for the return of the goods deposited or for damages that the depositary has sold them unless it is clear that the sale was under the circumstances necessary and for the benefit of the depositor in which cases the depositary would only be liable for the price realised.

This was an appeal against a judgment of the Resident Magistrate of Aliwal North in an action in which appellants claimed delivery of a cart and harness, left by them with the defendant, or the value thereof. The summons alleged that in January, 1901, the plaintiffs deposited for safe-keeping with the defendant one Cape cart, of the value of £17, and a set of harness, valued at £3. They had demanded delivery of the same, but defendant had failed to comply with the demand. The plea was that the sum of £3 11s. had been tendered, being the balance, after deduction of expenses, of the proceeds of the sale of the cart and harness, which sale was duly advertised. The evidence for the plaintiffs was to the effect that they formerly lived with the defendant, and during the war were deported by the military. They left a power of attorney with Messrs. Stroyan and Osler to dispose of their property. They were expelled at 24 hours' notice, and left the cart and harness with defendant, directing him to keep them until they took them away or ordered someone else to do so. They were absent for about two years. They intended Mr. Stroyan to sell the cart and harness, but fixed £20 as a reserve. On behalf of the defendant, evidence was given to show that defendant kept the wagon from January until September, 1901, and then caused an advertisement to be inserted in the "Northern Post," to the effect that unless the cart and harness left by Messrs. McDally and Roberts were claimed by a specified date, they would be sold. As they were not claimed, defendant instructed Mr. James McTaggett to sell them, and they were accordingly sold by public auction for a sum which, after deducting a charge for rent, advertising, and sale expenses, left an amount of £3 11s., which defendant tendered to the plaintiffs. At that time carts were fetching a low price. The Magistrate gave judgment for the amount of the tender, and ordered plaintiffs to pay the costs. In his reasons, the Magistrate stated that Mr. Stroyan had every opportunity of seeing the notice of the sale. Defendant acted *bona fide*, believing he had the right to sell the property, and knowing that plaintiffs would not be in any worse position by receiving the proceeds, less expenses, of the sale by Mr. McTaggett than they would have been had Mr. Stroyan sold the property as instructed by plaintiffs.

Mr. Schreiner, K.C. (for appellant): The Magistrate's reasons are very difficult to follow; particularly what he

says as to a *nudum pactum*. He seems to lay down that if the goods of a depositary are left in a man's hands, the person receiving such deposit must take what he can get for them at a public auction. In this case the defendant had no right to sell at all. Then, again, he did not keep to the reserved price. The auctioneer's advertisement shows that he had no order to sell. Even a pledgee may not sell without a judicial order. In the forced sale the goods were sold for £5 10s. instead of £22, the reserved price. That was not to the interest of the owner, and therefore the defendant could not claim the privileges of a *negotiorum gestor*. Then, again, the names of the plaintiffs were incorrectly advertised, and we cannot assume that Roux knew by whose instructions the cart, etc., were sold. As to *Actio directa depositi*, see *Voet* (16, 3, 4, and 6, 1, 8). A depositary has no right to alienate, but must hand back the thing itself. *Voet* does not allude specifically to the point here raised, but see *Story on Bailments* (sec. 100), *Pothier on deposits* and *Digest* (16, 3, 1, 1). Even if a creditor has a lien it does not follow that he can sell. See also *Wilson* v. *Shaw* (1 Shiel, 299).

[De Villiers, C.J.: May not the depositary act as a *negotiorum gestor* in the interests of the depositor and of all parties?]

Here the depositary was acting solely in his own interests.

Mr. McGregor (for respondent): The case of *Wilson v. Shaw* does not apply, and in these cases the Court will construe the contract between the parties very strictly. See *Burge* (vol. 3, p. 603), and *Storey on Agency* (sec. 371), *Kent* (vol. 2, 642), *Grueber* (2, bk. 48, sec. 14).

[De Villiers, C.J.: But that surely means that the pledgee can sell if he first obtains the judgment of the Court, or if he is allowed to do so by special pact with the pledgor.]

Then I submit that the respondent could avail himself of his rights as a *negotiorum gestor*. It has been argued that he acted for his own advantage, but a *negotiorum gestatio* operates both in favour of the *negotiorum gestor* and in favour of the man whose business he takes in hand. McTaggett should have proved his claim in the Magistrate's Court. If a mandatory acts *bona fide* he cannot be met by the *exceptio doli mali*. If I claim an article I must tender payment. Here there was no tender, not even of costs of sale. Even if we did dammify the appellant, and the case should go against us, he cannot claim costs. On the overruling of the exception see *Van Leeuwen* (vol. 2, p. 216, Kotzé's Translation). The plaintiff sustained no damage by the sale of this cart, and I would even go further, and say that the defendant, having acted *bona fide*, and having benefited the plaintiff by saving him from further expense, must be regarded as a *negotiorum gestor*. As to the exception *doli mali* see 6 *Promptuarium Juris Nori* (480).

Mr. Schreiner (in reply): The plaintiff was not absent two years, and the cart was sold at the end of six months.

[De Villiers, C.J.: According to the summons the deposit was paid at the end of 1901.]

Yes, a mistake was made as to the date.

[De Villiers, C.J.: What is the value of the cart and harness?]

Over £35, and I submit that our claim is a very reasonable one. Then see sec. 92 of Act 28 of 1883. A licensed person may sell property left in his custody and not reclaimed within six months; a boarding-house keeper has no such right.

Cur. Adv. Vult.

Postea (August 17).

De Villiers, C.J.: The facts of this case are very simple, and its right decision depends upon the application of certain elementary rules of law. During the recent war the plaintiffs, who had been ordered by the military authorities to leave the town of Aliwal North, left a cart and harness in the custody of the defendant, with the request that he would keep the articles until they either took them away or ordered someone else to do so. The plaintiffs, before leaving, appear to have requested a Mr. Stroyan to sell their goods for them, and the belief of one of the plaintiffs is that the price was fixed at £20, but Stroyan did not carry out the mandate. After the defendant had been in possession of the cart and harness for about eight months, he was informed by one McTaggart that he had been instructed to sell the cart and harness, but the defendant refused to deliver them, claiming, as he did, a

lien for his charge for the custody of the goods. He then published a notice in the local newspaper to the effect that, unless a certain cart and harness left under his charge by Messrs. McDally and Roberts, were claimed within three weeks, the same would be sold by auction to defray expenses. It should be here observed that the name of the plaintiffs' firm was "Medallie and Schiff," and not "McDally and Roberts," as advertised by the defendant. The expenses which he wished to defray consisted solely of his charge for the custody of the cart and harness. The goods not being claimed by anyone, were sold by public auction, and realised £4 18s. 6d., a price far below their present value, owing to the low price of such goods at Aliwal North during the war. During their absence from Aliwal North, which lasted for about two years, the plaintiffs never corresponded with the defendant, and on their return the defendant informed them of what he had done, and tendered the money he had received, less his charge for storing the cart and his expenses of advertising. The plaintiffs refused the tender, and brought an action in the Magistrate's Court for £20, which was really less than the true value of the cart and harness at the date of the plaintiffs' return. The defendant repeated his tender, and the Magistrate held the tender to be sufficient on the ground that the defendant was justified under all the circumstances in selling the cart and harness. In his reasons he lays stress on the fact that the defendant honestly believed that McTaggart had been instructed by the plaintiffs to sell the cart and harness, and on the fact that Stroyan, who had been actually so instructed, raised no objection to the sale, although he had every opportunity of seeing the notice. In regard to the first of these facts the defendant's belief that McTaggart had been instructed to sell the cart and harness cannot assist him if in fact McTaggart had no such authority. In regard to the fact that Stroyan raised no objection to the sale, it is sufficient to say that a notice to the effect that a cart and harness belonging to two other persons would be sold cannot be held to amount to a notice that the cart and harness of the plaintiffs would be dealt with.

I am not prepared to say that under no circumstances can a depositary with the consent of the depositor sell goods deposited with him for safe keeping, but I am clearly of opinion that if he does so sell them the burden lies on him of proving that he acted in the interest and for the benefit of the depositor. It is a primary duty of a depositary to return the thing deposited when it is required of him, and if he is unable to do so he cannot escape liability without proving that this inability does not arise out of his own negligence. If it is lost or injured through his negligence he is responsible to the extent of the loss or injury. It is no valid defence to the depositor's claim for a return of the goods that the depositary has sold them unless it is clear that the sale was under the circumstances necessary, and for the benefit of the depositor. If the goods had been sold to save them from perishing, or on account of the depositary having to leave the place, and being unable to find anyone else to take the custody, he would not be liable for more than the price of the goods received by him less his expenses. But if the goods had been sold without the clearest necessity, the depositary would be liable in damages for the breach of his primary duty to retain the custody of the goods entrusted to his case.

In the present case there is no evidence whatever that the sale was a necessary one, or in the interest of the plaintiffs. They had authorised Stroyan to sell their goods in Aliwal North, including, presumably, the cart and harness, but he would not have sold them unless he could obtain a fair price for them, and the price actually realised was certainly not a fair one. The defendant says that he sold in order to recover his charges for keeping the articles, but assuming that such charges were claimable, he should have obtained the judgment of a competent Court for the amount, in which case the articles might have been attached and sold in execution. But there was nothing in the contract between the parties, which justified the defendant in taking upon himself the responsibility of selling the articles entrusted to his custody, and as he was unable to restore the articles when they were demanded from him, the Court below ought to have given judgment for

the amount of their value. The appeal must accordingly be allowed, and as the plaintiff's counsel does not object to the counterclaim of £1, judgment will be entered for the plaintiffs for £19, with costs in this court and in the court below.

Kotzé, J., concurred.

[Appellant's Attorneys: Walker and Jacobsohn; Respondent's Attorneys: Reid and Nephew.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZÉ.

TRIAL CAUSE.

ATKINS v. DELPONT. { 1903. Aug. 6th.

Lessor and lessee—Obligations of lessor—Defective premises—Damages.

A lessor is liable in damages to the lessee in respect of any injury caused to the property of the lessee by the defective condition of the premises leased: provided that the lessor had knowledge of such defect, or by reason of his trade or calling ought to have had such knowledge.

This was an action for the recovery of £45, rent said to be due by the defendant to the plaintiff in respect of certain premises in Long-street.

The declaration stated that on the 21st October, 1901, the parties entered into an agreement by which the defendant rented certain premises at the corner of Long and Bloem streets for £30 per month. The defendant was given notice to leave, on account of alterations, by the 15th February, 1902, and when she left on the 28th February, the sum of £45 was owing to the plaintiff. Plaintiff claimed £45, with interest *a tempore morae*, alternative relief, and costs of suit.

The plea set out that the premises were leased to the defendant for the purpose of sub-letting, and that they were not fit for that purpose. She had suffered damages to furniture, and by reason of the loss of tenants, to the extent of £100. The plaintiff agreed that the premises were not fit for habitation, and consented to rebate some rent during the renovations. The defendant claimed in reconvention £100 damages, with interest *a tempore morae*, alternative relief, and costs of suit.

Mr. Gardiner for plaintiff; Mr Benjamin (with him Mr. Russell) for defendant.

Henry Atkins, plaintiff, said that the negotiations for the lease were carried on for him through the Colonial Orphan Chamber. The defendant entered into possession of the premises in November, and at that time he knew of nothing being wrong with the plastering. In January the Town Council were proceeding against him for letting the premises for dwellings, instead of offices. Subsequently a satisfactory arrangement was arrived at. Notice to quit the premises was given for the 15th February. On the 14th January the defendant, Mrs. Delpont, pointed out two of the twenty-one rooms, in which all the plaster had fallen off. The rooms looked as if they were being occupied. Mrs. Delpont asked if she could remain in the premises, and suggested that the workmen might proceed with the work while the tenants shifted about. The defendant then said she had taken a place further up the street, but that it would not be ready at the time. Witness offered to store the furniture free of charge in three of the front rooms, until the other premises were ready. Witness did not agree to let the defendant remain, and there was no arrangement about rent. There was no mention of damages, beyond the fact that she stated that she had suffered some inconvenience, and the tenants had to leave. Witness saw a notice posted up to the effect that the tenants were not to disturb themselves, as the defendants did not intend to leave. The defendant did not leave on the 15th February, and witness caused an attorney's letter to be sent to the defendant. After defendant had left the premises, she suggested to plaintiff that she should be let off with half a month's rent, and witness referred her to the Colonial Orphan Chamber.

Cross-examined by Mr. Benjamin: Witness was in England when the lease was entered into, and he knew nothing of the defective walls. There were no

complaints about the other rooms. Subsequently the majority of the rooms had to be stripped. He could not say whether his agents sent a demand for the rent for January and February. Beyond two of the rooms, he could not give any opinion as to whether the premises were fit for habitation. He was not aware that there was a great demand for furnished apartments at the time.

Re-examined by Mr. Gardiner: The defendant offered to shift from room to room when the workmen would come in.

Max Rosenberg, architect, said that he was in charge of the erection of the plaintiff's premises. He had been in England part of the time, and in January, when he heard of the defective plastering, he visited the premises with Mr. Atkins. He could not say how many rooms they saw at the time. He remembered the defendant asking the plaintiff to be allowed to remain, and witness said that it was quite impossible. The plaintiff promised to do everything in his power to assist the defendant, and on that occasion there was no mention of rent or damages. The defendant refused to let the workmen in on the 15th February.

Cross examined by Mr. Benjamin: He heard the greater part of the conversation, and he would not contradict the defendant if she said that he was a minute or two absent.

George Wm. Steytler, Secretary for the Colonial Orphan Chamber, said the negotiations were conducted through Messrs. Chiappini Bros., who acted for the defendant. He had no knowledge of the defective plastering at the time the premises were let.

Sarah Hind said she was manageress while the Delpont's had the rooms. There were twenty-one rooms in all. None of the tenants left in consequence of the plaster falling off. She was not aware that any tenants had been refused, but two gentlemen complained of the rooms. People were glad to get anything at that particular time.

By Mr. Justice Maasdorp: The plaster commenced to fall after the new year.

Continuing, witness stated that she remembered Mr. Atkins telling the defendant that she must leave the premises. There was no mention of rent at that time. The plaintiff said that the defendant would have to leave on account of the notice from the Town Council. Two notices were pasted up against the wall, one of which was to the effect that the tenants need not be alarmed, and that their luggage would be removed free of charge. The second one merely altered the date.

Cross-examined by Mr. Benjamin: She did not hear all of the conversation. Plaster fell off the other rooms, but not in sufficient quantities to prevent their being let. An old lady and gentleman left before their month was up, although they had paid in advance. She did not think the several witnesses in Court left on account of the rooms.

For the defence, Mr. Benjamin called the defendant, Martha Delpont. She stated that her husband transacted most of the business in connection with these premises. Two months' rent was paid in advance. When she first entered the premises the plaster was good, but about nine or ten days later the plaster commenced falling, and it was sufficient to touch the walls to fill the rooms with plaster. With the exception of six rooms, the other rooms were more or less stripped of the plaster. The plaintiff, when he visited the premises, said she must lock up all the rooms in order to see what the damage was, and he said he could not pay her any damages, because he did not know what damages he would get himself. She said that she wanted someone to look at the furniture to see the damage. The plaintiff promised to let her off with a month's rent. It was very difficult to get such a large place.

Cross-examined by Mr. Gardiner: She did not leave on the 15th February, because the plaintiff said that a week or two did not matter. She remained on till the 28th February, because six of the rooms were fairly good, and she had no place to go to. It was an arrangement with the landlord that she could store the furniture free of charge in the front rooms, and that she could remain, rent free, for a month. The tenants would never take their things out of their boxes, because they would be destroyed. She could have let the rooms to "Volunteers," but they were not nice people. It was only natural now that Mrs. Hind, having got the premises, would take the landlord's part. She understood English very well, and she made no mistake about the plaintiff's promise. She was not excited on the day Mr. At-

kins called, in fact, she never got excited. She did not offer to pay one month's rent to the plaintiff. She could not tell who put up the notice. She wanted the house back again, but the plaintiff would not let her have it.

Re-examined by Mr. Benjamin: The plaintiff wrote the letter giving notice to quit in order that the defendant might show it to her tenants.

John Delpont, husband of the defendant, said that he carried on the negotiations with the Colonial Orphan Chamber on behalf of his wife. Ten or twelve days after they took possession there was a serious fall of plaster. There was another fall ten days later, and witness complained personally to Mr. Steytler, who said that he could not do much, as the owner of the premises was in England. Things went from bad to worse, and the mattresses and furniture became seriously damaged in all but four rooms. It cost about £400 to furnish the rooms, and he estimated the depreciation at about 25 per cent. The plaster kept on falling all day, and with the traffic, the linoleum became damaged. From the 15th till the 30th November, his receipts were £34 to £35, during December £67, January £63, and February £50. His expenses during a month ran to about £57, but it was only when the place was full that he made any profit, because he could then tell the lodgers that he was going to increase their rent, and if they did not like it they could go If the house was full, he would have turned over from £90 to £100. He had practically no profit from the premises in question. When the plaintiff came to the house in January, he expressed great surprise at a new house being in such a condition. In several spots the paper was holding the plaster on the wall. The plaintiff said the best thing to do was to lock up the rooms. The plaintiff agreed with Mrs. Delpont that she should remain for a month rent free, and after further agreeing to give a few days' grace, he sugested sending a letter, in order that the defendants could explain the state of affairs to the tenant. The plaintiff promised to give them back the house.

Cross-examined by Mr. Gardiner: He was absolutely certain that he had seen Mr. Steytler in January. The plaintiff had made such nice promises that he did not call in an assessor to look at the damaged furniture. He did not reply to the attorney's letters demanding the rent, because he did not think it necessary. He was positive that the plaintiff promised the premises a month free of rent, when his attention was drawn to the damage.

Herbert Lawrence said that he occupied a room in the premises in the latter end of January. When the plaster came off the walls, the wind howling through was sufficient to blow out the candle. He complained several times to the manageress, and he had to leave on account of the draught.

Cross-examined by Mr. Gardiner; He had not to leave Cape Town at the time. He took apartments in Hope-street.

Counsel were then heard in argument on the facts.

Cur. Adv. Vult.

Postea (August 17).

[Kotzé, J.: The defendant has not satisfied me that the plaintiff agreed to waive a month's rent from the 15th January to 15th February, 1903. The plaintiff has, however, established his claim in convention to the recovery of the sum of £45, for rent from the 15th of January to the 28th of February, 1903. Against this the defendant sets up a claim in reconvention for £100 damages. She complains that the premises leased to her were not reasonably fit for occupation, and has led evidence to show that the plaster work of several of the rooms was defective, and that owing to the fall of plaster from the walls she sustained damage to her furniture, and also suffered a loss of lodgers.

A lessor is obliged to deliver the buildings hired in a fit and proper state for the purpose intended. In the present instance the premises were hired to be used as a boarding-house or as furnished apartments. The lessor is further, as *Grotius* lays it down, liable to the lessee for any damage caused by a defect in the property leased, where he has knowledge of such defect, or by reason of his trade or calling ought to have known of the defect. *Van der Linden* states the rule in too general a way when he says that the lessor is bound to compensate the lessee for damage sustained through actual defects (*wezenlyke gebreken*) in the thing leased. He refers to *Digest* (19, 2, C. 19, section 1), in support of his statement.

This passage in the *Digest* puts two cases. The first is that of a person hiring out wine jars, and here the jurist says that if through a defect in the jars wine leaks out and is lost, the person who has so let them out will be liable to make good the loss. *Zoezius* and *Voet* understand this to refer to the letting out of wine jars by a person in the way of his trade, who is taken to have knowledge of the defect. In other words, he is presumed to have known what he ought to have known. The other case put is where a forest pasture is let, and, by reason of noxious grass or herbs, the lessee's cattle are injured or destroyed. Here the lessor will duly be liable in damages to the lessee, if he knew of the existence of the noxious grass or herbs, but not if he were ignorant of their existence, although in the latter instance the lessee would be entitled to an abatement or remission of rent. There must, therefore, be knowledge, either express or implied, of the defect, in order to render the lessor liable in damages. This I take to be the correct rule of our law. It is so stated by *Grotius*, and has been understood and followed in several cases in this Court.

Now, the defendant entered into occupation on the 15th November, 1902, and paid £60 by way of two months' rent in advance. When she entered into occupation the walls of the rooms were apparently in good condition, but a day or two after some plaster commenced to fall off. A fortnight later a more serious fall of plaster occurred, and notice was given of this to the plaintiff's agent during the first week in December. No steps were, however, taken, to repair the plastering. On the 14th of January, 1903, the plaintiff, who had meanwhile returned from Europe, visited the premises, and saw for himself what had occurred. On the same day the defendant had received a month's notice to quit from the plaintiff's agent. This was because the Town Council had objected to the premises being used as dwellings when they were originally built for the purpose of being occupied as offices. The defendant did not, however, actually vacate the premises until the 28th February. When notice was given to the plaintiff's agent in December of the falling in of the plaster, and the inconvenience caused thereby, the plastering should have been repaired. The defendant was willing to shift from room to room till this had been done. After notice had been given, the plaster continued to fall, but no repairs whatever were attempted. There is evidence to show that the defendant sustained some damage to her furniture through the constant falling in of the plaster, and for this damage I think the plaintiff, as lessor, is liable after notice had been given to his agent, and no attempt was made to remedy the defective plastering. Some lodgers also left the defendant. The only point is whether the defendant can claim compensation for this from the lessor, and, if so, whether she is entitled to damages for the whole period of occupation. It was contended on behalf of the plaintiff that the defendant can not claim any damages after the 15th January, 1903, for as she knew of the defective state of the plastering, she remained there at her own risk. The case of *Wheeler* v. *Van Reenen* (2, Juta, 269), was relied on to show that if a lessee, knowing of the defective state of the premises, enters or continues in possession, he cannot sue the lessor for any damages caused by the defective state of the buildings. Now, so far as damage was done to the furniture, that happened before the 15th of January. Although the defendant may not be entitled to claim damages for loss of lodgers after that time, and the evidence tends to show that before that period no lodgers had actually left, she was nevertheless entitled to have the full use and benefit of occupation. This she did not have and enjoy by reason of the falling in of the plastering and the uninhabitable condition of some of the rooms. She is entitled to a remission of rent on that account. I think that the damage which she has sustained has been somewhat exaggerated by the defendant. The sum of £100, which she claims, is far too high, and an amount of £30 appears to me to be a reasonable and sufficient compensation for damage done to the furniture. As to a remission of rent, the sum of £15, or half a month's rent, is all that I am disposed to award. There should, therefore, be judgment for the defendant on her claim in reconvention for £45. The result is that both the plaintiff and defendant obtain a judgment for £45, and I think there should be no order with regard to costs.

[Plaintiff's Attorneys: W. E. Moore and Son; Defendant's Attorneys: Silberbauer, Wahl and Fuller.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice KOTZE.

CROWN OF DENMARK v. S. A. MILLING COMPANY. { 1903. Aug. 7th. " 10th. " 22nd " 24th.

Demurrage—Charter party—Reasonable diligence — Custom and facilities of port of discharge.

A charter party provided that the discharge of the ship at C. dock should be according to the custom and facilities of the port and that for each day's detention threepence per ton register should be paid. By the custom of the port the landing of goods was done exclusively by the Harbour Board. The Board provided no sheds at the docks for the storage of goods other than general cargoes, and did not employ a sufficient number of vehicles for removing goods as fast as the ships in port could discharge them, but the defendants, the charterers, owing to the large number of cargoes of wheat which were being landed for them, and to their failing to provide sufficient appliances for coping with their increased business, could not receive the cargo from the plaintiff's ship as fast as the vehicles could deliver it.

Held, *in an action for demurrage that the defendants having contributed to the delay by their want of diligence were liable for the detention beyond the time when, with the exercise of reasonable diligence, they might have taken delivery of the whole cargo.*

This was an action brought by Thomas Francis Milman, master of the British ship Crown of Denmark, on behalf of the owners, against the South African Milling Co., to recover £372 for demurrage or detention of the plaintiff's vessel.

The declaration set out that the plaintiff represented the owners of the vessel, and the defendants carried on business in Cape Town. The vessel arrived in Table Bay on March 24th, 1903, under a charter party, entered into at London on August 13, 1902, between the owners of the vessel, through their duly authorised agents, and Messrs. Dewar and Webb, as agents for Messrs. Kerr, Gifford and Co. (charterers). The vessel was loaded with a cargo of wheat, to be discharged at this port, the defendant company being the consignees of the cargo under bills of lading. It was provided by the said charter party that the discharge at Cape Town Dock should be according to the custom and facilities of the port. It was further provided by the charter party that 3d. per ton should be paid for every day's demurrage. The vessel entered the Docks on March 30, and commenced discharging the next day. It was provided by the Harbour Board regulations that a vessel of such tonnage should discharge not less than 200 tons per day. The defendant company failed to effect reasonable despatch, and the lay days ran on to the 12th May, instead of the 20th April. The plaintiff claimed up to the date of issue of summons for demurrage at the rate of 3d. per ton. The defendants' plea admitted the formal allegations, but stated that the custom of the port with regard to unloading and discharging was that these duties were solely and absolutely vested in the Harbour Board, and that the consignees could in no way control the work. The defendants were at all times ready and willing to receive such portion of the cargo as the Board from time to time might deliver. The defendants denied any liability, though they admitted that the delivery was not completed till the 12th May.

The replication denied that the whole matter was in the hands of the Board, and stated that the discharge was frequently in the hands of stevedores, as was the case with the Crown of Denmark. The plaintiff did not admit that the matter was entirely out of the power of the consignees. The delay was due to the failure of the defendants to receive the cargo. The rejoinder was general.

Mr. Searle, K.C. (with him Mr. J. E. R. de Villiers), for the plaintiff; Mr. Schreiner, K.C. (with him Mr. Close), for the defendants.

The evidence of the master, taken on commission, was put in, which set forth that he had information from the Quay Superintendent, of the Harbour Board, that the delay was caused through the merchants being unable to receive the cargo. From the start, the rate of discharge was not sufficient, and he never had more than one hatch working. The stevedores were prepared to work two hatchways and two gangs, and in that case, 300 tons per day could have been discharged. The Harbour Board would not allow him to discharge, because he would have blocked the quay. The defendant company, on being interviewed about the delay, said they hoped to make up for the delay before the allotted time. Captain Leigh said the whole delay was caused through the inability of the defendant company to receive the cargo. The 22nd of April was the only day they could not discharge through wet weather. In other places, he had discharged 400 tons per day from one hatch. He could not say from his own knowledge whether the defendant company could receive the cargo or not. On the 14th, 15th, and 17th April they were stopped for want of wagons. The Harbour Board allowed a remission of four and a half days' dock dues, but he could not say why the remission was made. He was never stopped for want of men.

Wm. Matthie, partner in the firm of Neill and Matthie, stevedores, said that his firm commenced to discharge the vessel on the 31st March, and finished on the 12th May. One hatch was worked, and he could easily have taken out 200 tons per day. With three hatches, he could have discharged about 400 tons per day. The Quay Superintendent ordered him to stop work on a number of days, and altogether, on twelve working days there was no work done at all, and on five days there was only half-work done. The ship should have been discharged in about nine days. Witness had the labour at hand to do that. The Harbour Board did not allow the quay to become blocked, and they had to stop work when the cargo was not taken away. The Glenbank, with 2,804 tons, was cleared in eleven working days. There was no necessity for delay when a ship was ballasting.

Cross-examined by Mr. Schreiner: He knew that the ship was taking in ballast on three days that the work was stopped. The ballasting would not have affected the discharge of the wheat. The gear broke occasionally, but that only necessitated delay for an hour or so. The ship was shifted twice by the Harbour Board. The Board allowed three and a half days' dock dues for days on which there were no trucks available. It was a special occasion when wheat was discharged in rainy weather, and the consignee took that risk.

Captain Leigh, Dock Superintendent, said that he had control of the discharge of vessels in the Docks. The Harbour Board took the cargo from the ship's slings, and put it in trailers or trucks. He had to stop the stevedores on many occasions, because the Milling Co. could not receive the cargo. He had that information from Mr. Mellish, cartage superintendent. Mr. Mellish reported that on several occasions many trailers were still under load. In consequence of that, he gave the stevedores orders to stop the discharge. Witness wrote to the consignees drawing attention to the fact that he had to stop the unloading owing to the number of trailers the defendants had under load, but he received no answer. He wrote again on the 14th April, asking the defendants to expedite the unloading, and they replied stating that they failed to see the purport of the letter, and that the responsibility could not be placed on them. The delay of shifting of the ship would be amply allowed for by half a day on each occasion. The Crown of Denmark should have discharged 250 tons per day through one hatch. There was no block, so far as the dock area was concerned, and there was no reason why the stuff should not be taken away.

Some days they were short of trucks, but the Board had sufficient trailers to deliver 200 tons a day. The remission of dock dues was made in accordance with the regulations.

By De Villiers, C.J.: No remission would be made if the fault were that of the consignees.

Cross-examined by Mr. Schreiner: Witness had not the original warrants. It would have been possible for the consignees to send wagons for the stuff. Witness would not have allowed them to do so in this case, because the Harbour Board plant was "boxed up" with their stuff. Witness did not have the reports of Mr. Mellish. Verbal reports were given every evening. Witness had no written reports. Witness had seen trailers in the vicinity of the mill. He had not received any written reports from Mr. Mellish, and he did not consider it necessary to have such reports. He did not know who would impose the penalty for the detention of trailers. He could not say whether the consignees were fined or not. He would not say that the trailers outside the consignees' stores were from the Crown of Denmark, although that ship was stopped. The Board had not a store in which they could deposit the cargo. When he said 250 tons per day, he was giving the amount that could be discharged. On the 21st, 22nd, 23rd, and half of the 25th April, the Harbour Board was short of trucks. The Railway Department said that they were blocked at Artois Siding, and could not receive any more stuff.

Re-examined by Mr. Searle: The Harbour Board could always keep going as long as the merchants would receive their stuff. The object of the Harbour Board's sheds was for a general cargo that had to be sorted.

Arthur Wm. Mellish, cartage superintendent to the Harbour Board, said that at that time he had sufficient trailers to discharge the Crown of Denmark at the rate of 200 to 250 tons per day. The cause of the delay was a congestion of loaded trailers at the defendants' stores. The defendant company was receiving other cargoes, and there was delay at the stores. Fifty-nine trailers could not be left outside the stores, on account of the Municipal regulations, but they were distributed over different points. The defendants complained of insufficient labour, and witness procured them some assistance. He constantly reported this matter to Captain Leigh. Witness tried to get Mr. Steven to work overtime or on Sunday, but he was not inclined to do so.

Cross-examined by Mr. Schreiner: Seven tons would be the average on a trailer. The trailers might have been on the piece of ground at the foot of Bree-street. It might happen that the trailer man might not be on the spot to take the delivery note, and the consignee's men would then have to wait. The Harbour Board regulations allowed a maximum time of discharge, and witness could penalise if 54 tons per day were not taken in one store door. The consignees could order three cargoes to different doors. The defendants should have opened up other points to receive the cargo.

Re-examined by Mr. Searle: On one occasion Mr. Attwell complained to him of having to wait on the Harbour Board's men. The cause of delay was that the plaintiffs had too much grain at the same time.

John William Hairbottle, quay superintendent of the West Quay, said that the entries in the log book were made by his instructions. In the return put in he obtained the information, "Milling Company blocked," or "Artois Siding blocked," from Mr. McGregor or Mr. Metcalfe.

Cross-examined by Mr. Schreiner: He put down the weather according to his own judgment. April 23 was a rainy day, and although there was not a single bag taken out on April 20, he had it marked "fine" in the log. He would not swear that April 18, 19, 20, and 21 were all fine days.

Re-examined by Mr. Searle: The delay through broken gear was not worth speaking of.

Robert Thomson, the quay superintendent of the North Quay, stated that he was in charge of the quay when the Crown of Denmark was being discharged. Any instructions which would have been given as regards the South African Milling Company not being able to take in the cargo would have been issued by the outdoor superintendent, Mr. McGregor.

Thomas Metcalfe, goods superintendent at the Docks, stated that he was in charge of the despatch of cargo by rail,

Four trucks were despatched on 21st, and seven on 28th, to Artois Siding. Mr. Patterson, the Assistant Traffic Manager of the C.G.R., told witness that twenty-four trucks had already been discharged at Artois Siding. Witness told the manager of the Milling Company, on Saturday, 25, to have facilities for unloading at the siding, because a train load was being sent down the following day. Subsequently Mr. Patterson went so far as to request witness not to send down more trucks, as the line at the siding was becoming blocked. Arrangements were then made that no further wheat should be despatched, as the S.A. Milling Company were unable to take in the wheat. Notwithstanding that, witness offered to send a special train down. He asked a Mr. Wood to make arrangements to have the train unloaded, but Mr. Wood afterwards admitted that he had not made such arrangements. Witness received a telephone message from the Milling Company not to send any more, as there was a large number of trucks waiting to be unloaded at Artois Siding. Witness could have sent a much larger quantity, but that the Railway Department would not supply the trucks, because several consignees had been ordering more goods than they could take in, with the result that the trucks were detained under load at the station.

Cross-examined by Mr. Schreiner: Mr. Wood acknowledged in the presence of Mr. Steven that he had made no arrangements to off-load the special train on Sunday. Witness could not say if the train did reach Artois on Sunday; it was loaded at the Docks ready for despatch. Witness could not remember the exact words, but Mr. Steven told him that the siding at Artois was blocked, and that it would be useless to send forward any more wheat for a week.

Re-examined by Mr. Searle: There was no delay on the part of the Harbour Board in the despatch of the wheat.

James Patterson, assistant traffic manager on the Western System, said that he saw Mr. Steven along with Mr. Metcalfe on the 27th April. Witness pointed out that the loop at Artois Siding was blocked with wheat, and the defendant company were not discharging as quickly as the wheat was being tendered. On the 21st April twenty-four trucks blocked the line.

Mr. Steven said that the Harbour Board were sending up more trucks than he could deal with. Witness pointed out that as the defendants were not keeping up with the discharge that the Harbour authorities would have to stop the ship. If the trucks had been off-loaded within twenty-four hours, there would have been no scarcity. Mr. Steven agreed when witness said that no more trucks would be sent up to Artois for a week. At Mr. Steven's suggestion witness sent a wire to the foreman to urge the manager there to facilitate the off-loading. The manager was instructed to employ more native labour. The block at Artois continued right into June.

Cross-examined by Mr. Schreiner: He would not say that the Milling Co. off-loaded more expeditiously than any other country siding. The Railway Department sent down whatever trucks were available to the Harbour Board, and by the end of April there was no particular scarcity of trucks. Witness stopped the supply to Artois because the defendant company could not cope with the supply.

Joseph McGregor, outdoor superintendent at the Docks, said that he got instructions from Captain Leigh when to stop the discharge of cargoes. The only reason for stopping the Crown of Denmark was Captain Leigh's statement that the defendant company were unable to cope with the grain.

Cross-examined by Mr. Schreiner: Witness had no knowledge of the circumstances himself. Two hundred and fifty tons per day would be reasonable for the Harbour Board to take out of the Crown of Denmark. It was possible to accomplish that. The customary rate of discharge was about 200 tons per day.

Re-examined by Mr. Searle: A general cargo would be discharged much slower than a special cargo which had to be sorted out.

Auguste Fock, in the employment of the Harbour Board, stated that he was the person who prepared the return (produced) of the tonnage discharged from each grain ship in the port, during the first six months of the year.

Alexander McRae stated that he made out the return (produced) from the return put in by the previous witness. The return showed the discharge of grain vessels of over 200 tons, from January to June.

Cross-examined by Mr. Schreiner: Witness allowed for Sundays and holidays in

his calculations. Saturday was treated as a full working day, and calculated as such.

Robert William Clark stated that he was employed in the cartage superintendent's office, of the Harbour Board. He made out the return (produced) showing the number of trailers supplied to the Milling Company.

Cross-examined by Mr. Schreiner: The return was prepared from the book which is kept, and at the Dock gates, and the book kept by the Milling Co. at their premises. From the times at which the 32 trucks, shown in the return as being supplied to the Milling Co., passed through the Dock gates, until the times taken from the Milling Co. book, the trailers must have been standing under load somewhere.

George West stated that he made the entries in the book referred to by the last witness as being kept at the Dock gates.

Mr. Searle closed his case.

For the defence, Mr. Schreiner called Richard Attwell, who stated that he was employed in the defendant company, and was in charge of the flour mill in Bree-street. There were several stores, but the wheat of the Crown of Denmark had been deposited in the open square. Three of the stores had a capacity of 21,000, 18,000, and 15,000 sacks, while 50,000 sacks could be put in the open square. Of the total of 1,874 bags received in the store on the 1st April, 538 were from the Crown of Denmark, and there was no scarcity of trailers then. It was not true that the defendant company were unable to take the wheat from the trailers, neither was it true that the mill was full up. The trailers off-loaded as fast as they came up, and on many occasions there was no man accompanying them to give delivery. The Harbour Board often left their trailers without any delivery notes, and on some occasions there was delay in taking the empty trailers away. When the Harbour Board's delivery was in order, there was no delay on the part of the defendant company. The men were good, hard workers, and in off-loading they could earn in piece work about fifteen shillings a day. In April last there was room in the stores. In putting the wheat of the Crown of Denmark outside it rather facilitated matters for the Harbour Board. On the day on which the letter of complaint was received, 1,245 bags had been taken into the stores from the Crown of Denmark.

Cross-examined by Mr. Searle: Between March 31 and April 11, 1,576 bags of wheat were received from the Osborne. It was not a usual thing for the firm to have three ships discharging at the same time. The Harbour Board were pressing to have more wheat taken in, and so the Board lent the assistance of a gang of men. A delay in taking away the empty trailers would impede the delivery. Witness admitted that he had been asked to take the wheat in faster.

Re-examined by Mr. Schreiner: He had received 22,000 bags from one of the three ships. Witness often complained about the trailers being allowed to stand in the street. About 800 bags per day were ground, so that the quantity in the stores was daily reduced by that amount.

Matthew Irving, Quay Superintendent, in the employ of the Harbour Board, said he took the details of the discharge of the steamer Inverie, which worked on Sundays. The tonnage returns appeared in fifties and hundreds, and that was caused through getting as near the number of bags as possible, although it was not strictly correct. The exact returns were given in the case of sailing vessels.

George Taylor Nicholson said that he had the observations of the rainfall at the Docks, which were taken in the draughting office. The record was taken at 9.30 a.m., and would show the rainfall for the preceding 24 hours.

Andrew McKenzie said he had been connected with shipping at the port from 1867 to 1901. Previous to 1901 he was contractor under the Act for the Board. During his time he had to take the cargo from the ship, irrespective of any action of the consignee. The ships were never stopped discharging. For a ship of 2,000 tons and upwards, the average would be quite up to 300 tons a day. He would rather not give an opinion as to the Harbour Board's working at the Docks since he left, but they had been changing and making regulations since 1901, and the officials at the Docks just did what they thought fit. He might say something now not up to the mark, and he would rather not.

Cross-examined by Mr. Searle: Rather than stop the ship, he thought it better to bring even grain back and

stack it in the open, if the consignee could not receive it.

Re-examined by Mr. Schreiner: The Harbour Board had abundant ground to stack in the open if the stores were full.

Alex. James Robb, Assistant General Manager of Railways, said he remembered the block at Artois Siding in April, and it was reported to him that the ship was discharging more rapidly than they could cope with. Subsequently he found that the Chief Traffic Manager had been misinformed with regard to the congestion at Artois Siding. The consignee had no control as to the trucks.

Cross-examined by Mr. Searle: The ship was not stopped in consequence of the Railway Department's action.

James Steven, manager and resident director of the Cape Town branch of the S.A Milling Co., said that last year they paid close on £8,000 dock dues. This was the only case in Cape Town in which a claim had been made against the company. He did not remember the company ever paying a fine for the detention of trucks. Mr. Attwell gave a correct statement as to the facilities at the Bree-street mill. They recognised it was better to have a quick discharge, and the stevedores had a free hand with regard to engaging men. An extra gang had been put on at the time of the Crown of Denmark to cope with the discharge. They milled considerable quantities, and very often the cargo was immediately put into the hoppers. Eighty to ninety tons would not be an excessive amount to mill in one day. He had facilities to receive the 15.000 bags with reasonable despatch at Cape Town. They had abundant open space. Since Friday he had been to Artois Siding to make inquiries as to what took place in April last. At that time the stores had only six weeks' supply of wheat in hand, and that induced him to transfer the cargo to Artois. The gang of extra men had been employed before he got the letter from Captain Leigh. There was never any complaint of Artois being blocked. Trucks were used instead of trailers for the discharge of certain class of cargo within the Municipality. On the day of the complaint by Captain Leigh he had taken 1,200 bags into the Bree-street mill. Messrs. Metcalfe and Patterson interviewed witness and assumed that the defendant firm were not unloading with sufficient dispatch at Artois. Witness had no recollection of agreeing that nothing should be sent forward for a week until a special train had left. He assumed that Mr. Patterson was acquainted with the facts of the case, and witness then wired his people to impress on them the importance of clearing the reported congestion. Witness had no knowledge of his own as to anything out of the ordinary at the Artois Siding. Subsequently the railway officials found they had been inaccurately informed, and the ship recommenced unloading on May 1. The large iron trucks were not so speedy in discharge as manual labour could not move them, and he had Mr. Patterson's promise that no more of them would be sent up. Witness thought the Harbour Board should not have stopped the ship, but should have gone on and made a charge if necessary against the consignees. Apart from regulations, and as a matter of custom, he would say that the rate of discharge would not be as given. Wheat could not be discharged in wet weather. He would say that the discharge in this case was something in excess of the custom of the port. He tried to facilitate matters with Mr. Mellish as much as possible. He knew of no instance of trailers having been kept waiting at the stores.

By De Villiers, C.J.: Had witness only been dealing with the Crown of Denmark, the discharge would have been faster. It was not for any length of time that he was working more than one ship.

By Mr. Schreiner: The trailers were discharged by the defendants quicker than most people. Then, again, the Municipality regulations delayed them.

By Mr. Justice Kotzé: He did not think they would be justified in working overtime to cope with the pressure.

By Mr. Schreiner: It was not customary for the trailers to convey cargo during the night to consignees. Until the trailers were brought to the door he submitted that the consignees were not responsible. The Harbour Board should bring the cargo back and stack it.

Cross-examined by Mr. Searle: A good many grain ships had been consigned to witness recently; nearly half of the total number which had entered the Bay. The Ernest Reyer and the Crown of Denmark were being discharged to witness's store up to the 21st. Captain Leigh wrote stating he had been obliged to stop the dis-

charge from these owing to so many trailers being under load with the cargo. There were always trailers under load. Witness did not think 20 or 30 trailers were an unusual number to be under load. Witness considered the Harbour Board should not put so many trailers under load; the goods should be stored. Witness did not know the Board did not have storage. The Board had always stored grain from other ships consigned to witness, and he did not know why in this instance they should have departed from the practice. At this time the Harbour Board had unfortunately pulled down their old stores preparatory to building larger ones. There was a great difficulty about getting men to work overtime. The Harbour Board had supplied witness with men; this was for the convenience of the Harbour Board. At the time the discharge of the Crown of Denmark commenced, Mr. Mellish suggested to witness that there should be another point of delivery. He urged witness to take Harbour Board ground for stacking, but witness chose his own stacking ground, as the Harbour Board charges were so enormous. Elevators could not be used at the present stores of the company, as at Port Elizabeth, but the matter of installing elevators in the new premises was under consideration. The quantity of grain taken in during the last six months had been exceptionally large, this being due to circumstances over which the company had no control.

Re-examined by Mr. Schreiner: Short of having elevators, for which a railway siding was required, the company had the best appliances. The Harbour Board had plenty of ground on which to stack.

Frederick William Dunn, inside manager of the defendant company's stores, stated that for the sole storage of grain there were seven or eight stores in Cape Town. The stores had a respective capacity of eighteen, fifteen, twelve, twelve, ten, twenty-one, nine, and two thousand bags, and the yard would hold fifty thousand. On the first day of discharge the bags were brought direct to the mill, and broadly the same capacity would be going out. In isolated cases there might be a delay of five minutes with the defendant company. There was no intimation of when trailers might arrive, and it was a serious delay when the Harbour Board's man did not produce the wagon notes. Should the mule wagon not be convenient, the empties might be delayed all day. There was no delay on account of the stores being full. There was capacity in the yard for thirty thousand bags. Stacking in the open was quite a usual thing in this country. It was usual for a consignee to have two or three cargoes being discharged at the same time. He was satisfied that the return made up by Mr. Attwell was correct. The return showed that there was abundant storage.

Cross-examined by Mr. Searle: Previous to the Crown of Denmark they had had two cargoes running at the same time. Mr. Mellish and other Harbour Board officials spoke to him about hurrying things along. They could comfortably take in 300 tons a day, but, with the limited hours, they could not keep up with the regulations in discharging both ships. It was a usual thing for trailers to lie at the bottom of Adderley-street.

Re-examined by Mr. Schreiner: There was time wasted every day when the trailers had to wait for an engine.

Wm. Costert, in the employ of the Corporation, produced a return of rain gauges. On the 20th April rain started from two o'clock in the morning and lasted till the evening of the same day.

Cross-examined by Mr. Searle: The rainfall at the reservoir varied very much from that of Cape Town.

J. W. Herbert said that the reason the discharge was not quite so good now as it was in McKenzie's time was that the Harbour Board exercised the right of stopping discharge. It was his opinion that the Board should store the cargo, but there was no reason why it should not be stacked at present in the open.

Mr. Searle, K.C. (for plaintiff): Clauses 13 and 14 of the Charter party are the most important; they are as follows. No. 13: "Vessel to be cleared at the Custom House at Portland and Astoria, in the name of the charterers. The Master to report to charterers, or their agents immediately on arrival of the vessel at port of discharge, and enter the vessel at the Custom House in their name. Vessel to discharge afloat with dispatch according to the Custom of the port of discharge; cargo to be delivered at ship's tackles. All literage to be at the expense and risk of receivers of cargo, except in case of average when lighterage shall be borne by whom it may concern. Discharge to be all at one port, unless other-

wise provided. The holders of bills of lading, representing the greater portion of the cargo are to be entitled to name the discharging dock, provided they avail themselves of this privilege within 24 hours after the arrival of the vessel is notified to charterers' agents by the Master or his agents, and the dock to be one into which the vessel can safely enter at next high water, and commence to discharge without unreasonable delay, and where she can safely lie at all times, and provided vessel is not thereby compelled to lie in an unsafe anchorage waiting for docking orders. Captain to be entitled to employ his own broker at port of discharge."

No. 14: ". . . . . It is also agreed that for each and every day's demurrage or detention at port of call, the shipowners shall have a lien on cargo for all freight, detention, demurrage, and dead freight, if any, but upon shipment ment of the cargo and acceptance by the master, and on settlement of dead freight, if any, or of any freight not represented by bills of lading, and of demurrage, if any, at port of loading, charterers shall be deemed to have fulfilled this charter party, and shall be under no liability thereafter, under any provisions hereof, for any matters, past or future, or for any loss, damage, or other claim for breach of charter party." These are the clauses which touch the method of discharge. The bill of lading incorporates the charter party. In this case there is no fixed number of days for discharge; the discharge was to be within reasonable time. See *Carver* (Sec. 616 (*a*), p. 702, 3rd edit.). The consignee is not liable if the dock authorities do the work of discharge, unless he is guilty of negligence.

[De Villiers, C.J.: But see *Postlewaite* v. *Freeland* (49 L.J., Ex., 630, and 5 Ap., Cas., 599).]

I was going to refer to that, but I do not wish to introduce cases in which a time limit was fixed. *Wright* v. *New Zealand Shipping Co.* (4 Exch., D., 165) is a case in point. See also *Ashcroft* v. *Crow Orchard Co.* (9 L.R., Q.B., 540). That was a loading case, but the same principles apply to discharge. There there was a question of self-imposed liability. See also *Tillet and Others* v. *Coombe Avon Works* (2 Times L. Rep., 675), where the cases I have previously mentioned are commented on. There the principle is laid down that if no time is fixed, the ship must discharge within a reasonable time, and the term "reasonable time" must be interpreted by the circumstances of the port. The same principle is laid down in *Carlton Steamshipping Co.* v. *Castle Mail Packets Co.* (66 L.J., Q.B., 819), *Hick* v. *Raymond* (H.L. Appeals, 1893, p. 22). The same principle is laid down in *Good* v. *Isaacs* (Q.B., 1892, Vol. 2, 555). The only question is whether the time has been extended by the Act, or default of the consignee. Now then to apply these principles of law. This vessel took 43 days to discharge, and of these, 43 days, 35 were working days. It appears from the stevedore's evidence that the vessel was stopped during 12 days from discharging. The vessel was well found, and the stevedore was not in fault; but the consignees had another vessel consigned to them, and nearly 3,000 tons out of a third vessel. This was a very exceptional circumstance. Mr. Stevens admits that he did not expect these three cargoes to be thrust upon him at the same time. On May 15, the captain complained of the slow discharge, and stated that between May 1 and May 15 only three days' work had been done. It must be remembered that the weather was fine during the whole of this time. Less than 100 tons a day were discharged, whereas McKenzie says that 200 tons would be a reasonable amount.

[De Villiers, C.J.: Ought you not to allow Saturday as a half day?]

That is quite a new point. By 200 tons a day we mean 200 tons a day on an average for all the working days. On one day—and that a Saturday—176 tons were discharged. My contention is that the lay days expired on April 22.

[De Villiers, C.J.: How many wet days do you allow for?]

I am not allowing for any wet days. There is no evidence of any wet weather during that time save on April 12. I am willing to allow for two days, and to take the demurrage as running from April 24 to May 12. We have nothing to do with the Harbour Board, and take our stand on the Charter Party. Steven practically admitted that the delay was owing to the fact that the company had three vessels discharging at the same time, and Atwell admits that Mellish frequently complained of the slow discharge. It was a

common thing for from twenty to thirty trailers to be kept waiting at defendant's place for discharge. The cause of delay was that defendants had only two doors by which they could take the wheat into their stores. Then, the fact that the Harbour Board lent labourers to plaintiffs proves that the plaintiffs had not sufficient labour. It is true that the Harbour Board has not fined defendant, but that proves nothing.

Mr. Schreiner, K.C. (for the defendant): Before replying to the argument, I should wish to discuss what are the customs of the port of Cape Town. In discussing this point, we must look closely into the position of the Harbour Board and their regulations. The Harbour Board is a statutory body under Act 26 of 1896. The Harbour Board has confined to itself the landing of cargo. See *Harbour Board Regulations* (No. 6 p., section 7). See also p. 36, which shows that this work is done for reward. The Harbour Board does not await directions from the consignee before discharging cargo. See regulation 15 (p. 12) of Harbour Board. It is the duty of the Harbour Board to duly discharge a ship which it has once berthed. See regulation 35 (p 14). If the consignee does not duly take delivery a fine of sixpence per ton is imposed; he is also charged for storage, and the goods lie at his risk. All these provisions are portions of the custom of the port. In this case the captain has mistaken his remedy. If the Harbour Board has failed in its duty to duly discharge he should have sued the Harbour Board. If the Board had done its duty there would have been no demurrage. The Harbour Board should have put down the wheat where they could.

[Kotzé, J.: The captain addressed himself direct to the consignee.]

Yes, but he mistook his position. We had no control over the discharge of the vessel, and we say that the Harbour Board had no right to stop the discharge.

[De Villiers, C.J.: Of course, the Harbour Board must do its duty; but the point is, could the charterer have overcome these difficulties by reasonable diligence. We cannot condemn the Harbour Board: it is not before us.]

I do not ask that. Captain Lee's conduct caused the demurrage. He stopped the discharge because he was not satisfied with the rate at which the consignee was taking delivery.

[De Villiers, C.J.: Did not your negligence cause him to act as he did?]

No, we did not *cause* him to act in that way, though our not taking delivery as quickly as he wanted may have been his motive. It is for the plaintiff to show that we directly caused the demurrage, not that our negligence (if any) induced somebody else to cause it.

[De Villiers, C.J.: The point is, could the defendants by the exercise of due diligence have unloaded the trailers as they arrived?]

I submit not; they had three ships discharging at the same time, but surely that was no offence, and no proof of negligence.

[De Villiers, C.J.: Was it not the duty of the defendants to provide means and a sufficient number of men to enable them to take delivery?]

I submit not. They dealt with every trailer as it arrived, and they could do no more. The defendants have shown they have not omitted anything they could possibly do to take speedy delivery, and therefore they cannot be held responsible for demurrage.

Mr. Searle: Plaintiff's counsel takes into account twenty days, and assumes that there was no demurrage. The utmost that could be allowed for were four Sundays and four Saturdays. Plaintiff's counsel says that Saturday should count as half a day. One hundred and fifty tons landed per day is an average for the whole week, and on one particular Saturday they even discharged 176 tons; it would, therefore, be absurd to say that 150 tons is a reasonable average *per diem*. They are not entitled to a deduction of more than fourteen days in any case. There were only two wet days; it has been said there were four, but the rain gauge at the Docks only showed two. As to the shortage of trucks, I cannot admit that we are responsible for that.

[De Villiers, C.J.: Why need you go into that?]

It has been argued that some days should be taken off on that account.

[De Villiers, C.J.: I am not taking off any.]

Then I will leave that point. In questions of demurrage you cannot divide days. See *Carver* (section 631) and *Scrutton* (p. 240). The average of

150 tons includes wet days and Saturdays. Hence wet days should not be taken off. If the Court is of opinion that 150, and not 200 tons should be taken as a reasonable rate of discharge, the demurrage will work out at eleven days.

Mr. Schreiner: We are surely entitled to some consideration on account of the shortage of trucks.

Cur. Adv. Vult.

Postea (August 24).

De Villiers, C.J.: This is an action brought by the master of the ship Crown of Denmark to recover from the defendants the amount of demurrage alleged to be due by them for their delay in taking delivery of a cargo of wheat consigned to them. The charter party provided that the discharge at Cape Town Dock should be according to the custom and facilities of the port of discharge, and that for each day's detention 3d. per register ton, or its equivalent, should be paid by the holders of the bills of lading or their agents. The registered tonnage of the ship was 1,987 tons, and the total quantity of wheat consigned was 3,407 Cape tons. She arrived in Table Bay on the 24th of March last, and commenced to discharge her cargo at 1.30 p.m. on the 31st of March. The landing of goods in the port is done exclusively by the Harbour Board, in the exercise of powers conferred on it by Statute. On the 1st of April the Dock Superintendent wrote to the defendant as follows: "I have the honour to point out that owing to the large number of trailers we have at present under load with wheat for your store, I have been compelled to stop the landing from the ships Ernest Reyer and Crown of Denmark. I trust you will see your way to do all you possibly can to expedite the off-loading of these trailers." No answer was sent to this letter, and on April 14 the Dock Superintendent again wrote calling attention to the fact that the discharge of the Crown of Denmark had been stopped on that day, and would be stopped on the following day, owing to the number of trailers still under load for the defendants' stores. On April 15 the plaintiff himself wrote to the defendants, bringing to their notice that his ship was being detained through their failing to take delivery of the cargo, and giving them notice that, unless delivery was taken at the customary rate, viz., 200 tons per working day, demurrage would be claimed. In their reply to the Dock Superintendent's letter, the defendants say: "We are receivng wheat from the Docks, and unloading the wagons with all reasonable despatch and considerably within the time limit you give us," and in their reply to the plaintiff's letter, they say, "Orders for the delivery of the whole of your cargo have been placed with the Harbour Board authorities, as you would have ascertained had you made any inquiries at our office." This last statement does not appear to be quite correct, for several of the landing and delivery warrants produced at the trial bear a later date than the letter, but the point is of no importance, for the question to be decided is not whether the orders for the delivery of the cargo had been given in due time, but whether the delay in the actual landing and delivery of the cargo was attributable in whole or in part to want of diligence on the part of the defendants. Until April 20 the defendants received delivery of the cargo from the Harbour Board trailers at their stores in Cape Town. Mr. Mellish, the Cartage Superintendent of the Board, stated in his evidence that when the discharge of the Crown of Denmark was commenced, there were two other cargoes being delivered to the defendants' stores, and that, in consequence, there was a congestion of loaded trailers there. He added that only a limited number of trailers could be placed opposite the doors of the stores at one time, and that the rest were standing at the nearest available place. Mr. Attwell, who was the first witness called for the defendants, admitted that Mr. Mellish had often complained about the slow rate at which they were taking delivery, "but," he added, "I know the man; he complains without cause." Mr. Stephen, however, the manager of the defendants, who gave his evidence with great fairness and perfect candour, said that it was part of Mr. Mellish's duty to be constantly complaining, and that he should be admired for it. Both of these witnesses throw the blame of the slow delivery on the Harbour Board, whose trailers, they say, were not promptly removed after they had been emptied, and which sometimes had no one in

charge to give delivery of the wheat. The Court is satisfied from the evidence that, whatever impediments may have been placed by the Harbour Board in the way of the prompt discharge of the cargo, the defendants might by the use of reasonable diligence have overcome. It may be quite true, as Mr. Attwell said, that the defendants off-loaded the trailers as fast as they came up, but it is clear from the evidence that the trailers would on many days have come up much faster than they did if the defendants had more doors through which to receive the wheat and more labourers to unload, or if they had supplied their stores in Cape Town with mechanical appliances, such as they had at Port Elizabeth, for expediting the unloading of trailers. On April 20 the defendants directed the remainder of the cargo to be sent to Artois Siding. There was some delay in the discharge of the trucks, in consequence of which the Docks Superintendent gave instructions to stop the discharge of the ship temporarily, but the defendants deny that they were responsible for the delay at Artois Siding, and the evidence of the Assistant Traffic Manager appears to support their denial. The question whether the Railway Department or the defendants are to blame for the delay at Artois Siding is a question between those parties, and cannot affect the rights of the plaintiff as representing the owners of the ship. For the purpose of the present case it is sufficient to say that when a hitch occurred in the prompt despatch of trucks from Cape Town to Artois Siding, the defendants gave no instructions to send the wheat to their stores in Cape Town instead of sending it to Artois Siding. The result was that the discharge of the cargo was not completed until the 12th of May. There is a dispute between the parties as to the number of working days between March 31 and May 1, but the Court is satisfied that, allowing for Sundays, whole holidays, half holidays, rainy days, and days on which the plaintiff was prevented from discharging cargo without any fault on the defendant's part, or eleven in all, the number of working days between those dates was twenty. The summons asks for demurrage until May 5, but the parties have agreed, through their counsel, that the pleadings should be so amended as to embrace a claim for demurrage up to May 12.

The defence raised by the plea is that the defendants were at all times ready and willing to receive, and did receive, without delay, all such portions of the cargo as the Harbour Board, in the exercise of its absolute powers and discretion, did from time to time deliver to them. Their counsel has, however, gone somewhat further in his argument. He contends that the Board was guilty of illegality in delaying, and at times stopping the discharge of the cargo, and that the plaintiff's remedy for any damages he may have suffered is against the Board and not against the defendants. The Board is not before the Court, and, in the view which I take of this case, it is unnecessary to say anything as to its liability. The question to be decided is whether the defendants are liable in this action for demurrage whatever degree of blame or liability might attach to the Harbour Board. I quite assent to the view that the defendants' obligation to unload can only be ascertained by reference to the customs and facilities of the port of Table Bay, and that they should not suffer for any delay occasioned wholly by the Harbour Board. The law on the point was definitely stated by the Lord Chancellor (Lord Selborne) in the House of Lords in 1880, in the case of *Postlethwaite* v. *Freeland* (5 A.C., 608), in the following terms: "If an obligation, indefinite as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of reasonable diligence, ought to be taken into consideration." There have been several variations in subsequent cases upon this statement of the law, but they all agree in this, that the charterer cannot avail himself of any self-imposed liability or of any difficulty placed by others in the way of prompt discharge, which he might have overcome by the exercise of reasonable diligence. In the analogous case, where the obligation is imposed on the consignee to unload in a reasonable time, a similar principle has been adopted. In the case of *Hick* v. *Raymond and Reid* (A.C.,

1892, p. 29) in the House of Lords, the Lord Chancellor (Lord Herschell) said: "It appears to me that the only sound principle is that the 'reasonable time' should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under these circumstances I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee." In the present case the Harbour Board, which has the sole and exclusive control over the landing of goods from ships, had only a limited number of trailers at their disposal, and although it may have been the duty of the Board to provide sheds for goods which consignees could not take with sufficient despatch, it cannot be held to have been guilty of illegality in regulating the discharge of goods by the number of vehicles at its disposal. The means and appliances employed by the defendants for receiving delivery of the cargo of the Crown of Denmark would have been amply sufficient if that had been the only cargo which was being unloaded for them. Unfortunately for them, and possibly without their fault, several cargoes were being unloaded for them at the same time, and the appliances which they actually possessed were wholly inadequate to the emergency. The shipowner might reasonably have expected from the defendants that they would make provision for an emergency which they ought to have foreseen. By not using reasonable diligence to counteract the effects of the Board's remissness, if any, they must be held to have contributed to the delay, and this want of diligence existed after as well as before April 18. When they found that the Harbour Board failed or refused to send a sufficient number of truck loads to Artois Siding, they ought to have directed delivery in Cape Town and provided the means and appliances for dealing with the large quantities of wheat that were being unloaded for them by different ships.. It may be quite true that the Board ought to have provided sheds at the Docks for the storage of goods which the consignees could not receive with sufficient promptitude, and ought to have employed a sufficient number of vehicles for removing the goods as fast as the ships in the port could discharge them. On the other hand, the defendants, having several cargoes of wheat consigned o them, ought to have provided the means and appliances for receiving delivery as fast as the Board could deliver the wheat. Having contributed to the delay by their want of diligence, they are liable for the detention of the ship beyond the time when, with the exercise of reasonable diligence under the circumstances which actually existed, they might have taken delivery of the whole of the cargo, notwithstanding any remissness in the performance of its duties by the Harbour Board. With reasonable diligence they could have obtained delivery at the rate of at least 150 tons a day. At that rate the whole of the cargo would have been landed in twenty working days, and the discharge would have been completed on May 1. The discharge was not completed until May 12, and taking the rate agreed upon by the parties, viz., threepence per register ton, as the measure of damages for each day's detention, the judgment of the Court must be for £273 4s. 3d., with costs.

Kotzé, J.: The ship Crown of Denmark, with a cargo consisting of 29,800 sacks of wheat, entered the Cape Town Docks on the 30th March last, and commenced to discharge on the following day. The plaintiff's case is that the discharge of the whole cargo consigned to the S.A. Milling Company could have been completed in seventeen days, but that owing to the neglect and delay of the company to receive due and prompt delivery of cargo the ship did not complete the discharge until the 12th May. Demurrage is, therefore, claimed at the rate of 3d. per ton or £24 6s. 9d. per day for each day from the 21st April to the 12th May inclusive, amounting to the sum of £496 15s. In answer to this claim the Milling Company contends that the discharge and delivery of all cargo is under the sole and absolute control of the Table Bay Harbour Board, an independent statutory body, and that the Milling Company did at all times receive without any delay on its part all such portions of cargo as the Harbour Board in the exercise of its powers and discretion from time to time thought fit to

deliver. It will be necessary to refer to the charter party, which embodies the contract between the parties. The charter party provides that the discharge of the vessel at Cape Town is to be according to the custom and facilities of the port of discharge, but beyond that it is silent as to the time or number of days within which the unloading or discharge of the cargo is to take place. This being so, the law implies an agreement to discharge the cargo within a reasonable time, and what is a reasonable time must be judged of, not according to ordinary circumstances, but to actual and existing circumstances, including the custom and facilities of the port. For reasonable time is not an abstract, but a relative expression, and must be interpreted according to the actual circumstances, in considering which the custom and facilities of the port of discharge must also be taken into account, especially where, as in the present instance, the charter party contains a clause to that effect. In speaking of the duty of the shipowner and charterer in this respect, Lord Selborne, L.C., observes: "If an obligation to load or unload, indefinite as to time, is qualified or partly defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer or shipowner *could not have overcome by the use of reasonable diligence*, ought to be taken into consideration." *Postlethwaite* v. *Freeland* (1880) (5 App. Ca., 608). And more recently Lord Herschell, L.C., says: "The only sound principle is that reasonable time should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch, under those circumstances I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee." *Hick* v. *Raymond* (1893), (App. Ca., 29). In that case it was held by the House of Lords, affirming the decision of the Court of Appeal, that the consignees were not liable for delay to the shipowner caused by a strike of dock labourers. No actual decision of the English Courts was cited holding a consignee liable for demurrage by reason of his neglect to take due and prompt delivery of the cargo. But it is plain that the ordinary rule as to liability for negligence must apply to such a case, and this also clearly follows from the cases in the House of Lords to which I have referred.

It seems to me that in the present instance two material questions arise for consideration: (1) What are the custom and facilities of the port so far as the discharge of cargo is concerned; and (2) did the consignee do everything proper and necessary to take discharge in the customary manner; or, in other words, has he done everything that could reasonably be expected of him under the circumstances? The evidence shows that, as soon as a ship is berthed in the Cape Town Docks, the Harbour Board, which is an independent statutory body, takes the sole control of the discharge and delivery of the cargo. The Board acts in a double capacity. It does the work of unloading for the shipowner, and when the cargo leaves the ship's side it acts in the delivery of the cargo for the consignee. The consignee furnishes the Harbour Board with delivery warrants, stating where the cargo is to be delivered, and the delivery is then effected either by means of trailers or by means of railway trucks. The storing accommodation in sheds, except for a general cargo, appears to be very limited at the Docks, and no stacking of cargo is allowed on the quay. In so far as the cargo of grain in the Crown of Denmark was concerned, the consignees gave directions for the bulk of the cargo to be delivered at their stores in Bree-street, and for a portion to be sent by rail to Artois Siding. The discharge of the cargo began on the 31st March, and from the commencement the receipt of delivery was unsatisfactory. On the 1st April the Dock Superintendent wrote to the defendant company, drawing its attention to the large number of Harbour Board trailers under load with wheat for the company's stores, and pointed out that in consequence of this he had been compelled to stop the landing from the ships Ernest Reyer and Crown of Denmark, and trusted the company would do all it possible could to expedite the off-loading of the trailers. To this letter no reply was sent, nor does it appear that any steps were taken by the defendant company to remove the cause of the complaint. On the 14th April a

letter of similar import had again to be addressed to the company, so far as the Crown of Denmark was concerned. The company was receiving delivery of cargo in the early days of April from three vessels, including the Crown of Denmark, and the evidence has satisfied me that the company did not do all that it might, and ought to have done to cope with this temporary pressure. It apparently had sufficient storage, and nothing was easier than to have employed extra gangs of men, and to have worked overtime, instead of keeping the trailers loaded with sacks of wheat waiting to be off-loaded. In this way the pressure would have been relieved and the delivery expedited. It was the duty of the consignee to have done this. I am likewise satisfied that there was a block of railway trucks loaded with wheat at Artois Siding, and that this was due to the failure of the consignee to engage extra labour to off-load these trucks. It is also proved that when the Goods Superintendent at the Docks arranged with a representative of the defendant company to send on a special train-load of wheat to Artois, the latter omitted to carry out the necessary arrangements for the purpose. The defence set up by the company, that it can not control the Harbour Board, and that it did all it possibly could to receive delivery, as the Harbour Board was ready to make it from time to time, has, in my opinion, not been made out. This is not an instance where the delay has been caused by some circumstance beyond the control of the consignee; such as a strike of dock labourers, or the independent action of the local authority, as was the case in *Good* v. *Isaacs* (1892, Q.B.D., 555). The Harbour Board may have been wrong in stopping the discharge of the cargo, that is a point upon which I do not at present desire to express any opinion. The conduct of the company, as consignee, in not taking prompt delivery when the Harbour Board exercised despatch and sent forward the trailers loaded with grain, was the reason why the discharge of the cargo was stopped, and the *causa causans* of the delay, and the consequent detention of the ship. By the use of reasonable diligence on the part of the consignee all this could have been easily prevented and overcome. The delay, therefore, to use the language of Lord Herschel, has been caused and contributed to by the consignee, and he cannot over against the shipowner avail himself of any alleged wrongful circumstance on the part of the Harbour Board, which has been brought about by his conduct, and could have been provided against and remedied by him.

It is said on behalf of the plaintiff that 200 tons or 1,600 sacks of wheat per day could easily, according to the custom and facilities of the port, have been discharged from a ship like the Crown of Denmark, that is, working only one hatch. The captain states that although he did not use more than one hatch, he had two out of three hatches ready rigged for the purpose of unloading, and by working two gangs, for which he had arranged, he could readily have put out 300 tons daily. I must say there is certainly a good deal of evidence to show that, regard being had to the facilities and custom of the port, a discharge of 200 tons a day would be a reasonable quantity to unload from a ship like the Crown of Denmark. As a matter of fact, on five or six days the ship did discharge over 200 tons, that is, over 1,600 bags per day. But, upon the whole, I think it best to be guided by the list which has been put in, giving the number of ships which have discharged a cargo of over two thousand tons of grain at the Cape Town Docks between the 1st January and 30th June, 1903. This list shows the average to be from 150 to 160 tons per day, and gives the average discharge of the Crown of Denmark at only 104 tons per day. The ship had a total tonnage of 3,642, and took thirty-five working days to discharge. Now, taking a daily average of 150 tons, the discharge ought to have been completed in twenty-four working days. This leaves eleven days, for which the shipowner is entitled to demurrage at £24 16s. 9d. per day, or £273 4s. 3d. in all. There should, therefore, be judgment in favour of the plaintiff for that amount, with costs.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant's Attorney: G. Trollip.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

HEYNES, MATHEW AND CO. V. ZWEIGENHAGT. { 1903. Aug. 7th.

Sale—To whom was credit given.

Goods were supplied to a business carried on under the style of Godfrey & Co., upon condition that the defendant should be regarded as principal in the purchase of the goods.

Held, *that credit was given to the defendant as principal debtor, and that he was liable to the plaintiffs for the price of the goods.*

This was an action brought by Heynes, Mathew and Co., wholesale chemists and druggists, Cape Town, to recover £336 0s. 4d. from Louis Zweigenhagt, chemist and druggist, Cape Town, for goods sold and delivered.

The declaration set out that the plaintiffs had supplied to the defendant, trading under the style or firm of Godfrey and Co., goods to the amount of £336 0s. 4d., and the defendant neglected or refused to pay such sum. The plaintiffs prayed for judgment for this amount, with interest *a tempore morae*, and costs of suit.

The defendant in his plea, admitted who the parties were, but denied the other allegations in the declaration, specially denying that he carried on business as a chemist and druggist under the style or firm of Godfrey and Co. He denied that he was indebted to the plaintiffs in any sum whatever. The defendants had not sold or delivered any goods to him, and he had not received any goods from them. He prayed that the claim should be dismissed with costs.

The replication was general.

Mr. Gardiner for plaintiffs; Mr. Wilkinson for defendant.

Alfred H. Mathew, partner in the firm, said he knew the defendant. He remembered the defendant coming to their office in December, 1902, with reference to opening a business in Hanover-street. He said he had certain premises there, and he asked about Mr. Godfrey, who was a chemist, and whom the defendant wanted to put in as a manager. He proposed to trade as Godfrey and Co. Witness told the defendant that they would only supply him with goods on one condition, and that was that he alone should be responsible financially. Mr. Godfrey had previously been in the firm's employ, and they had had transactions with him, through which they had lost money. Hence they were only prepared to look to Zweigenhagt for the money. They arranged to supply him with an opening order, equal to goods to the value of about £300, and to allow him 90 days' credit. They afterwards sent a letter to Zweigenhagt, confirming the arrangement. The reply was signed, "Godfrey and Co.," and was dated from Observatory-road. When they sent their bills they sent a copy to the firm of Godfrey and Co., and a duplicate copy to Zweigenhagt, at his private residence, first at Observatory-road and afterwards in Kloof-street. He had seen the defendant three or four times, and the latter had promised to come and see them. It was not until they made a legal demand that the defendant did anything in the matter. Defendant said he was carrying on building operations at Rondebosch, and that he could not settle the account then. He afterwards wanted the plaintiff firm to take over the business, and said he would waive any claim with regard to fixtures if they would release him from the debt. He said he had spent about £130 on the fixtures. They would not entertain this proposal. Defendant then offered them a bill for 90 days for the whole amount, and they said they would only accept it on condition that his wife's name was attached, as he had told them that he had no property, and that it was his wife's. Subsequently a letter was received from Godfrey and Co., tendering the stock, fittings, etc., estimated to be of the value of £380, to the plaintiffs in settlement of the bill.

Cross-examined by Mr. Wilkinson: They told the defendant that they would not accept him as security for Godfrey. There was a question raised as to some fittings, for which they asked £50. The defendant offered £20, and said that, unless it were accepted, he should cancel the opening order. They declined to accept that notice because the opening order had been previously given uncon-

ditionally before any dispute with regard to fittings arose. Their position was that the defendant had no right to cancel the order. Godfrey did not until afterwards represent the defendant to the firm as his financier. They would not accept such a proposal because Godfrey had not got a penny.

Frank Carlton Mathew, another partner in the plaintiff firm, corroborated the evidence of the last witness as to the interview with Zweigenhagt. He took the opening order on the condition that the business was Zweigenhagt's.

John Alfred Mathew, senior partner, also gave corroborative evidence.

Thomas Farquhar Tenant, town traveller for Heynes, Mathew and Co., said that in April last he met defendant in the street and spoke to him with reference to the account of Godfrey and Co. Witness asked him to settle the account, and defendant said he would call at the office within two days.

Mr. Gardiner closed his case.

Louis Zweigenhagt, the defendant, said the shop where Godfrey and Co. carried on business was the property of his wife. Witness acted as agent for his wife. Witness called on Mr. Alf Mathew in November, and suggested he should take the shop. Mr. Mathew said that if witness could find a trustworthy man the firm were willing to support him and to be security for the rent. Witness afterwards suggested Godfrey, and Mr. Mathew said he was a very good man. Witness said that Godfrey had told him that he had very little capital to start, and that he thought Dr. Sellar would go in partnership with him. Mr. Mathew told witness to send Godfrey in. Mr. Mathew advised witness to help Godfrey to put in the fittings, and he (Mr. Mathew) would support him with the stock, on condition that Godfrey only bought from Heynes, Mathew and Co. Witness saw Godfrey again early in December, and later on Mr. Mathew told witness the firm would support Godfrey if witness would stand security; he said he was willing to start Godfrey with the fittings. Witness never gave Heynes, Mathew and Co. any order. On the 23rd December the firm wrote to witness, saying: "We beg to thank you for your order handed to us to-day by Mr. Henry Godfrey." That letter was supposed to come to witness, but it went to Mr. Godfrey. It was addressed to Mr. Godfrey's place, and witness was shown it by Godfrey. After receiving the letter the witness saw Godfrey and told him to cancel the order. Witness afterwards went to see Mr. Mathew, and told him he was not open to stand as security or to take any responsibility for any stock delivered. Witness's only interest in the matter was to get a good tenant. The business was Mr. Godfrey's. Witness had no interest in the profits of the business. Witness told Mr. Mathew that he was willing to lend Godfrey £100 for fittings for a year, bearing interest at 6 per cent., and that Heynes, Mathews and Co.'s bills would first be paid. Mr. Mathew said that would be all right. Witness never undertook any responsibility on behalf of Godfrey.

Cross-examined by Mr. Gardiner: The letter of the 23rd December was addressed to "Mr. L. Zweigenhagt, corner of Station and Main roads, Observatory." In his reply, Godfrey referred to "our Mr. Zweigenhagt." Witness asked Godfrey for an explanation of the term "our Mr. Zweigenhagt," and Godfrey said witness was supposed to be a supporter. Witness did not agree to pay Godfrey a salary of £20 per month. In April, witness was advised by Mr. Mathew to take over the business, and employ Godfrey at a salary of £16 a month. Witness afterwards saw Godfrey, who told him he had been allowing himself £20 out of the business, but that he would in future only take £16 a month. Mr. Mathew advised witness to try and sell the place for Godfrey. Witness did not offer Mr. Mathew to give over the business, and to give a promissory note for 90 days.

Henry Godfrey said he made no arrangements with Heynes, Mathew and Co. personally. Witness arranged with defendant that he should supply fittings, and defendant said he had arranged satisfactorily with Heynes, Mathew and Co., on witness's behalf, as to the stock. The only concern Zweigenhagt had with the business was in regard to the money spent on the fittings, in respect to which witness agreed to pay Zweigenhagt 6 per cent. interest. The business was witness's; defendant had no share in it.

Cross-examined by Mr. Gardiner: Witness did not undertake to be responsible to Heynes, Mathew and

Co. Witness knew the firm would not accept his undertaking to be responsible. The arrangement was made with Heynes, Mathew and Co. by Zweigenhagt. Witness did not know the terms of the arrangement. Zweigenhagt originally agreed to guarantee witness £20 a month salary; but he afterwards said witness should draw it from the business.

Re-examined by Mr. Wilkinson: Witness owed the money to Heynes, Mathew and Co. He did not go to Heynes, Mathew and Co. for credit, because he knew the firm would not give him credit.

Mr. Wilkinson closed his case.

Mr. Wilkinson (for the defendant): The plaintiff asserts that credit was given to defendant, but defendant did not give any order personally; the order is in Godfrey's handwriting They told defendant that Godfrey was not a good business man and that they had lost money by him, and yet the plaintiffs say, that knowing this, the defendant selected Godfrey as his manager. I submit that this is a most improbable story. There was some correspondence about fittings, and the defendant told plaintiffs he would not be able to carry on business if they charged more than £20 for his fittings; in such case he said he must cancel the order. Godfrey's contention is that the business belonged to him, though he owed money on it. There is a direct conflict of evidence as to whether defendant or Godfrey was owner of the business. If the defendant was merely a guarantor, the form of this action is misconceived. There is no proof that Godfrey was personally liable.

Mr. Gardiner was not called upon.

Maasdorp, J.: In this case the plaintiffs claim from the defendant the sum of £336 0s. 4d., said to be the price of certain goods supplied by them to the defendant, who is alleged in the declaration to carry on business as a chemist and druggist at Cape Town, under the style or firm of Godfrey and Co. The defendant denies that the goods were sold and supplied to him, and says that he did not carry on business under the style or firm of Godfrey and Co. The real issue as raised between the parties in this case, as it now stands upon the evidence, is whether the goods were supplied to Godfrey, carrying on business as Godfrey and Co., or to Louis Zweigenhagt, carying on that business. We have the evidence of Mr. Godfrey himself, who was called as a witness for the defence, and who says he at no time entered into any contract with the plaintiffs in respect to this business, and that he undertook no responsibility to them, because he was well aware that they would not have given him credit in the matter. Mr. Godfrey says that any agreement that was entered into with the plaintiffs was entered into by the defendant, and that he doesn't know what the terms of such agreement were. We are, therefore, thrown upon the evidence of the plaintiffs and of the defendant as to what the contract was that was entered into between the parties, and it seems to me it has been quite clearly proved, both by the oral evidence that has been given ,and by the documents, which support that evidence, that there was an agreement entered into between the plaintiffs and the defendant, the express terms of which were that the goods were to be supplied to the business of Godfrey and Co., on the express condition that the business should be long to the defendant, and not to Godfrey; and the reasons for not giving credit to Godfrey at the time were given by the plaintiffs to the defendant at the interview they had. The goods were subsequently supplied, and a letter was written, from which it is quite clear that the plaintiffs looked to Mr. Zweigenhagt as the party with whom they were contracting. Subsequently to the goods being supplied, it appears that there was some difficulty as to the payment, and on different occasions the defendant was addressed either by the partners in the plaintiff firm or by their clerk, who requested him to come and settle this account, and on several occasions he promised them that he would come and see them at their place of business, and settle the matter. These promises were made before the letter of demand was written, and upon his failing to keep these promises, a letter of demand was written, and he again had an interview with Mr. Alfred Mathew, one of the partners of the firm. At that interview he offered to settle the matter with them by giving them a bill. This offer was made after he had requested Mr. Mathew to take over the whole business and carry it on for his own benefit. Mr.

Mathew refused this, and also refused to take the bill, unless it were endorsed by the defendant's wife. The defendant, however, did not supply that endorsement, and there the matter ended. Now up to that period there was no denial at any time by the defendant that he was the principal in the purchase of these goods, and that he was personally liable; and I come to the conclusion that his own evidence, as given in this case, is wholly unreliable, and that the contract is proved by the plaintiffs, who are supported entirely by the correspondence which has been put in. I find, therefore, that the goods were supplied to Louis Zweigenhagt, carrying on business under the style or firm of Godfrey and Co., and judgment must be given against him for the sum of £336 0s. 4d., with costs.

[Plaintiffs' Attorneys: Van Zyl and Buissinné; Defendant's Attorney: P. M. Brink.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZE.]

TRIAL CAUSE.

COOMBER v. COOMBER. { 1903. Aug. 10th.

This was an action brought by Maria Coomber against her husband for a decree of judicial separation, and for the possession of her private inheritance. Mr. Alexander was for the plaintiff, and the defendant was in default.

Mr. Alexander said that the matter came before the Court on 25th June last, and the plaintiff now asked the Court to allow her to receive from the Master and executors of a certain estate, without the assistance of her husband, to whom she was married in community of property, her private inheritance. The parties were married in Johannesburg in August, 1896, and there were two boys, of the respective ages of four and six, of the marriage. In 1898 the defendant maliciously deserted plaintiff in Johannesburg, and had not since been heard of. The plaintiff claimed a decree of judicial separation, £5 per month for the maintenance of herself, and £4 for that of her children, until they attained the ages of sixteen years, forfeiture of all rights arising out of the community of marriage, alternative relief, and costs of suit.

Decree granted, one-half of the estate to be paid to the plaintiff, and the other half to be paid to the Master and the interest to her, maintenance to date from the present.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

REVIEW.

REX v. SWART. { 1903. Aug. 11th.

Lashes — Previous conviction — Act 20 of 1856.

Under Sec. 42 of Act 20 of 1856, a magistrate may not punish a prisoner who has been previously convicted with lashes unless the previous conviction took place within two years of the subsequent one.

Maasdorp, J.: In this case, which came before me for review, the prisoner, Lucas Swart, was charged with theft before the Resident Magistrate at the Paarl. A previous conviction was proved against him, and the magistrate sentenced him to three months' imprisonment with hard labour, and eight lashes with the cat-o'-nine-tails. When the sentence was passed, it occurred to the Resident Magistrate that he could only inflict lashes where the previous conviction had taken place within two years, and it appeared that in this case the last previous conviction took place on the 20th June, 1900. When the sentence was sent up for review, the attention of

the judge was drawn in the record to that fact. Under the circumstances, the magistrate has exceeded his jurisdiction, and the sentence must be amended by striking out the lashes; the proceedings are otherwise confirmed.

TRIAL CAUSES.

NYILA V. NYILA.

This was an action brought by the husband, who is living at the Native Location, Maitland, against his wife, for divorce on the ground of her adultery. Mr. Rainsford appeared for the plaintiff, and the defendant was unrepresented.

George Smith, clerk in charge of the Marriage Registers, Colonial Office, produced the record of the marriage.

The plaintiff said he was married to the defendant in the district of Glen Grey about nine years ago. About two years ago, when they were living at the Maitland Location, the defendant left him, and went to live with another man at D'Urban-road.

Walter Yeba stated that the plaintiff's wife was living at D'Urban-road with Memani. They were living as man and wife.

A decree of divorce was granted.

REVELAS V. POWER.

Injury to property — Assault — Damages.

This was an action brought by Constantine Revelas, a Greek shopkeeper, of Muizenberg, against Michael Power, Observatory-road, to recover £180 for malicious damage to goods, and personal injuries inflicted by the defendant. The defendant counter-claimed for £500 damages for assault.

The declaration set out that on or about the 28th March, 1903, the defendant entered plaintiff's shop at Muizenberg, and wrongfully, unlawfully, and maliciously broke, damaged and injured the plaintiff entered his shop at Muizenberg, and wrongfully, unlawfully, and maliciously broke, damaged, and injured the plaintiff's goods in the said shop, causing loss and damage to the amount of £50. At the same time and place, the defendant wrongfully and unlawfully assaulted plaintiff, injuring him so as to incapacitate him from business for some time, and in consequence the plaintiff had sustained damage in the sum of £130. The plaintiff claimed damages in the total sum of £180 on the said two counts.

The defendant, in his plea, admitted the formal allegations of the declaration. He admitted that he went to the plaintiff's shop, but said he entered the shop lawfully, and the plaintiff wrongfully and unlawfully assaulted him with great violence, and struck him on the head and body with a bottle and hatchet, and cut, bruised, and seriously injured him. The defendant was compelled to use force to repel the assault. Save as above, defendant denied the allegations, especially that he unlawfully broke and injured the goods of the plaintiff, and unlawfully assaulted the plaintiff, or that the plaintiff had sustained damages for which he was liable. He prayed that the claim be dismissed with costs. In reconvention, he claimed leave to refer to the allegations above pleaded, and stated that in consequence of an assault by the plaintiff, now the defendant, he had suffered great pain, and was wholly incapacitated from attending to business, and had been put to expenses for medicine, and had otherwise sustained damages in the sum of £500, which he claimed.

The plaintiff, in replication, said that the defendant wrongfully and unlawfully assaulted him, and that he was compelled to use force to resist the said assault, and that any injuries inflicted on the defendant were inflicted in lawful defence of his person and property.

Upon these pladings issue was joined.

Mr. Buchanan for plaintiff; Mr. Upington for defendant.

Constantine Revelas, plaintiff, stated that he did not know the defendant. Witness carried on business at the Masonic Buildings as a general dealer. On Saturday night, 28th March, the defendant came in to the shop half drunk, with one of his friends, and started swearing at once. Witness thought the defendant was going to fight with the witness Palmer, but the latter went out, and the defendant immediately took up a position on a table, although he was only invited to sit on a chair. Witness was about to weigh some monkey nuts when the defendant bundled bunches of grapes into the scales. He then took the fruit

on to the counter, and commenced pressing it. Witness asked him to desist, and the defendant lifted a couple of pound weights and struck witness with one on the head. The defendant was forcibly ejected, and on the way out he succeeded in kicking over baskets and mineral water cases. The defendant returned to the shop, and proceeded to throw the seventeen bottles of mineral water at the witness. The glass cases behind the counter were smashed, and the defendant thereupon attempted to smash the window with a large stone, and when witness was struck on the back he commenced spitting blood. The defendant made another attack, and witness rolled with him on to the street in the course of the fight. "Thousands" of people came along, and half an hour later a policeman separated them. He had to pay £1 between the doctor and the chemist. He still had the mark on the forehead, and continued to suffer pain from the injury to his back. He was only a couple of days from business, as he could not lie down with the pain. He had stock to the value of about £600 at that time, and he suffered about £80 damage. On Saturdays in the summer months he would make from £30 to £35.

Cross-examined by Mr. Upington: He left Greece to make some money out here. There was no other reason. He had previously been convicted for assaulting a person in his shop at Muizenberg. He threw a two pound weight at a man as he was leaving the shop. He did so to protect a lady in the shop. Fortunately, he missed the man with the weight. The defendant did not attempt to weigh grapes for his friend; he squeezed them into the scale. Witness did not take up one of the weights and strike the defendant on the hand. Witness spoke to him quietly, and did not strike him. The whole row occupied about three-quarters of an hour. The defendant's friend was outside when the seventeen bottles were being flung inside. Witness did not proceed to throw bottles at the defendant. Witness had a small sweet hammer in his hand, but he did not use it, and he could not see if the defendant was all cut over the head, as he himself was blinded with blood. Witness did not lose his temper and strike the defendant with a bottle. He simply took a look round his property, and put the loss down at £80. Cigars, cigarettes, and confectionery were damaged to the extent of £55. The damage to glasses and show cases he put down at £5, and the loss of trade at £12. About thirty boxes of cigars were damaged.

Maasdorp, J.: The cigars fell off the shelves, and got damaged by the mineral water.

Mr. Upington: Thirty boxes of cigars were open, and they all got damaged. He returned to the shop the next day. He did not put the defendant out very hard.

Maasdorp, J.: The defendant kicked the boxes of mineral waters outside, and then started throwing the bottles inside.

Re-examined by Mr. Buchanan: The bottles were all full of lemonade, and the floor became wet and the cigars saturated. He paid £5 for mending portion of the show-cases.

Johannes Palmer, a coloured fisherman from Muizenberg, said that he was in the plaintiff's shop when the defendant came in "barking like a dog." Witness said: "Why, you bark like a dog," and the defendant replied, "Clear out, you black fellow." Witness left the shop, and when he was some distance away, he saw the defendant throw mineral water bottles into the shop. The plaintiff did a good business, and on some Saturday nights it was difficult to get into the shop.

Cross-examined by Mr. Upington: Witness could not say if the plaintiff was a violent man, and if he was always having rows.

Cecil van der Poel, fisherman, said he saw plaintiff in defendant's shop on the Saturday night. Witness took a seat in the shop. Power took some grapes, and squeezed them into the scale. Revelas tried to get Power to go, and Power threw a lemonade bottle into the case. Witness ran out, and on coming back, he saw the two struggling in the street. At the start, a man came into the shop and asked for nuts. Power asked the man if he wanted grapes, and took up a bunch of grapes, and squashed them into the scales.

Cross-examined: The two Revelas tried to put Power out. Power did not, in witness's hearing, offer to pay for the grapes. When witness came back, only one of the Revelas had hold of Power, whose face was covered with blood. Power handled the grapes roughly. Witness only saw one bottle thrown.

Re-examined: Power was half-drunk. Revelas's face was also covered with blood. The shop was in confusion after the affair. The glasses were shattered, and some cigar boxes were lying about. There were about four cigar boxes on the floor.

By Maasdorp, J.: Before Power was put out of the shop witness did not notice whether plaintiff was hurt on the forehead. He did not see Power strike Revelas with a weight. When witness ran out, the shop was in good order.

Dr. Bulger said he attended plaintiff on the Saturday night. There was a large swelling on the left side of the chest, this being the result of a severe blow. Plaintiff's head had been previously dressed.

Cross-examined: Witness also saw Power, who had severe injuries. He was under witness's care for ten days. He had received at least three severe blows with a blunt instrument. They could have been caused by a bottle.

Re-examined: Power was about half-drunk when witness saw him. Power's injuries could not have been caused by a toy hammer, nor by rolling against the curbstone.

By the Court: The chemist had dressed the wound on plaintiff's head. It was not a severe wound, and little force had been used.

Mr. Buchanan closed his case.

For the defence, Mr. Upington called

Michael James Power (defendant), who stated that he was a carpenter by trade. He usually visited Muizenberg every Saturday, and on the evening of the 28th March he went into the plaintiff's shop, with the intention of buying fruit. He did not bark like a dog at the door. Immediately afterwards Revington followed into the shop, and the only other person there was Van der Poel. Witness asked Revington if he would have same grapes, and when he proceeded to pick the grapes, the plaintiff struck him with a weight. The plaintiff then came from behind the counter, and struck witness on the shoulder. Witness retaliated, and struck the plaintiff back. The plaintiff and another man threw him outside, and then he was struck on the head with a bottle. The plaintiff rushed out, and knocked witness down with a hammer. The police then came up, and took him to a doctor. He remained at St. James, and paid the doctor £6 for attendance. He was laid up till the middle of April, and had to pay another man £16 to do his work. He was wounded on the nose, forehead, and top of the head. It was customary to select fruit that was exposed for sale. It was untrue that the plaintiff's face was covered with blood. It was only after bottles were thrown at him that he retaliated in the same manner.

Cross-examined by Mr. Buchanan: He did not care for publicity, otherwise he would have taken action. He could not bark like a dog; he would make a poor attempt at it, and would leave that to other people. It was quite natural that his blood would get up when he was struck. He was simply "hurled" out of the shop. The plaintiff was a pretty good wrestler. Witness bombarded the shop after he himself had been bombarded.

Re-examined by Mr. Upington: He had done nothing in the shop before the plaintiff struck him.

George Revington, foreman tailor, in the employment of Mr. John Garlick, stated that on the evening of March 28 he was at Muizenberg with his wife. After tea he saw Power in the plaintiff's shop. Witness called for some monkey nuts, and the defendant asked him to have some grapes, and proceeded to weigh them. The plaintiff got excited, and struck the defendant on the hand with a weight. He then came from behind the counter, and struck the defendant and got struck back. The defendant was thrown out just as witness was called out by his wife. Witness saw a bottle flying out into the street when the defendant was lying in the gutter.

Cross-examined by Mr. Buchanan: The defendant was in a happy mood, but was not half drunk. The plaintiff got angry because the defendant did not desist weighing the grapes.

Samuel Short, engineer, stated that on the evening of the 28th March he saw the defendant thrown into the gutter from the plaintiff's shop. When witness lifted the defendant up, he saw one of the men in the shop about to throw a bottle. He did not see the defendant throw bottles.

Cross-examined by Mr. Buchanan: He would say that the defendant was thrown out. He heard other bottles breaking outside.

John Doyle, clerk, residing at Muizenberg, said that he saw the defendant fling something into the shop after he had been thrown outside, and imme-

diately afterwards he saw the plaintiff rush out with something like a hammer in his hand. The defendant guarded a blow, and clinched with the plaintiff. Witness thought that the defendant was being murdered, and went for the police.

Cross-examined by Mr. Buchanan: He did not see any bottles flying about. The plaintiff was on top of the defendant when witness went for the police.

Re-examined by Mr. Upington: When the defendant threw the bottle he was on the ground.

This closed the evidence, and after counsel had been heard in argument on the facts,

Maasdorp, J.: There is not much difficulty, in my opinion, in this case to gather from the evidence of the disinterested witnesses what it was that really took place at the time when this unpleasantness arose between the plaintiff and the defendant. The defendant was out holiday-making, and arrived on the evening in question at the plaintiff's shop in a boisterous and a merry mood. I don't think he could be described as being very seriously under the influence of liquor or drunk, but he arrived there in rather a lively temper, and upon his friend following into the shop he began in a playful manner to take liberties with the fruit that there was in the shop, and by so doing annoyed the plaintiff. Now, it seems to me, had the plaintiff not so readily lost his temper no harm would have followed after that, but the plaintiff seems to be a rather quick-tempered man, and was very soon infuriated. He requested the defendant to desist from meddling with the goods, and the defendant refused to do so. Thereupon. the plaintiff and his brother proceeded to put the defendant out of the place. In my opinion, up to that time no assault had been committed by the defendant. It has not been proved that the defendant struck a blow with the weight that was lying on the counter, and inflicted a wound on the plaintiff's forehead. Van der Poel, who seems to have seen everything that took place, said that he saw no blows struck by the defendant at the plaintiff. Consequently, the first violence that was used, whether it was justifiable or not, proceeded from the plaintiff and his brother. They may have been justified in putting the defendant out of the place when he refused to leave the goods alone, but they seemed to me to have done it in a violent manner. He was provoked, and it appears that blows were struck before the defendant was finally ejected out of the door. At that time the defendant was in a great rage, and I am satisfied that he vented his rage by picking up a number of bottles that were lying at the door, which had fallen out of a box during the scuffle, and proceeded to fling them into the shop. He may have been retaliating for the assault he had received, but I am quite sure that he saw he was doing damage to the goods, and that he insisted on flinging these bottles into the shop, regardless of what damage he might cause. Van der Poel says the first bottle that was thrown into the place caused a crash in the glass case, which was fixed up against the wall, and he was so frightened that he rushed out of the shop. The plaintiffs, seeing that their property was damaged, made an attack upon the defendant, and I think it was then that the most serious wounds were inflicted on both sides. It was then that the defendant's face was injured by some weapon, which was used by the plaintiff, and it is not at all improbable it was only then that the plaintiff received the injury to his side. There is no doubt that both of them got very roughly handled, and if the question of assault was now only before the Court I would have been inclined to decide that each party brought what he received upon himself by his own fault, and was not entitled to redress, and I would have given judgment against each party on his own claim. But the further question arises whether, under all the circumstances of the case, the defendant should not be held liable for the damage he caused to the property of the plaintiff. Now, I feel satisfied that when the defendant flung these bottles into the shop in the mood in which he then was he intended to do some damage, and that damage resulted. The question arises, "What amount of damage should be allowed to the plaintiff for the injuries he received in consequence?" One would have expected that if any serious loss had been suffered by the plaintiff that he would have obtained the testimony of some independent witness to place proof of it before the Court. The evidence upon the damage is extremely unsatisfactory, and it seems to me when we go into details of the loss

that was suffered it amounted to a few panes of glass in this glass case, and three or four boxes of cigars and some cigarettes, and this is valued by the plaintiff at £50. Now, I am quite satisfied if we allow five pounds for the damage suffered it would meet the loss which the plaintiff sustained, and, under all the circumstances of the case, I think the plaintiff should have judgment for £5 for the injuries to his goods, and that we should allow him Magistrate's Court costs.

Kotzé, J., concurred.

[Plaintiff's Attorneys: D. Tennant, jun.; Defendant's Attorneys: Friedlander and Du Toit.]

GENERAL MOTION.

SPILHAUS AND CO. v. "BELGIAN KING.

Mr. Benjamin moved as a matter of urgency for the appointment of a commissioner to take the evidence of the captain and crew of the ship Belgian King, which would be at East London for a few days. The plaintiffs in the case, Wm. Spilhaus and Co., consented to the application. The affidavit of an attorney at Port Elizabeth set out that the Belgian King was under attachment at Algoa Bay for alleged short delivery of cargo, and the charter was about to expire. Security would be given by the owners. The ship would be in East London for a few days, and might never visit South African ports again, and it was necessary to take the evidence of the captain and crew at once.

Order granted, the Resident Magistrate at East London being appointed as commissioner.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Honourable Mr. Justice MAASDORP, and the Hon. ourable Mr. Justice KOTZÉ].

GENERAL MOTIONS.

JEFFREY v. WAKE { 1903. Aug. 12th.

Mr. Gardiner applied as a matter of urgency for the arrest of a witness, who had been subpœnaed in the case of Jeffrey v. Kotze, set down for hearing on Wednesday next. The petition of the plaintiff set out that the witness, Thomas Henry Wake, was in a position to prove certain allegations, and that the said witness intended leaving for the Transvaal that night. The witness had been duly served with the subpœna, and his evidence was material to the plaintiff's case. Counsel applied for an order for arrest until the respondent would give satisfactory security, and for the appointment of a commission to take evidence, Mr. Advocate Pyemont to act as commissioner.

The witness, having given an assurance that he would remain over for 24 hours, the order was granted for a commission, Mr. Advocate Pyemont to act as commissioner.

BRAUN v. POWRIE.

Sir H. Juta, K.C., for the plaintiff, moved as a matter or urgency for the appointment of a commissioner to take the evidence of a witness named Myburg, who was about to leave for Oudtshoorn.

Mr. Close opposed the application on behalf of the defendant on the ground that there was not sufficient time to instruct counsel.

Application granted, Mr. Upington to act as commissioner.

TRIAL CAUSES.

THOMSON v. THOMSON.

This was an action brought by Martha Maria Magdalena Thomson, of Constantia-road, Wynberg, against her husband, for restitution of conjugal rights, or, failing compliance, a decree of divorce. Mr. Upington appeared for the petitioner, and the defendant was unrepresented.

Mr. Smith, clerk in charge of the Marriage Register, Colonial Office, proved the registration of the marriage.

Martha Maria Magdalena Thomson, the plaintiff, said she was married to defendant on the 28th September, 1893, at Cape Town. They first lived at Sea Point. Her husband was a journalist, and was at that time editor of the "South African Review." In 1896 they went to Bulawayo, where her husband was editor of a paper at £60 per month. While they were at Bulawayo, her husband became addicted to drink, and in 1897 he lost his

position through drink, and they were reduced to poverty in consequence. She came down to Cape Town in 1897 at his request, and she went to live with her mother. At first her husband sent her money, and then he stopped. At the end of 1898 she pawned her jewellery, and returned to Bulawayo, where they started a home again. They remained together till the outbreak of the war, when she came down to Cape Town again at his request. Defendant had not sent her any money since that time. He was now living in Cape Town, but she did not know what employment he was following. She received letters from him, and in October last year she went to Bulawayo again in search of the defendant, whom, she found, had been in Cape Town all the time. She subsequently met the defendant in Cape Town, and asked him to take her back. He said that he had no money to enable him to support her. She had since maintained herself by dressmaking. Her attorneys had received a letter from the defendant, in which he said that his wife told him in April last that she would on no account live with him again. It was she, not he, who had refused to live in matrimony. Witness admitted that she told him that she would not live with him unless he provided a house and took a decent position. She was prepared to go back to the defendant if he provided a home for her.

By the Court: It was entirely owing to the defendant's own fault that he had not a decent position. She was now living with her sister and brother-in-law. Defendant was at present doing literary work.

De Villiers, C.J.: There has been personal service, and if the defendant had been present and stated that he would be prepared to receive the plaintiff, there might have been some difficulty in granting a decree of restitution of conjugal rights. But, as there is no appearance for the defendant, the Court will grant a decree, but it must be clearly understood that if the defendant appears on the return day, and shows that he is willing to receive the plaintiff, to do the best for her, even though that best is not what she expects, if it is the best that under the circumstances can be expected from him, she will not be entitled to a final decree. Upon that understanding, the Court will grant a decree of restitution calling upon the defendant to return to or receive the plaintiff on or before the 31st August, failing which you will take a rule calling on the defendant to show cause on the 12th September why a decree of divorce should not be granted.

THOMSON v. THOMSON.

This was an action for the declaration of nullity of marriage on the ground of an existing marriage at the time the marriage was celebrated between the parties. Mr. Benjamin appeared for the plaintiff, and the defendant was in default.

Mr. Benjamin said that it was found necessary to take evidence in England in regard to the prior marriage, and in regard to the spouse of the first marriage being alive. He was therefore instructed to ask that the matter be allowed to stand over until the 16th November to enable the evidence to be taken.

Application was granted.

THE "MARGA" v. SEARLE AND OTHERS. 1903. Aug. 12th. " 22nd. Sept. 3rd

Charter party—Bill of lading—Demurrage.

A charter party was entered into between the plaintiff and B., who consigned part of the cargo to the defendants under bills of lading, which made no reference to the charter party. There was no evidence that B. acted as the agent of the defendant.

Held, *that in so far as the bills of lading differed from the charter party the defendants were liable under the bills of lading and not under the charter party.*

The bills of lading provided that the consignees should take delivery as quickly as the goods could be delivered in the ship's slings from the ship. Owing to the crowded state of the port, there was considerable

delay in the discharge, and the evidence showed that it was impossible for the defendants, owing to lighters being unobtainable, to hasten the discharge.

Held, *that the defendants were not liable for demurrage.*

This was an action brought by the master of the German barque Marga, representing the owners, who belong to Hamburg, against Edward Searle and Co., of Port Elizabeth, and twelve other persons or firms, to recover £1,049 17s. 4d. for demurrage of the said vessel in the port of Algoa Bay.

The plaintiff's declaration set out that on the 6th February, 1901, at Hamburg, one Blumenthal entered into an agreement with the owners or agents of the said vessel upon terms and conditions set forth in the charter party which formed part of the agreement. That Blumenthal acted on behalf of Searle and Co., who had full knowledge of the charter party, and who acted as agents of the vessel. All the bills of lading provided that all goods were subject to an absolute lien for freight until paid, and for all charges, including dead freight, demurrage and other charges. She arrived at Port Elizabeth on the 3rd October, 1901, and was duly placed in a berth. On and after 4th October the vessel was ready to deliver the goods, and it was the duty of the defendants to receive the goods as quickly as they could be delivered from the ship's slings. The defendants as consignees, and the first defendants as consignees, charterers and agents, failed and neglected to make provision to receive the goods, and delivery did not commence until the 14th December, 1901. In terms of the charter party the plaintiff was entitled to claim demurrage at the rate of 4d. per ton net register per day, and according to the charter party lays days expired on the 28th November, 1901. The defendants refused to recognise the plaintiff's claim for demurrage. The plaintiff, in order to preserve his lien upon the cargo for demurrage, on or about the 8th of January, 1902, ceased discharging and delivering cargo, and applied to this Honourable Court for an order of attachment of the cargo consigned to the defendants, and also to other consignees not now joined as parties to this suit, and on the 6th day of February, 1902, the plaintiff recommenced discharge and delivery of cargo upon satisfactory security being given pursuant to the order of this Honourable Court in respect of his claim for demurrage and without prejudice to his rights as entitled to a lien on the said cargo, which lien still continues. Should the Court hold that the defendants were not bound by the agreement in the charter party, the plaintiff contended that the period between 3rd October, 1901, and 28th November, 1901, was a reasonable and sufficient time for defendants to accept the goods in terms of the bills of lading. In order to prevent multiplicity of suits, the twelve other defendants agreed to abide by the decision in the present case. The registered net tonnage of the vessel is 1,016 tons, and the amount of demurrage due to the plaintiff is £1,049 17s. 4d.

The defendants' plea set out that they had no knowledge of the circumstances whereunder the charter party was entered into, that they were not parties to it, and were not bound by its terms. They denied that Blumenthal entered into the charter party under any instructions from the first defendants, or that any of them had any knowledge of its terms. They stated that the bills of lading constituted the contract between the parties, and that they carried it out according to the terms thereof. The discharge of the vessel had not been delayed by any neglect or default of the defendants, but had been regulated and conducted in accordance with the rules and regulations of the Harbour Board, and in accordance with law and the practice and custom of the port. If any delay in the said discharge had arisen it was through hindrances beyond the control of the defendants, and for which they were not liable. The defendants claimed in reconvention £95, £73 7s. 11d., £35. £14 3s., £19 18s. 3d., £94 5s. 6d., and £1 0s. 3d., by reason of the delay occasioned by the refusal of the plaintiff to deliver the said cargo.

Mr. Schreiner, K.C. (with him Sir H. Juta K.C.), for plaintiff. Mr. Searle, K.C.), (with him Mr. Benjamin), for defendants.

Mr. Schreiner put in certain correspondence, including an agreement of the other defendants to abide by the decision of the case, and said the first point in the case was the matter of construction of the documents. The bills of lading did not state the number of lay days, but under the charter party, the number was implied in the bills, and counsel would contend that both documents should be read together. The bills of lading could not be understood unless the charter party was read. There would be very little evidence in the case, as the captain was dead, and the charterer was hostile. His contention would be that Blumenthal was acting for the consignees when he determined these days on their behalf. Blumenthal knew what the actual lay days were when he signed the bills of lading for the consignees. The cessor clause substituted an absolute lien upon the cargo for the plaintiff's demurrage, and when it was shown that Blumenthal acted as agent for Searle, then the defendants would be bound by the stipulations under the charter party. His clients held that it was a German contract, and they had very strong advice that the terms of the bills of lading could not fail. He would urge that Act 5 of 1879 was never intended to debar the Supreme Court from doing that which the Courts at Westminster would do under similar circumstances, and further, that in England the contract would be determined on a German construction. The broad rule was that the law of the country where the contract was made should apply.

Mr. Schreiner called

Charles R. Hodgson, broker and general agent, of Port Elizabeth, who said he was agent for Messrs. Smith and Co., Durban, the owners of the Penguin, a small coasting steamer, which had for two or three months, before October, 1901, done lighterage work in Algoa Bay. She was chartered by the Union-Castle Co. There were several lightering vessels at Port Elizabeth; as far as he remembered, there were about seven or eight. In October, 1901, witness endeavoured to hire the Penguin, but the negotiations came to nothing. On or about October 17 the vessel went to Mossel Bay with a small cargo. To witness's knowledge, witness did not know of any application to hire the lighter for the Marga. The Penguin returned on the 9th November. She was available on the 14th, and was engaged in lightering on the 15th for Mackie, Dunn and Co. This was for a sailing ship. Witness's practice was to charge for time. On November 19 witness chartered the Penguin to Mosenthal and Co. She was discharging Bucknall steamers from the 18th to the 28th November. Witness believed these steamers carried general cargo. She sailed for East London on November 29, and returned about the 28th December. On the 8th, 11th, 18th, and 20th January the vessel was again hired for lightering work, and subsequently she went on a coast voyage. If the charterer took the boat at £30 a day, witness did not care whether the cargo was general or not. Witness did not agree with the evidence given on commission that owners of private lighters would not hire their vessels for lightering general cargoes, owing to the difficulties and want of facilities. Witness gave evidence in the case of the Silvia on Circuit in 1902.

Cross-examined by Mr. Searle: There were firms who had lighters of their own. Witness could not say whether these firms would have hired out their lighters at the time in question. In addition to these there were the Penguin and another coaster —the Rouselong—which did lightering work. Witness could not say whether the Rouselong could go alongside the Marga to lighter. Mr. Searle may have spoken to Mr. Griffiths, witness's partner, about hiring the Penguin. If Mr. Searle said he spoke to witness concerning the Penguin, witness would not deny it. All general cargoes had to go into the Harbour Board stores. Until a vessel got a store into which the cargo could be placed, the practice was not to allow her to land the cargo. The whole of the stores and the appliances were under the control of the Harbour Board. Searles were generally able to give as quick discharge as anyone in the port, and witness sometimes employed them.

Mr. Schreiner closed his case.

Mr. Searle called

James Searle, jun., partner in the firm of Searle and Co., who said his firm were agents for the Marga, which arrived in Algoa Bay on the 3rd October. The cargo consisted of cement, salt, and matches. There were 500 barrels

of cement, 300 bags of salt, and 10 cases of matches. The firm received the documents in the ordinary course through the bank. When they took up the drafts, they had no knowledge of the terms of the charter party. It was on the 16th October that they were first aware of the terms of the charter party. When the vessel came, witness made all efforts to get her discharge accomplished as quickly as possible. The discharge was in the hands of the Harbour Board. If the cargo were all for one consignee, it could be taken to the consignee; otherwise it would have to be taken to the Harbour Board store. Several firms were interested in this cargo. The Harbour Board refused a written application by the firm to allow the vessel to come into the jetty. The Harbour Board took a vessel's turn from the time the vessel was entered in the Customs books. The Marga had a preferential turn on the 14th December. The Harbour Board decided to land timber on the beach ,and witness protested that the Carl Peel should be allowed to discharge, if the Marga was not allowed to unload her mouldings, which was agreed to. There was delay in accordance with the custom of the port, and witness tried everywhere to get private lighters. He had to supply more valuable cement, in order to keep a contract with the Municipality. He had also to supply a better quality of salt in another contract. The Harbour Board store was first available about the middle of December. Witness tried to get the vessel worked at night, but the Harbour Board could not fall in with the suggestion. On the 8th January the captain refused to discharge any more cargo, and in consequence of that, the Harbour Board took away the lighter and the vessel lost her turn. On the 8th January the captain claimed a lien on the cargo. Witness received notice on the 10th January, and, in consequence of that, the discharge was delayed until the 6th February. Witness claimed damages from the 8th January to the 6th February. Had the captain continued he would have finished his discharge in three or four days. Witness suffered loss through the scarcity of cement at the time, and he could have sold it during January at 1s. 6d. a cask more than in February. He claimed 1s. a bag on 300 bags of salt. On each case of matches he claimed 5s. Blumenthal, acting for someone else, gave witness a quotation for cement, but he was not witness's agent. The ship carried a certain amount of optional cargo, including cement and salt. Part of that cargo was sold to witness, the transaction taking place after the vessel left for South Africa. Before the application, witness offered security to the master.

Cross-examined by Mr. Schreiner: The letter from Blumenthal appointing witness as agent was a mistake, inasmuch as witness had merely suggested that he would merely store the cement of the optional cargo. Blumenthal was not his Continental representative in relation to the consignment of goods that were shipped per the Marga. He would not charge Blumenthal with the difference if he could get the cement cheaper than witness's prices. They were simply agents for the ship, and he did not think it was their duty to protect the captain's demurrage claims. He could not give any rule or regulation of the Harbour Board bearing on the case. He could not say that the store allotted by the Harbour Board on the 14th December received anything except timber up to the 2nd January. The ship was stopped on the 30th and 31st December, because she was last in turn in order to give preference to the transports. The reason why they could not discharge from more than one hatch from the 14th was because of the scarcity of lighters.

Re-examined by Mr. Searle: Blumenthal was a well-known charterer in Port Elizabeth, when he took over De Jong's business. As agent he did not take a log of what was discharged each day. He made every effort possible to get the ship discharged, and it was beyond his control to urge the Harbour Board when they were dealing with transports.

Carl Heidveder, bookkeeper to Messrs. Dreyfus, Port Elizabeth, said he received the bills of lading in the ordinary course. Their name figured as the shipper, and not Blumenthal. He had never seen the charter party at all. His goods were not discharged until February. He claimed sixpence a gross on the matches, because there was a scarcity all round at the time, and five shillings on the sewing machines. He could not in any way have hastened the discharge of the Marga.

Cross-examined by Mr. Schreiner: He would not have sold all the sewing ma-

chines in the short space of time, but, as he had no idea of when he would get those in the Marga, he did not order any more, and, consequently, lost the sale.

Wm. John Thomas Coates, shipping clerk in Messrs. Phillip Bros., Port Elizabeth, said that he represented his firm in the claim of £95 on the goods consigned per the Marga. According to the bill of lading, they should have received 1,663 packages, but they only received 1,625, leaving a shortage of 38. By taking an average number of feet £95 would be a fair value.

Cross-examined by Sir H. Juta: The invoice gave him the quantity, and he did not measure the mouldings. He could not say how many feet he was short, and he merely went by the packages. He put in a claim against the ship after she had left.

Wm. Edward Clift, marine superintendent to the Port Elizabeth Harbour Board, stated that he adhered to his evidence on commission. He made a correct statement from the log showing the discharge of the vessel. The Marga was stopped on the 30th December on account of the mail boat, which landed 1,015 tons.

Cross-examined by Mr. Schreiner: He could show by a statement the number of vessels being discharged by private lighters from the 18th September to the end of December.

Re-examined by Mr. Searle: With one exception the private lighters were being used during that time for their own lines. There was no room in the Harbour Board stores until the 14th December.

Mr. Searle closed his case.

Mr. Schreiner, K.C. (for the plaintiff): The captain has a lien on the cargo for demurrage.

[Mr. Searle here asked to be allowed to put in certain original invoices which had just arrived from Port Elizabeth.]

We have not seen them, but I do not object to their going in. To proceed: The charter allowed sixty-seven days for loading and for discharge. The contract was that the cargo was to be discharged in thirty-five days, but, of course, they could get more time by saving time in loading.

[Kotzé, J.: But the endorsement on the charter expressly gives thirty-five days for discharge.]

My contention is that forty-five days were allowed for discharge at Port Elizabeth; then demurrage would commence, and the lien would come into operation. The bills of lading were subject to the provisions of the charter party, and hence the captain did not lose his right *in rem* over the goods by signing these bills. There is nothing to show that we ever gave up our right to lien.

[De Villiers, C.J.: How does the question of lien affect the case?]

Because the captain stopped the discharge, and came to Court for leave to attach the goods. The consignee has a right of action against the charterer if the captain enforces his lien, but the consignee has no immediate contract with the captain. Unless the bill of lading is read with the charter party, all rights under clause 35 as against the charter vanish. The bill of lading was signed without prejudice to the stipulations of the charter party. Looking at the two documents together, it is clear that the charterer was Blumenthal. He made the bills of lading. The conditions as to demurrage were inserted in the charter party. Blumenthal shipped the goods, and the bill of lading was signed on June 15, 1901. This bill was a blank bill, and the effect of handing it over to any endorsee was to transfer property in the cargo to him. No express freight is stipulated for in the bill of lading, and the word as used therein only means freight as per charter party. If I once show that the consignee was by the bill of lading put on inquiry as to the terms of the charter party, it follows that the captain by signing the bill of lading abandoned his rights as to lien for demurrage after thirty-five days. See Scrutton (p. 47) where he cites *De Laurier* v. *Wylie* (17 S.C. Sess. C., 167).

[De Villiers, C.J.: But is there any proof that Blumenthal was acting as an agent for Searle?]

He was clearly in that position, for he was not selling cement, etc., which were shipped by him; the correspondence clearly shows this. See *Ireland* v. *Livingstone* (41 L.J.. Q.B., 201, and 5 H.L., 395), cited at p. 574 of *Benjamin on Sales*. As I have pointed out, we are entitled to say that Searle and Co. were acting through their agent, Blumenthal. It would be monstrous to say that the ship was bound to lie forty-seven days at Port Elizabeth until they could take delivery.

[De Villiers, C.J.: But see *McLean* v. *Bellinghan* (2 Scot's Rep.).

It is difficult to see how Bellingham could have been anything but an agent or a broker between the two parties. The whole case is really between Searle and Co. and us, and if other parties are joined, it is only that they may be able to plead in reconvention. I would refer to *Scrutton* (p. 323, 3rd Edition). An endorsee of a bill of lading is put upon inquiry as to the terms of the charter party. *McAloney* v. *Spilhause* (11 Sheil, 509). So in this case Searle knew the condition of the port better than the captain could be supposed to know it. If we must stand or fall by the charter party, see *Wright* v. *N.Z. Shipping Company* (40 L.T., 413), which was not overruled by *Postlewaite* v. *Freeland* (L.T., 601). See also *The Jaederen* (68, L.T., 266).

[De Villiers, C.J.: The captain tried to get lighters, but could not.]

That is only secondary evidence.

[De Villiers, C.J.: You represent the late captain, and what he said to his mate is evidence.]

It is not necessary that we should put in evidence to which we object.

[De Villiers, C.J.: Then the other side can put it in.]

I object to their doing so.

[De Villiers, C.J.: I make a note of your objection.]

It was the duty of the consignees, if of anybody, to engage lighters, and Searle took no steps to get them beyond making inquiries from one individual. This case is on all fours with *Wright* v. *N.Z. Shipping Company*. *Postlethwaite's* case does not override *Wright's*, but only decided that demurrage could not be claimed if the custom of the port were observed. In this case we have to deal with alternative customary methods of discharge. Surely a duty was cast upon the consignees to arrange to receive their cargoes. See *Milman* v. *S.A. Milling Company* (12 C.T.R., 690). Searle could have provided a private lighter had he been willing to pay for it.

[Kotzé, J.: The large lighters were all engaged.]

They could have got the Penguin. She was engaged for only a few days. I now go on to point out that we are not responsible for restraints of princes, therefore we are not responsible for any delay caused by the presence of transport ships. On December 14 a store was allotted to us, but we could not discharge till January 2. The bill of lading, however, makes exception as to delay arising from restraints of princes in favour of the ship only, and not of the consignee.

[De Villiers, C.J.: What restraints of princes were there?]

The action of the military.

[De Villiers, C.J.: You knew that the place was in possession of the military, how, then, can you claim for delay?]

Take the case of a strike: that case would afford a mutual exception to both the ship and the consignee, but this is quite a different matter. By the charter party the consignees were bound to take delivery as fast as the goods could be delivered from the ship's slings. They excuse themselves on the ground of want of landing facilities, and this rose from the *vis major* employed or threatened by the military. See *The San Roman* (26 L.T., 948).

[De Villiers, C.J.: Has that question anything to do with demurrage?]

Yes, because the consignees must be ready to receive their goods from the slings, and must show that we got delivery according to the custom of the port.

[The Court requested Mr. Benjamin to address himself to the claim in reconvention only.]

Mr. Benjamin (for defendants, plaintiffs in reconvention): There are three claims in reconvention, viz., those of Searle and Co., of Dreyfus and Co., and of Phillips. This last is a claim in respect of short delivery, which is admitted.

[De Villiers, C.J.: Then as to delay. The master, you say, refused to discharge; where is your damage?]

That is shown by the correspondence put in. Searle and Co. lost on salt and on cement in consequence of these articles not being delivered in time for a favourable market. They lost about 5s. per case on matches. In all they lost about £55. This is not a case on all fours with one in which the master cannot deliver owing to the perils of the sea, for here the goods were in the harbour. The claims of Dreyfus and Co. have been considerably reduced. Counsel for defendant in reconvention has relied strongly on the clause in the bill of lading as to weight and number of goods delivered, but the defendants have already abandoned that

ground by admitting responsibility for a shortage of 38 cases of mouldings. See *Scrutton on Charter Parties* (p. 117 and 118, 4th edition). The onus is on the ship to show that number and weight stated in the bill of lading were not duly received on board. See also the recent case of *Holtman* v. *Stewart* (88 L.T., 702).

Mr. Schreiner (in reply on damages claimed in reconvention): See *Scrutton* (p. 281). The case for the plaintiffs in reconvention has been argued as if the measure of their damages should be regulated by the interest on the value of their goods. There is nothing to show the ship knew that the goods were required for a certain market. No doubt there have been cases in which special damages have been given, where the carrier had notice that the goods were required for a particular season, but this is quite a different case.

Cur. Adv. Vult.

Postea: (Sept. 3rd.)

De Villiers, C.J.: This is an action for demurrage brought by the master of the ship Marga against the defendants, who are merchants, residing at Port Elizabeth. The plaintiff in his declaration relies mainly upon the terms of the charter party, which was entered into between him and Blumenthal at Hamburg, and the terms which he relies upon are these: As much as is payable abroad, according to the bills of lading, in cash at the port of discharge on right and true delivery of the cargo, and the balance—but in no case less than one half—to be paid in Hamburg after the final departure of the vessel from the Elbe, in cash, at the financially quoted rate of exchange for short sight bills on London, less 6 per cent. for interest and insurance, on receipt of which the charterer's responsibility concerning this charter to cease, the captain to have a lien on the cargo for all freight, dead freight, and demurrage." Then with regard to demurrage there is an endorsement to this effect on the charter: "The ship has in all 67 days for loading and discharging; of these days 22 have been used in Hamburg, thus 45 days are left for discharge to be counted, as per the charter party." The defendants, as I have said, are merchants at Port Elizabeth, the goods were consigned to them, and they were holders of the bills of lading, upon which they ultimately received delivery of the goods. The clause relating to the discharge is as follows: "The master to deliver the goods with all reasonable despatch, and the consignees are to be ready to receive them free from alongside when at hand, and to take delivery as quickly as the goods are delivered in ship's slings by the ship, otherwise the master may discharge at the expense and risk of the owners, or, in his option, charge demurrage for the ship at the rate of 4d. per ton net register of ship." The captain to have a lien on the goods for all these charges. The first question to be decided is whether the defendants are bound by the charter party or by the terms of the bill of lading. The bills of lading make no reference to the charter party, but the contention is that the defendants knew of the terms of the charter party, or if they did not know the terms they ought to have known these terms. The general rule is concisely stated by Carver, in his work on "Carriage by Sea," as follows (Section 160): "When the bills of lading are in the hands of strangers to the charter party, either as original shippers or as indorsees to whom the property has passed, they show the contract under which the goods are being carried; and the shipowner's claims, exemptions, and liens on the cargo, given by the charter party, are not preserved as against such shippers or indorsees, except as far as those terms of the charter party are expressly incorporated in the bill of lading." Counsel for the plaintiff has, therefore, taken great pains to convince the Court that Blumenthal, the charterer, was in reality the agent for the defendants. My opinion, however, is that the evidence wholly fails to establish such a contention. I have read and re-read the correspondence, and am unable to find in that correspondence any proof whatever that Blumenthal was other than the vendor. Much stress has been laid upon the fact that this is what is called a c.i.f. contract, and that the price was to cover the cost, insurance, and freight, but that is no proof that an agency was intended to be established. If it had been proved that a commission was payable to Blumenthal, then certainly there would have been some evidence that there was an agency, but it is clear that no commission was payable. Upon this point the judgment of Lord Blackburn, then Mr. Justice Black-

burn, is of importance, and I do not think there is any subsequent case which in any way overrules his *dicta*: "If the consignor is a person who has agreed to supply the goods at an agreed price to cover cost, freight, and insurance, the amount inserted in the invoice is the agreed price, and no commission is charged in such a case. It is obvious that if the freight is high the consignor gets the less for the goods he supplies; if the freight is low he gets the more, but, inasmuch as he has contracted to supply the goods at this price, he is bound to do so, though, owing to the rise in price at the time of shipment making him pay more for the goods, or of freight causing him to receive less himself, because the shipowner receives more, his bargain may turn out to be a bad one. On the other hand, if owing to the fall in price in the port of shipment or of freight the bargain is a good one, the consignee must still pay the full agreed price. This results from the contract being one by which the one party binds himself absolutely to supply the goods in the vessel as it is stipulated for, at a fixed price, to be paid for in the customary manner, that is part by acceptance on receipt of the customary documents and part by paying the freight on delivery, and the said party binds himself to pay that fixed price. Each party therefore takes upon himself the risk of the rise or fall in price, and there is no contract of agency or trust between them, and therefore no commission is charged." Now it seems to me that that is exactly the case here, and that there is no agency established, and that, therefore, the defendants are not bound by the terms of the charter party, but are bound by the terms of the bill of lading alone. I have already read those terms. The master is to deliver the goods with all reasonable despatch, and the consignees are to be ready to receive them free from alongside when at hand, and to take delivery as quickly as the goods can be delivered in the ship's slings by the ship. Mr. Schreiner has relied upon the case of *Milman* v. *S.A. Milling Company*, (12 C.T.R., 690), which was recently decided in this Court, but in that case the Court held that the consignees had contributed to the delay, and that they were liable. There is one case, however, which counsel for the plaintiff greatly relies upon, and that is the case of *Wright* v. *New Zealand Shipping Company*. I do not wish to say more in regard to that case than this, that if it is in conflict with the case of *Postlethwaite* v. *Freeland*, the Court should follow, as it has recently done, the decision in the later case. The two cases may, however, be distinguished, as was done by Lord Selborne, on two grounds—first, that there was no express reference to the custom of the port, and, secondly, that there was no evidence that reasonable diligence would not have enabled the charterer to provide sufficient lighters. So that he went mainly upon this question of evidence. But the Court has been referred to the most recent case upon the point that was decided in the present year, also in the House of Lords, the case of *Hulthen* v. *Stewart and Co.*, decided on the 25th May. "By charter party it was agreed that a steamer should proceed to a named port, and there deliver a cargo of timber, 'to be discharged with customary steamship dispatch, as fast as the steamer can deliver . . . according to the custom of the port,' with an exception in respect of delay caused by a strike or lock-out. The ship duly arrived at the port, and was ready to deliver the cargo, but delivery was delayed by the crowded state of the dock to which she was ordered. There was evidence that she would not have been discharged more quickly, under the circumstances, elsewhere in the port, and that the consignees had used all reasonable means to procure the discharge." The Lord Chancellor, in his judgment, expressed his surprise that the question should have been again raised after the previous decisions thereon. Lord Macnaghten was equally emphatic, and he ended his judgment in the following words: "It is, I think, established that in order to make a charterer unconditionally liable, it is not enough to stipulate that the cargo is to be discharged 'with all dispatch,' or 'as fast as the steamer can deliver,' or to use expressions of that sort. In order to impose such a liability, the language used must in plain and unambiguous terms define and specify the period of time within which delivery of the cargo is to be accomplished. I am, therefore, of opinion that the appeal must be dismissed with costs." The House of Lords were

unanimous in the same way as the Court of Appeal had been unanimous. The remaining question is, whether in point of fact the defendants had used reasonable diligence, all such diligence as could reasonably be expected from them to receive delivery of the cargo as fast as the ship could deliver it. Upon this point there is certainly some evidence in support of the view that lighters might have been obtained, but the impression of the whole of the evidence upon my mind is that it would have been impossible for the defendants to receive delivery of the cargo more quickly than they did. It is said that the Penguin was available, but we have the evidence of Mr. Searle that he had tried, that he had spoken to the agent for the Penguin, and endeavoured to get the lighter from him, and had failed. But if evidence were wanting on the part of the defendants, I think that evidence is really supplied by the evidence given on behalf of the plaintiff himself in Belgium. The bill of lading, as I have already remarked, provides for the master to deliver with all reasonable dispatch, and the consignees to take delivery as quickly as the goods are delivered in ship's slings by the ship, and then comes this clause: "Otherwise the master or agent may discharge and store them at the expense and risk of the owner of the goods, or, in his option, charge demurrage." It is clear from the evidence taken on behalf of the plaintiff himself in Belgium that there was an anxiety to prove that the master had done everything to discharge and store the goods at the expense of these owners, and witness after witness was called, and stated that the master had made the admission. He stated that he had gone daily on shore in order to obtain lighters, and on each occasion he had failed to obtain lighters. An objection was raised to the admission of this evidence, because it is said that the plaintiff himself did not put it in. Of course, the plaintiff is not bound to put in any evidence which has been taken on commission; but if that evidence has been taken, and it comes to the notice of the Court which authorised the commission, I consider that the Court would have been justified without any consent on either side in directing that that evidence should be put in. But that point does not arise now, because the defendants themselves have requested that that evidence, taken on behalf of the plaintiff, should be put in, and the Court allowed it to be put in in so far as it contains admissible evidence, and consequently any admissions made by the master, the plaintiff in the present case, or rather the former plaintiff—because he is dead now; he represented the owners—and any admissions made by him to the witnesses would clearly be evidence. It is, therefore, now before the Court, and upon that evidence it is perfectly clear that the master informed his chief mate and several of the crew that he had done everything he could to obtain lighters on shore, and the chief mate says he speaks from his knowledge, because he had seen the master endeavour to obtain lighters. It was as much to the interest of the master to endeavour to obtain lighters as it was to the interest of the consignees, and, therefore, I think these admissions made by the master are of some importance to the case. But, quite independently of these admissions, I think that the evidence, taken as a whole, must lead the Court to the conclusion that the defendants have done everything in their power that could reasonably be expected from them to obtain quick delivery of the cargo. Owing to the congested state of Port Elizabeth at the time, the congestion being caused by the great number of ships in the Bay and the large quantity of cargo that was being landed for the military, the defendants were unable to obtain quicker delivery. When the master could obtain a berth and was in a position to discharge his cargo he refused to deliver the cargo, claiming his lien. Of course, I think he would have had his lien—I need not go into my reasons now—for his demurrage, but, if there was no demurrage payable, he clearly was wrong in detaining these goods, and for that detention I consider he is liable to damages. The only question is what the measure of damages should be. The contention of the plaintiff is that the measure of damages should be only the interest on the value of the goods, whereas the defendants' contention is that the measure of damages should be the profit which they would have made upon the goods. Well, I must say that the evidence is not very satisfactory as to the profits. Part of the damage seemed to have been occasioned by the delay of the Railway Department, which sent the goods, and there is the

admission in the case of Dreyfus that there were other circumstances which occasioned the damages, and upon the whole, without laying down a hard and fast rule that only interest should be chargeable, the Court is of opinion that in the present case no more than interest upon the amount should be charged. It is not quite clear what that amount is, but the parties may come to terms upon what the amount is on which interest may be charged. As to the claim of Phillips, I consider that it should not have been made. It is wholly outside this case. Here are a number of defendants brought into court to have a question of demurrage decided, and then there is the claim for short delivery, and I am by no means satisfied that there was short delivery. The case has not been clearly made out, and, as to the claim of Phillips, there should be absolution from the instance. The judgment of the Court will, therefore, be upon the claim in convention for the defendants, with costs, and, as to the claims in reconvention, there will be judgment for Searle for the amount presently to be ascertained, as well as for Dreyfus for the amount to be ascertained presently. As to the other claim, there will be absolution from the instance. The costs of the action will be paid by the plaintiff.

Maasdorp, J., and Kotzé, J., concurred.

Judgment was entered for the defendants on the claim in convention, and on the claims in reconvention for Searle for £3 7s. 11d., and for Dreyfus for £18 0s. 6d., absolution from the instance in the claim of Phillips, costs to be paid by the plaintiff. It was also ordered that Mr. Searle's personal expenses be included in the costs.

[Plaintiff's Attorneys: Findlay and Tait; Defendant's Atorneys: Van Zyl and Buisinné.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

PROVISIONAL ROLL.

FORD V. FORD. { 1903. Aug. 13th.

Mr. Upington moved for a decree of civil imprisonment against the defendant upon an unsatisfied judgment of this Court, delivered on the 15th May last in an action for divorce. Upon that judgment a writ was issued for £45 6s. 4d. and £1 4s. 6d., taxed costs. The summons also called upon defendant to show cause why he had not paid two sums of £4, being monthly instalments for the maintenance of his child. Correspondence was read, which had passed between the parties, showing that a dispute had arisen as to defendant's access to the child.

Defendant said that he had been placed in a very unfortunate position by his wife's unfaithfulness. He was now in debt to the tune of £109 5s. 2d., and he should like to show the Court why he had come into this position.

Maasdorp, J.: We cannot go into that. Why didn't you raise the matter at the proper time?

Defendant: I was badly advised by my solicitors. I was blackmailed in my last case.

A decree of civil imprisonment was granted, to be suspended on payment by defendant of £6 a month—£4 towards the maintenance of his child, and £2 costs—the first payment to be made on the 1st September.

Defendant: Will you allow me to have my child one day per month?

Maasdorp, J.: You must move the Court by a proper application.

FAIRBRIDGE, ARDERNE AND LAWTON V. MOLYNEUX AND SONS.

Mr. Benjamin moved for provisional sentence on a promissory note for the sum of £359 1s. 3d.

Order granted.

BOLUS V. SHAFFER.

Mr. Rainsford moved for provisional sentence for the sum of £250 on a certain mortgage bond, and interest at the rate of 7 per cent. from January 1, 1902. and that the property hypothecated be declared executable.

Order granted.

MALCOMESS AND CO. V. CHETTY.

Mr. Benjamin applied for the discharge of the final order of sequestration against the defendant's estate. A satisfactory settlement had been effected.

Application granted.

TREVOR V. CHETTY.

Mr. Close applied for the provisional order of sequestration against the defendant's estate to be discharged.

Application granted.

WAKELIN AND CUNNINGHAM V. RANDALL.

Mr. Benjamin moved for provisional sentence for the sum of £65 on certain conditions of sale.

Order granted.

HODGSON V. DIMBLEBY.

Mr. Upington moved for provisional sentence on the sum of £300 on a certain mortgage bond with interest from January 1, 1903, £9 being a half year's interest due from June, 1902, and that the property specially hypothecated be declared executable.

Order granted.

BARRY BROS. V. TELFER.

Mr. P. S. T. Jones moved for provisional sentence on a promissory note for £475 6s. 4d., with interest from the 29th November, 1902, and costs of suit.

Order granted.

COTT BROS. V. LAMPERT AND WOLLAS.

Mr. M. Bisset moved for the provisional order granted on August 6 by Mr. Justice Maasdorp to be made final.

The defendants appeared, and one of the men said that their assets were sufficient to meet all their debts. They were only short of ready money.

Maasdorp, J., said it appeared that at the meeting the debtors offered to pay their creditors 10s. in the £.

One of the defendants repeated that they were not insolvent.

Maasdorp, J., advised defendants that they should instruct an attorney and have these statements put on affidavit before the Court. The matter was ordered to stand over till later in the day.

Later the defendants consented to an order for compulsory sequestration, and the Court accordingly granted the order.

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ILLIQUID ROLL.

WASSERFALL V. SCHACKNONIS. 1903. Aug. 13th.

Mr. Struben moved for judgment on the sale of certain property, the Bella Vista, plaintiff tendering transfer, and also for *a tempore morae*.

Order granted.

HOGG V. LONGLEY.

Mr. Upington moved for judgment under Rule 329d for the sum of £50, money obtained by the defendant from the plaintiff on the 10th December, 1902, by means of false and fraudulent misrepresentation, which said sum the defendant contracted and agreed to spend on the plaintiff's behalf, but which he had wrongfully and unlawfully appropriated to his own uses, and also interest from the 10th December last, and costs of suit.

Order granted.

ROSS V. PRIDEAUX.

Mr. Russell moved for judgment under Rule 329d for transfer and conveyance of certain land, the plaintiff having paid the whole purchase price.

Order granted.

AHMED V. ALIE.

Mr. Rowson moved for judgment under Rule 319 for the sum of £82 10s., moneys disbursed by the plaintiff for the use of the defendant, and interest *a tempore morae*, and costs of suit.

Order granted.

STAFFORD V. WOLFAARD.

Mr. C. W. de Villiers applied for judgment under Rule 329d for the sum of £183 7s. 9d., goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Order granted.

PURCELL AND OTHERS V. HENDRICKSON

Mr. Buchanan moved under Rule 329d for judgment for the sum of £133 19s. 8d., goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Order granted.

REHABILITATIONS.

Mr. Benjamin moved for the rehabilitation of Charles William Leach, now of Queen's Town. The estate was sequestrated in 1898. The books did not appear to have been properly kept, and there was also a sum of £720 unaccounted for. A dividend of 7s. 6d. in the £ was declared.

Maasdorp, J., said that a sum of £700 had been withdrawn from the business which had not been accounted for. That would require some explanation, and the matter would have to stand over *sine die* pending such explanations by the debtor.

Mr. Close moved for the rehabilitation of Hulgaard Peter Meyer. The estate showed a deficiency of £268.

Rehabilitation granted.

Mr. Van Zyl moved for the rehabilitation of Hermann Teich. The estate showed a deficiency of over £3,000.

Rehabilitation granted.

Mr. M. Bisset moved for the rehabilitation of Morris Schaverien.

Rehabilitation granted.

GENERAL MOTIONS.

DE WET v. DE WET. { 1903. Aug. 13th

Mr. Van Zyl, for the plaintiff, moved for an order declaring the defendant of unsound mind, and for the appointment of a *curator bonis*. Mr. De Waal, as *curator ad litem*, appeared for the respondent.

Dr. Moon stated that the defendant was at present at Valkenberg, and had been there since February, 1903. She was suffering from melancholia and delusions, and was unable to manage her own affairs. She might recover in time.

Order granted, Daniel Jacobus de Wet, of Mount Prospect, being appointed curator of the defendant's goods and person.

Ex parte SCHULTZE.

Mr. De Waal moved for the rule nisi under the Derelict Lands Act to be made final.

Order granted.

Ex parte HARTFORD.

Mr. De Waal moved for the rule nisi under the Derelict Lands Act to be made final.

Order granted.

Ex parte AURET.

Mr. Russell moved for the rule nisi under the Derelict Lands Act to be made final.

Order granted.

WELLS v. WHITE. { 1903. Aug. 13th

This was a motion to make absolute a rule nisi granted on the 26th June, calling on respondent to show cause why he should not be interdicted and restrained from using a certain road.

The petition of Mary Wells, stated that she was the owner of certain property at Newlands, known as Kelvinside, which property was adjoined by that of the respondent, John Joseph White. Petitioner's property was bounded on one side by a 40-feet road, on another by a 30-feet road, and on a third by a 25-feet road. The said 25-feet road was on the land of the applicant, and was her property. The respondent had used this road, and had broken down a fence at the end of that road so as to get thence to his property. The 25-feet road was made by the person from whom applicant had bought the property. Respondent insisted on using the road. Applicant prayed for an interdict restraining respondent from using and trespassing thereon.

The respondent deposed, on affidavit, that he claimed that he was entitled to have access to the road in question for himself and his tenants, and that applicant was not entitled to the sole and exclusive use of the same. When deponent purchased the property this road was shown on the diagram attached to the transfer. The fence referred to was respondent's property, having been erected by the person from whom he purchased. Part of the 25-feet road fell into the 40-feet road, and it was over this part that deponent got access to his property. He had no objection to waiving his right to the use of the 25-feet road, providing the 40-feet road was extended to the 30-feet road, so as to give

him access to the property. The 25-feet road was laid down by the common predecessor, and was shown on the diagram of deponent's predecessor.

The affidavit of one Brodie stated that he formerly owned the property of applicant and respondent. Before selling to respondent's predecessor he reserved the 25-feet road as his absolute property. He subsequently sold part of the property to applicant, inclusive of the road in question. Neither the respondent nor his tenants had a right to the use of the road. He referred the Court to the diagrams.

Sir H. Juta, K.C., for the respondent; Mr. Benjamin for the applicant.

Sir H. Juta, K.C.: A 40-feet road runs at the back of our property. At the side there is a 30-feet road. The 40-feet road is a continuation of a 25-feet road. The applicant in her petition does not show what title she has to the 25-feet road or to the 40-feet road. That road was laid down by a common predecessor, and these roads were marked on Rymer's diagram. Rymer divided the property, and sold to applicant's and respondent's predecessors in title respectively. Roberts's affidavits show that although the road is on the applicant's property it is not part of her property.

[Maasdorp, J., (to Mr. Benjamin): You do not claim the 40-feet road?]

Mr. Benjamin: Oh, yes, we say it is part of our property. We do not admit that respondent has a right to come on the road. He can only get on the 40-feet road by using the 25-feet road.

[Maasdorp, J.: Your petition refers to title deeds. Where are they?]

I thought they had been put in; but counsel for the respondent admits that the road is on our property. How, then, can the respondent be justified in using it?

[Maasdorp, J.: These roads are on the remaining extent; but there may be a servitude over the applicant's property.]

There is nothing registered on our title deeds. The respondent does not claim this road either as a *via necessitatis* or by prescription. If a right had been given by a former proprietor, it might have been binding on his immediate successor, but surely not on a remote successor. Admittedly the property is ours, and it rests with the respondent to justify his user.

Sir H. Juta was not called upon in reply.

Maasdorp, J., said the information before the Court was of too meagre a character for the Court to decide that the applicant was entitled to an interdict, and under the circumstances the rule *nisi* would be discharged, but the Court would allow the notice of motion in the matter to stand as summons in an action to be instituted by the applicant, costs of the motion to be costs in the cause.

ESTATE BERENS v. VAN WYK.

Principal and agent—Deed of sale—Retention by agent.

This was a motion for an order calling upon the respondent to show cause why he should not be ordered to deliver to the applicant a certain contract of sale in terms of which certain landed property at Stellenbosch was sold in April, 1903.

The affidavit of Mrs. Berens set out that on the 8th April, 1903, the respondent, acting under instructions, sold certain property, and failed to deliver contract of sale. The answering affidavit of the respondent stated that he signed the contract of sale on behalf of the applicant for whom he was acting. The replying affidavit of the applicant denied that the respondent was acting on her behalf to the extent stated.

Mr. Benjamin for applicant; Mr. Bisset for respondent.

Mr. Bisset said that the respondent was not entitled to deliver up the deed without the consent of both parties. If the application was granted the effect of it would be that the purchaser would have to pay an attorney the full costs of purchase. The agreement between the parties practically reduced the amount of the purchase price, and counsel contended that if the applicant ratified one part of the contract she must ratify the other.

Maasdorp, J.: The respondent in this case, acting as the applicant's agent, executed a deed of sale. He now holds that deed of sale as the agent of the applicant in this matter, and the principal is entitled to the custody of that document, and the Court must order the agent to deliver up the document

belonging to his principal. The order will therefore be granted as prayed. This order will in no way affect the rights of either the purchaser or the seller in any arrangement that may have been entered into as to the conveyancing of this property. The custody of this document by the seller cannot affect any rights the purchaser may have, he not having a party to this matter. I may mention that no right of lien that the respondent may have on this document is set up. If that had been set up the Court would have determined his rights in that respect. The defence which he sets up has failed. Consequently, the order of the Court is that the document be handed over to the applicant, and the respondent pay the costs of the application.

ESTATE WEIDNER (MASTERTON) v. BRAND.

This was a motion for an order of attachment against the respondent for contempt of Court in failing to comply with an order directing him to file a full and true account of the estate.

Mr. Benjamin for the applicant; Mr. Close for the respondent.

Mr. Benjamin: The respondent has now filed a full account, so there can be no question of contempt of Court, and now we have to deal only with a question of costs, and ask that the respondent should be ordered to hand over all documents.

Mr. Close: The application as to the handing over of the documents is a supplementary application.

[Kotzé, J.: In whose favour is the balance?]

In that of the respondent by some £745. The respondent is quite justified in refusing to hand over his accounts, because it is necessary that he should retain them in order to prove his claims.

Mr. Benjamin (in reply): The correspondence which passed shows that it was admitted that the property was registered in the applicant's name.

With the consent of counsel on both sides the account was referred to Mr. Maynard Nash as referee, before whom the account might be debated.

GRAHAM v. FIETH. { 1903. Aug. 13th.

Interdict—Discharge.

A. had instituted an action against B. for the recovery of certain bricks, and at A.'s instance a Judge in Chambers had interdicted B. from selling them pending the result of the action. B. now applied to have this interdict set aside.

Held, *that as A. now consented to the sale of the bricks without prejudice to his right in them, the interdict should be discharged, the bricks sold and the proceeds paid into the hands of B.'s trustee pending the action. Costs to follow the result of the action.*

This was an application for the discharge of a certain interdict granted by Kotzé, J., in Chambers, on July 23, restraining the applicant from disposing of certain bricks and other materials.

Mr. Schreiner, K.C. (for applicant): We had a good opportunity of selling these bricks. We do not ask that they should be sold by public auction, but we do ask that they should be realised as soon as possible.

Mr. Benjamin (for the respondent): I see no objection to the bricks being sold, provided the trustees are not allowed to deal with the proceeds. We did not understand from the notice of motion the position taken up by the applicant.

Mr. Schreiner: Our affidavits and notice of motion are sufficiently clear, and it is the fault of the respondents that the costs of opposition have been incurred. I submit that we are, therefore, entitled to the costs of this application.

Maasdorp, J.: In this case, it seems the respondents instituted an action against the applicant for the recovery of certain bricks, and he made application to the Court to restrain the applicant from selling the bricks. An advertisement of the sale of the bricks appeared the day before the application was made by the respondent in this case, and an interdict was then granted restraining the applicant from selling, pending

the result of the action. The applicant now moves that the interdict be set aside. The Court has not gone into the affidavits, and if we did go into the affidavits it would be difficult to decide now to whom this property belonged. It is impossible for the Court to come to the conclusion now that the respondent was wrong in the first instance in restraining the applicant in this application from selling his bricks. If the bricks belong to the respondent he had a perfect right to restrain any person from selling them, but, seeing the position in which the matter now stands, the respondent consents to allow the question as to the proprietorship of the bricks to stand over pending action, and allow the bricks to be sold and the proceeds to be retained by the trustee. In giving that consent, the respondent has not given up his claim to the bricks, and if it should turn out ultimately that he was entitled to the possession of the bricks, then he was justified in coming to the Court to restrain the applicant, and under these circumstances, I think the question of costs will depend upon who is the successful party in the action. Under all circumstances, the Court will order that the interdict be discharged the bricks be sold, and the proceeds retained by the trustee pending the action already instituted by the respondent, and the costs of this application will be costs in the cause.

[Applicant's Attorneys: Walker and Jacobsohn; Respondents' Attorneys: Faure and Zietsman.]

BOBBINS v. LE ROUX. 1903. Aug. 13th. " 28th. Sept. 15th.

Title to land—Interdict—Motion.

This was a motion for an order compelling the respondent to remove certain building and other material deposited on a certain lane on the Camp Ground, Rondebosch, and to restrain him from trespassing on the said lane.

When this matter was previously before the Court, it was decided that the information was then insufficient. The original affidavits were now put in, together with a further affidavit of the applicant, stating that the respondent continued to obstruct the passage and cause annoyance. The affidavit of Herbert Scholtz set forth that as a result of a search of the deeds the lot near the lane had been transferred to the applicant in 1896. In the respondent's lot, No. 9, there was a special condition that he could not make any use of the private lane on the southern boundary of the estate.

The answering affidavit of the respondent denied that he had given any annoyance. The road was certainly in a muddy state, but not so bad as the applicant stated.

Mr. Upington for the applicant. Mr. C. W. de Villiers for the respondent.

Mr. Upington put in the title deeds.

Mr. Upington (for applicant): Lot 1 was transferred in 1849, and again in 1853, from Meyer to Drossel ,and on August 16, 1877, Miss Hull transferred it to Gerard Myburgh. Lot 9 was transferred by Hawkins's Estate to Martin. Lots 2, 68, 69, 70 were transferred to Martin on June 18, 1849. Martin transferred to Gaugain in 1854, and in 1858 Gaugain transferred to Steinbock, who sub-divided lots 2, 68, 69, and 70. He transferred lot 9 to Haybrittle in December, 1858, and Haybrittle transferred to Myburg on April 7, 1881. Thus Myburgh was then owner of lots 1 and 9, and his estate transferred lot 1 to the applicant on June 18, 1897. No. 9 was transferred to Burhr on November 16, 1886, against which transfer the condition was registered that the transferee must not use the road on the south of the property or cut down trees on the south boundary of the property. Burhr transferred to Eason on August 24, 1889, Eason to Roberts on March 4, 1891, and Roberts to Le Roux Bros. on July 22, 1896, and Le Roux Bros. to the respondent on June 26, 1900. I contend, therefore, that the condition attached to the transfer to Burhr in November, 1886, clearly shows that we are entitled to the free use of this lane, and the respondent is not.

[Maasdorp, J.: There was no restriction till Myburgh got the place. How do you show you have the dominant tenement?]

[Kotzé, J.: The dominant tenement has been sub-divided; has the owner of each sub-divided portion a right to the servitude in full?]

[Maasdorp, J.: It is most important to ascertain which of these two properties is the dominant tenement. The matter must stand over until the Court can be satisfied on this point.]

Postea (August 28).

Mr. Upington: When the case was last before the Court I traced the history of this property since 1818. The applicant's predecessor in title transferred lot 9 to G. Myburg, and retained lots, 1, 64, 65, and 67. The affidavits and plans put in show that the respondent's property abuts on the lane in dispute. When Myburg restricted the rights of lot 9 it must be presumed that he did so in favour of 1, 64, 65, and 67. The respondent has, therefore, no right to this lane as far as the title deeds show; but he tries to set up an adverse user. We claim the right to the free use of this land to his exclusion. He does not dispute the title deeds, which are conclusive in our favour, and there is nothing on affidavit to support his claim to adverse user, and the onus of proving this user is on him. Even James Baron does not say he has used the land for thirty years.

[Maasdorp, J.: Was this road ever mentioned to Myburg?]

I do not think it was. I understand that it is still part of the remaining extent, and our contention is that the title deeds show that, as owners of this remaining extent, we have a right to the exclusive use of the road in virtue of our succession from G. Myburg.

[Maasdorp, J.: Then if anyone were to buy any one of these lots from the applicant, could such purchaser claim to use the lane?]

Certainly he could; the plan shows that.

Mr. C. W. de Villiers (for the respondent) referred to the deed of transfer to respondent's predecessor, which provided that he and his successors should have the use of the lane. That deed applied to the greater part of the property, certainly to more than was held by Myburg. Myburg did not hold all the property Venables had held. The property certainly included lot 1, but I do not think it included lot 9. The road marked on the old plan runs between the respondent's land and the rest of the estate.

Mr. Upington (in reply).

Cur. Adv. Vult.

Postea (September 15).

Kotzé, J.: My brother Maasdorp and I are both of opinion that the application should not be granted, but that petitioner should be left to obtain her remedy by an action. If she should institute an action, the costs of the application would abide by the result of that action.

[Applicant's Attorney, E. J. Schults. Respondent's Attorneys, Herold and Gie.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

Ex parte HOFMEYR. { 1903. Aug. 14th.

Admission of Attorney—Act 30 of 1892.

An official intimation having been made to the Court that the Governor does not intend to specify any examination in statute law for Transvaal attorneys, inasmuch as no examination is required in the Transvaal for attorneys of this Court.

Held, *that the applicant, who had been admitted in the Transvaal and had complied with all the provisions of the 2nd section of Act 30 of 1892, except those contained in sub-section d, was entitled to be admitted as an attorney of the Supreme Court.*

De Villiers, C.J.: In the matter of the application of Mr. W. A. Hofmeyr to be admitted as an attorney of this court, it appeared from the petition presented to the Court on a previous occasion that the applicant has complied with all the provisions of the 2nd section of Act No. 30 of 1892, except sub-section (d), which provides that the applicant shall have passed such an examination under the Statute Law of the Cape of Good Hope as the Governor shall from time to time specify. When the application was made, I was

informed that the Governor had not specified any such examination, and it was stated that the applicant ought to be admitted if the Governor does not intend to specify such examination, and the case was postponed to enable the Attorney-General to give some information upon the point. Since that time the Attorney-General has filed an affidavit, to the effect that the Governor has not specified, and does not intend to specify, any examination, in terms of section 2. It appears also that our attorneys are admitted as attorneys of the High Court of the Transvaal without further examination. Under these circumstances, as the Governor does not intend to specify any examination, and there is this reciprocity in the Transvaal, I am of opinion that the Court should allow this application, and the order will be made accordingly, the oath to be taken before the Registrar of the Supreme Court.

(See also p. 337.)

EYSSEN v. CALDER AND CO. { 1903. Aug. 14th.

Master and servant—Negligence — Common employment — Labour agent.

The defendants entered into a contract with the Military authorities "for the supply of native labour" at certain specified rates of wages. The defendants employed a timekeeper to engage the men, to observe the time during which the men worked and to pay them at the end of every week the wages, which were less by six pence a day per man than the amount agreed on with the Military authorities. The men were employed by the Military authorities to stack bales of forage under the control and supervision of a Military superintendent, and the defendants had no power to give any command as to the manner in which the work should be performed. The plaintiff, who was one of the men engaged by the defendants, sustained an injury through the fall of a bale caused by the negligence of one of his fellow servants.

Held, *that the defendant was not a master of the men and was not liable in damages for the injury.*

This was an action for damages for personal injuries received through the negligence of the defendants' servants.

The declaration set out that the plaintiff was a labourer, and resided in Cape Town, and the defendants were produce dealers, carrying on business at Maitland and Wynberg. In October, 1902, the plaintiff was employed by the defendants to work about a certain stack of forage at Maitland, and while so employed, was injured through the negligence and carelessness of the defendants' servants. A bale from the top of the stack struck the plaintiff on the eye, and he ultimately lost his sight. He had been six weeks out of work, and could not now earn so much money. The plea stated the plaintiff was engaged on behalf of the military authorities, and denied the plaintiff was employed specially to work about the said stack. The stack was not built by or under the control of the defendants' servants, and they could not be liable for any damage sustained.

Mr. Wilkinson for plaintiff; Mr. Upington for defendants.

Mr. Wilkinson said that the plaintiff was one of a gang of eight men who were engaged by the defendants some time in February, prior to which they had been working for the military. In working at the stacks of forage at Maitland, the plaintiff was under the direction of the defendants' foremen. On October 5, when the accident occurred, the plaintiff and two other men, who would be called, were working at the stack. It was usual at the close of the day to cover up the stack as a protection against rain, and suddenly, without anyone touching it, a bale fell from the top of the stack and struck the plaintiff on the eye, causing the injury.

Evidence was then called for the plaintiff.

Dr. Kitchen identified a prescription, but he had no recollection of the man who got it. The prescription was for the eye.

Dr. Wood stated that some time ago the plaintiff called at the Somerset Hospital, and witness recommended on his out-patient paper that he should have an artificial eye.

[De Villiers, C.J.: Can you recollect what caused the injury?]

Witness: The eye was blind and painful, and consequently I removed it.

You could not say what caused the injury; whether it was through disease or external injury?—I could not, on oath, my lord.

John Hy. Eyssen, plaintiff, said that on the 5th October, between 6 and 7 o'clock in the evening, he was working between two stacks at Maitland. The gang with which he was working were employed covering up the stack, and witness was busy on the ground fastening the ropes. There were four men on the top of the stack. The stack was only partially built. The gang that covered the stack had nothing to do with the building of it. The builders generally left at 5 o'clock. A ridge of bales was placed in the middle of the stack, to allow the rain to run off. Witness knew the exact way of stacking the bales, and if they were not put in as a brick wall was built, there was danger of some of them toppling over. While working below, he heard the foreman call out, "Take care, the bale is coming down." Witness looked up, and the bale struck him on the eye and the shoulder. There was a noise like the cracking of a whip when he was struck on the eye. He could not see, and he showed it to the foreman. First of all, he went to Dr. Kitchen, who gave him a prescription. In consequence of what the doctor said, he went to the hospital and saw Dr. Wood, who gave him medicine, but said that the eye would have to be removed. Dr. Wood ultimately removed the eye. He was six weeks out of work, and he could not earn as much money now. He could only earn now about 5s. a day, whereas he was making 5s. a day and earning overtime before the accident. In February last Lieutenant Jones asked for volunteers to go to Maitland, and witness was one of a gang of eight. Lieutenant Jones said they were going to work for the contractor, and they would get overtime. Mr. Calder paid him his wages at Maitland. While he was working for the military he got 9s. for Sunday work, and Calder paid him 7s. 6d. for the same work. They were all dissatisfied, and the foreman spoke to Mr. Calder about it. The latter said that they had nothing to do with the military now, and that they were working for him. That was said in the presence of the whole gang. He always received his pay from Mr. Calder. The Kafirs went to the same office for their pay. The defendants' foreman looked after the building of the stack.

Cross-examined by Mr. Upington: He was employed by the military at the South Arm, and Lieutenant Jones asked for volunteers for Maitland. Mr. Broers superintended the building of the stacks, and witness did not know whether Sergeant-Major Hare was in charge of everything. Sergeant-Major Hare did not give him orders, and witness did not hear him give orders to the foreman. He was made night watchman after the accident, and dismissed by the military for sleeping at his post two weeks ago. The military paid him from May 4. Mr. Wallace ordered him just the same as Mr. Broers. He did not see Mr. Calder before he came to Maitland. He did not know there was always danger when the tarpaulin was thrown over the stack.

Re-examined by Mr. Wilkinson: He was busy fastening the rope when the bale fell. The bale did not come down in consequence of the pulling of the ropes. Long after the accident payment by the ticket system began. He had frequently seen Mr. Calder walk about looking at the work, but he could not say that he gave orders. The foreman gave him instructions. He had seen Mr. Calder about compensation, and on the first occasion the defendant promised to see everything all right.

Joseph Jemmet, labourer, stated that he was working on the top of the stack in question. The stack was partially built. When properly built a bale could not fall off the top ridge. These particular bales were not properly stacked. No one had been working at the spot from which the bales fell before it fell. Witness saw that the top bales were not properly placed, but the foreman would not let him put them right, saying to cover them up however they were. Witness was paid for his Sunday's work by

Mr. Calder. He received 7s. 6d., but with others he complained that that amount was too little. Mr. Calder said he had nothing to do with the military. After the accident the ticket system was adopted for paying the men. Witness received his orders from Luyt. When witness complained about the 7s. 6d. Mr. Calder said, "I am employing you; the military pay you 9s., but I pay you time and a half." He always understood he was working for Mr. Calder.

Cross-examined by Mr. Upington: Witness saw Sergeant-Major Hare in company with the foremen, but he could not say whether he (Sergeant-Major Hare) was in charge of the place. He had been working at Maitland for twelve months. Mr. Broers never gave witness any orders.

By De Villiers, C.J.: He got his orders from Luyt, who, he understood, was employed by Mr. Calder. A bale weighed about 100 lb. The falling of the bale was the fault of the men who stacked the bales and the man who should see they were properly stacked.

William Waldemar Hayward said that he was one of the gang who was working on the stack with the plaintiff and the previous witness. Witness was only paid 7s. 6d. for the Sunday's work; he should have got 9s. The men complained that the money was short, and they went to Mr. Calder, who said that the military paid what they liked, and he (Mr. Calder) paid what he liked. Sometimes fault was found with the witness for setting right the bales which the stackers had improperly stacked. Witness got his orders from Mr. Broers and Mr. Luyt.

William Luyt stated that he was in charge of the men. Mr. Calder paid the stackers. Witness very seldom got any orders from Mr. Calder; he got them from Sergeant-Major Hare.

Cross-examined by Mr. Upington: Witness sometimes saw Sergeant-Major Hare give orders about the stacking.

Mr. Wilkinson closed his case.

Mr. Upington called

Henry James Broers, who stated that from October to July last he was employed by the military as superintendent foreman, under Sergeant-Major Hare, at Maitland. The stacking was controlled by witness and Sergeant-Major Hare. Calder and Co. had no control whatever over the stacking: Calder had no such authority. Calder merely supplied the labour, but from the time the men began work until they finished they were under the control of the military. The men were paid by Mr. Calder. The plaintiff did not report his accident to the witness. Witness or Sergeant-Major Hare inspected the stacks before the stackers stopped work.

Cross-examined by Mr. Wilkinson: Calder had not contracted to stack the forage; the contract was only to supply labour. The pay tickets originally came from Mr. Calder. Mr. Calder had nothing to do with witness. It was not a fact that it was Calder and not the military who controlled the men. Calder's timekeeper, Wallace, never interfered with the men.

Re-examined by Mr. Upington: Mr. Mountain was employed by the military as checker and clerk. Previously he was aware of an accident, and the man was given an easy job.

James Mountain said that in March and April last he was in the employ of the military authorities. He remembered the plaintiff being engaged at the stacks under Sergeant-Major Hare. Broers was superintendent under Hare. Witness was a checker and clerk under the military. He was in charge of a gang of boys. Calder and Co. merely engaged the labourers, but did not in any way interfere with the work. Calder and Co. paid the labourers by tickets. Injured men were usually paid during the time they were unable to work.

Cross-examined by Mr. Wilkinson: Men employed by Calder would report the matter to Sergeant-Major Hare, who would ultimately refer the matter to Calder, in order that the men might be paid. Hare would naturally want to see the work properly done by the contractors. Witness was paid by the military.

Re-examined by Mr. Upington: The men under witness were paid by Calder.

[De Villiers, C.J.: Who saw that the stacks were properly placed?]

Mr. Broers and Sergeant-Major Hare.

What control had Calder over the stacks?—None whatever.

Supposing any work was negligently done, the bales not properly placed, could Calder come and say, "put that straight"?—Well, no; I should not say so. He had nothing whatever to do with it.

Would his orders have been obeyed?—Probably, yes.

By Hare?—Oh, no.

Supposing there was negligence, who caused that bale to fall?—Probably it was the fault of the Kafirs.

Yes, but who looks after the Kafirs?—Mr. Broers.

Was he paid by Calder?—No.

Alex. Calder, partner in the defendant firm, identified the contract he entered into to supply the labour to the military. Witness had no control whatever over the plaintiff at his work. He paid his wages by ticket, which was checked by his timekeeper. He got the money from the military at the expiration of each month. The military prepared the pay sheets, which were attached to the accounts. The plaintiff was sent up by Lieut. Jones.

Cross-examined by Mr. Wilkinson: Witness did not ask for the conditions when he found that there had been an omission to enclose them. He did not think that the conditions might have been burdensome; in fact, he never gave the matter a thought. He contracted to do the work for a certain sum per man, and then paid the men himself. He was the only person they could look to for payment. The military designated their work, and superintended the men. He had no power to dismiss the men without the officer's sanction. He had no control over the work. Wallace did not, to witness's knowledge, give instructions. Wallace was there to check the time. He remembered a complaint being made to him by the men that they were not being paid sufficient for Sunday. He did not think that he said he was employing them now, and not the military. He would deny a thing if he did not remember it even if several men swore to it. He only paid the men in accordance with their engagement by him. Witness paid Luyt and Wallace. The people that were employed by the military were paid by the military, and the people that were employed by him were paid by him.

[De Villiers, C.J.: Supposing the military find fault with a man for the way in which he did his work, how were they to get rid of him?]

They would discharge him on the spot.

Would they have the right to do it?—Yes, my lord.

Did they ever do it?—I believe they have in reference to some Kafir labourers.

Then how would it be reported to you that the man was discharged?—By my timekeeper.

Is the timekeeper the only man you employed besides these labourers?—The only one, my lord.

Who paid the timekeeper?—We did, my lord.

You did not get his money back?—Yes, from the military; he was included as a foreman.

Did you get a commission on that?—No, my lord, we, practically speaking; paid more than he was getting from the military.

The timekeeper is not mentioned here in this contract?—No.

Is there any other contract besides that?—No.

Because sometimes these people worked at Green Point, is that under the same contract?—Yes.

Had you any control over the manner in which the stack was being placed?—No.

Had the timekeeper any control?—No control.

Then your sole object in having a timekeeper is to make sure you don't pay more than they are entitled to?—Just so, my lord.

All you did was to engage the men and pay the men?—That's all, my lord.

Whom did you employ to engage the men?—The timekeeper, my lord.

Who was your timekeeper, then?—Wallace, my lord.

Was he the timekeeper all through?—Not at the Docks, my lord.

Had you any control over Broers?—No control at all, my lord.

Nor over Hare?—No, my lord.

Mr. Wilkinson (for plaintiff): The question is, whose servants were the injured man and his fellow-servant? The accident itself affords *prima facie* evidence of negligence; and the only question is who is responsible for that negligence? If the defendant had appointed Broers and Horne he would still be responsible. I submit that he is the actual master. The defendant takes up the position that he is merely a labour agent, but he cannot get out of his liability to his servants by saying that they were employed in carrying out a contract which he had entered into with somebody else. The defendant may have taken his orders from the military, but the military did not employ the plaintiff. Broers reported Calder to the military authorities for careless work on a stack. Calder then appears to have been responsible to the

military, but the men in his employ were responsible to him and were paid by him while the men employed by the military were paid by them. If Calder did leave the management of his servants to the military, that does not affect the question of his liability. The master is responsible for the acts of his servants, done within the scope of their employ. *Forman* v. *Barnet* (6 M. and W., 49). Calder engaged the men; he paid them; he had power to discharge them. The question is, who had the final control of the plaintiff's acts? See *Beran on Negligence* (p. 820-821). If the relation of master and servant existed between the defendant and the plaintiff, there is nothing to show that it was ever terminated; and it is a very significant fact that, according to Mountain's evidence, injured men would refer to Calder. We are rather in the dark as to the relations between Calder and the Government, as we have nothing before us to show exactly what they were. I submit that Calder was the employer, and that he, and he alone, is liable.

Mr. Upington (for the defendant) was not called upon.

De Villiers, C.J.: I confess that I entertain the greatest sympathy for the plaintiff, who has lost the sight of one eye through the falling of a bale of forage on his head while he was employed in covering the stack. The stack was being covered by the military authorities, under the control and supervision of their own superintendent. The men employed to do the work were subject to the commands of the superintendent as to the manner in which they did the work. It has been contended, however, that inasmuch as the defendants had engaged the men and paid them their weekly wages, they stood in the relation of masters to the men, and are liable for the negligence of some of their servants resulting in injury to their fellow-servants. In the view which I take of the case, it is unnecessary to consider the question whether the doctrine of the English common law as to non-liability of a master for injury resulting to one servant from the negligence of another servant holds good in our law. That doctrine appears to be founded on the supposition that a servant on taking service contracts that, as between himself and his master, he will run the risk of any injury that might be done to him through the negligence of his fellow-servants engaged with him in a common employment. I am not prepared to say that this Court would import any such term into a contract of service without clear proof that the parties themselves had agreed to it; but the question would only have arisen for decision in the present case if the plaintiff and the men whose negligence caused the injury had been engaged upon a work over which the defendants exercised control. The defendants, however, were only the agents of the military authorities in engaging and paying the men, and for this service they charged a commission. They employed a timekeeper, who engaged and paid the men, and the defendants received from the military authorities the amount of the wages at which they had undertaken to supply the men. That undertaking was embodied in their tender, which was "for the supply of native labour." Having supplied the labour, the defendants ceased to have any control over the men, beyond paying the men, and, if thereto required, dismissing the men. They had no right to give any command as to the manner in which the work should be performed, and cannot, therefore, be held liable for any injury resulting from the negligent performance of that work. The persons who could and did give such commands were the military authorities, and it is to them only that the plaintiff should look for compensation for the serious injury done to him. There must be absolution from the instance, with costs.

[Plaintiff's Attorney: W. G. Coulton; Defendants' Attorneys: Fairbridge, Arderne and Lawton.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZÉ.]

S.A. BREWERIES V. HARBOUR BOARD. 1903. Aug. 14th. „ 17th.

Collision on road—Negligence.

This was an action brought by the South African Breweries, carrying on business in Cape Town, against the Table Bay Harbour Board, to recover £40 damages for the loss of a mule, in consequence of the negligence of the defendants' servants.

The declaration set out that on or about the 19th May, 1903, a certain traction-engine belonging to the defendants, with two trailer wagons attached, driven or under the charge of the defendants' servants, acting in that behalf, collided in Buitenkant-street, Cape Town, with a certain wagon, drawn by two mules, and that, in consequence, one of the mules was so injured as to necessitate its being shot. The cause was the careless and negligent driving of the defendants' said servants, and the negligent manner in which the said trailer wagons had been loaded by the defendants' servants. The plaintiffs had sustained damages to the amount of £40, the value of the said mule, but the defendants refused to pay this sum or any portion thereof. The plea admitted that the defendants refused to pay the plaintiffs £40 or any other sum, and said that the injury to the said mule was caused by the negligent driving of the plaintiffs' servant in charge of the said mules, and that had he driven the mules with due and proper skill and care, he would have avoided the said collision. Wherefore defendants asked that the said claim should be dismissed, with costs.

The replication was general.

Mr. Gardiner for the plaintiffs. Sir H. Juta, K.C. (with him Mr. Bisset), for the defendants.

George Hansell Clother, a commercial traveller in the plaintiffs' employ, and formerly a clerk of works, said he saw the collision, and he prepared a plan (produced) of the neighbourhood where the accident took place. He was driving from Commercial-street or Boom-street into Buitenkant-street. He was riding in his own cart. The traction engine was going up towards Roeland-street ahead of him; he was travelling in the same direction. He noticed a wagon belonging to the South African Breweries. He saw the last trailer collide with a case on a wagon near the stoep. Its near wheel was at the stoep, and the mules were near the granite step, facing into Boom-street. The wagon must have been right in the sluit at the time of the collision. The collision occurred by some timber on the last trailer striking a case on the wagon. In forcing the wagon back the trailer caused the dissel-boom to swing back, and one of the mules reared and its foot was caught under the wheel of the second trailer. The timber was overhanging eighteen inches over the nave of the wheel. The driver of the wagon did his best to keep the mules straight, but the engine proceeded for some time, though they called out to the engine-driver to stop. The engine man's explanation was that he was turning to the right into Roeland-street. Witness told him he ought to have been on the other side, so as to give the trailers room to swing round the corner. He took measurements, and he found that the marks of the trailer wheels on the offside were 6 ft. 3 in. from the stoep. The wagon that day was 5 ft. 10½ in. wide outside of case to case.

Cross-examined by Sir H. Juta: He did not see a cart in the road, which would have caused the engine to go out of its proper course. He did not see where the trailer was before the actual contact.

Bejarin Benjamin, driver in the plaintiffs' employ, said he was driving a wagon on the day named and was coming from Boom-street into Buitenkant-street, when he saw a traction engine going up Buitenkant-street. He turned his horses into the side of the street to avoid the traction engine, the same side as the accident occurred on. He did not see the acciden. occur. He passed along to Louw's bottle store. He heard some shouting. When he entered Buitenkant-street he did not see any cart about there.

Cross-examined by Sir H. Juta: If he had been driver of the wagon he would have stopped when he saw the traction-engine.

By the Court: He did not see the wagon moving just before the accident happened.

James G. R. Shipman, superintendent of the stables of the S.A. Breweries, gave evidence as to the value of the mule, which he stated to be worth £40.

Andries, a coloured man, deposed that he was the driver of the wagon. He did not see the engine and trailers before he came around the corner; he only saw them when the engine was on him. He pulled in almost to the stoep, his near wheel being almost against the curb-stone. Witness did not see the flagman. The last trailer went against his wagon. He had drawn to the side to give way to the engine. The engine passed, but the trailer struck the wagon. The driver of the engine did not stop.

Sir Henry Juta: You say you didn't see the engine before it was right on you?

Witness: No.

So that I wasn't far wrong in saying that you were blind as well as deaf?—I can see very well.

In cross-examination by Sir Henry Juta, the witness said he could not go any further because there were two curbstones in the way. He passed the first curbstone when the engine was alongside the wagon. He drove between the stone and the engine. He drove past the engine and the first trailer; the second trailer struck the wagon.

Re-examined: When the first trailer passed witness the wagon was standing still.

By Kotzé, J.: The engine was in Buitenkant-street when witness first saw it. Witness and the engine were both in Buitenkant-street. Witness was in Roeland-street when he first saw the engine.

Charles L. Burton, commercial traveller, said he saw the accident. Witness was driving a trap directly in front of the Breweries' wagon. There were two or three wagons off-loading at the corner, and witness did not see the traction engine until he turned the corner. It was not on its proper side, but was going to its proper side at an angle of about thirty degrees. The traction engine was on one side of the stoep, and witness was at the other when he first saw it. Witness took his cart in between the two granite slabs, and lay about two feet from the stoep. Witness's pony had to jump over the one slab. When he saw the danger witness's boy whipped the pony, which jumped over the slab, the cart also going over the slab. But for this witness would also have had an accident. Witness stopped. He heard a great crash behind him, and saw the wagon against the stoep, the mule being under the trailer. The Breweries' wagon was about three yards behind witness. The Breweries' wagon was much wider than witness's cart, and witness had to jump his pony to get out of the way. The engine did not stop.

Cross-examined by Sir Henry Juta: Witness did not see the wagon behind him until after the accident. Witness was close to the stoep before he saw the danger.

By the Court: Witness jumped the slab to get out of the way of the second trailer. The engine had passed, and the driver could not see his predicament. Witness did not think he could have done anything else to avoid the danger. Witness came around the corner very quickly, and was in the fix before he saw the danger. Witness's samples were broken as a result of the jump.

Mr. Gardiner closed his case.

Sir Henry Juta called

James Lambert, the driver of the traction engine in question. He said he went towards the centre of the road, because there was a trap standing on the left-hand side of the road. There was a man in front with a flag, and another man was walking on the right-hand side of the first trailer. Witness saw the Breweries' wagon coming down Roeland-street. There was ample room for the wagon to pass. It passed the engine, and the man on the side of the first trailer. Witness had to come further into the centre of the street to avoid the granite slabs. The engine was going at about 2½ miles an hour; the wagon was coming at the pace of a slow trot. Witness did not know what happened behind him. Hearing the pilot blowing his whistle, and the people shouting, witness pulled up. The wagon could have stopped after passing the engine. There was about nine feet of road space on witness's right-hand side when the engine passed the wagon.

Cross-examined by Mr. Gardiner: Witness looked behind as the first trailer passed the wagon, and saw that there was about two feet between the trailer and wagon. The second trailer ought to have allowed more room than the first. The only conclusion witness could come to was that the wagon turned into the second trailer. Witness did not recollect seeing Mr. Burton's trap. Witness had been employed steering and driving traction engines by the Harbour Board for two years. Witness was just turning again to the side, after having passed the trap he had referred to, when the accident occurred.

Robert D. Kelly, traction engine inspector, in the employ of the Table Bay Harbour Board, said he visited the scene of the accident about half an hour after it occurred. The traction engine was 7 feet 6 inches wide, and the trailers, with the planks, measured about 7 feet

in width. The planks were packed on the trailers lengthways. The greatest width of the planks was 22 inches, so that the planks could not have projected 18 inches, as stated. Witness saw the wagon, whose hind off wheel was nine feet from the stoep. The wagon was 4 feet 10 inches in width from wheel to wheel, so that between the near side wheel and the wall there would be 4 feet 2 inches. There were a lot of people walking about, and it was difficult to find the tracks. Witness found the tracks of the wagon. There were traces of it having turned towards the side of the road. There was a granite block on the side of the road which would have induced the driver of the wagon to turn to the centre of the road. Witness saw a dent in the case on the wagon.

Cross-examined by Mr. Gardiner: He distinctly traced the tracks of the wagon. He was quite sure that the wagon came down nine feet from the kerb, measuring from the off-wheel.

Angelo Bosna stated that he was the flagman in front of the engine when the collision took place. There was a cart in front of the engine, and to pass it the engine had to go into the middle of the street. The South African Breweries wagon came alongside in the opposite direction, and passed the witness about three feet away.

Joseph Ross, employed by the Harbour Board, said that he accompanied the engine and trailers on the occasion in question. He was walking by the trailer on the right hand side. The engine had to go to the middle of the road to pass a cart. The brewery wagon came along, and passed the witness. He did not see the collision actually take place. When he saw the brewery wagon first it was about twenty yards away.

Cross-examined by Mr. Gardiner: He did not notice any cart go past him before the brewery wagon came along.

By Maasdorp, J.: The brewery wagon, when it passed him, was about 5 feet from the trailer. He could not understand how the accident happened, because when the brewery wagon passed the witness it was quite clear of the trailer.

George Blommestein stated that he was the "steerer" of the traction engine. As he went up the street there was a one-horse trap in the way, and witness went somewhat to the middle of the road. When he saw the brewery wagon he turned his engine in to the left again. He saw nothing which would lead him to believe that there was likely to be an accident.

Sir H. Juta closed his case.

Counsel were then heard in argument on the facts.

Cur. Adv. Vult.

Postea (August 17).

Maasdorp, J.: The plaintiffs sue the defendants for £40 daamges for the loss of a mule, said to have been injured by the negligence of defendants or their servants. Defendants deny negligence, and plead that the injury was caused by the negligence of plaintiffs' own servants. A traction engine with two trailers, belonging to the defendants, was passing up Buitenkant-street, and met a wagon drawn by two mules of the plaintiffs' coming down the street. The wagon came into collision with the second trailer, and a mule was so seriously injured that it had to be shot. Did the accident then arise from negligence, and, if so, was it from the negligence of the plaintiffs or of the defendants? Under ordinary circumstances, there is room enough for the engine and two ordinary vehicles to pass each other at the place of the accident. The engine had to swing over to the right to pass a cart standing on the left side. This would not be evidence of negligence, but would certainly call for a sharp look-out by those in charge of the engine. From the track of the trailer to the opposite wall was 6 feet 3 inches. The granite block spanning the gutter projects 4 feet 10 inches, leaving an open space of 1 foot 5 inches. Burton's evidence corroborated this, for in order to pass with his narrow buggy he had to jump his horse and cart over one of the granite blocks. The engine, therefore, was driven so close to the right side that no vehicle coming from the other direction could pass there. Even that was not proof of negligence on the part of the defendants. It seemed that up till the time when the wagon passed the engine there was no negligence on either side. The vehicles were brought into close quarters, as may often happen in crowded streets, and due care and diligence should be used to avoid accidents. Plaintiffs' wagon stopped before the accident. The defendants' engine should also have been stopped, and the driver was guilty of negligence in not stopping

it. It was contended that the wagon should have stopped some time before it got up to the engine, but if ordinary traffic must give these engines so wide a berth, they would become an intolerable nuisance in the streets of the city. The wagon driver did his best to avoid the accident, and the engine driver was negligent. After the trailer struck the wagon and dragged the mule under its wheels it took a great deal of shouting from the passers-by to bring the engine to a stop. The injury to the mule was caused by the negligence of defendants' servants. The value of the mule was £40, and judgment must be given for that amount, with costs.

Kotzé, J.: The plaintiff complaints that the driver of the defendants' traction engine, with two trailers attached thereto, negligently came into collision with his wagon drawn by two mules, and that as a result one of the mules was so seriously injured that it had to be shot. By Act 6 of 1873 a locomotive may be lawfully used on a public road, provided it is not constructed or employed in such a way that it constitutes a public nuisance. The Act also leaves unaffected the common law remedy of any person to recover damages for any injury sustained by him in consequence of the use of a locomotive. The plaintiffs' case, however, does not rest on the defendants' traction engine being a public nuisance, and special damage suffered in consequence, but on the alleged negligence of the driver in charge of the engine. Now, although a locomotive may be lawfully on a public road, those who so employ it are under a duty to exercise reasonable care and skill towards all persons likewise lawfully using the road. What amount of care and skill will be considered reasonable must very much depend upon the particular circumstances of each case. And certainly the driver of a traction engine, like the driver of a motor car, regard being had to the great power and, in a crowded thoroughfare, the danger of the machine, should at least use the same amount of care and diligence which a person of ordinary prudence would exercise under the circumstances. The plaintiffs have to establish affirmatively that there has been such a want of care and diligence, as I have described, displayed by the defendants' servants, and that this was the direct cause of the collision, in order to entitle them to succeed in this action.

In the first place, it has been said that the traction engine with the two trailers was on the wrong side of the street, and that this raises some presumption of negligence. This may be true where it is coupled with other circumstances, as, for instance, where a driver is about to turn a corner in a crowded street. But the mere fact of being on the wrong side of the road is not *per se* sufficient proof of negligence. It is not like a case where the maxim *res ipsa loquitur* applies, and it may be satisfactorily explained. It will, therefore, be necessary to consider this fact in connection with the other material facts of the case. The evidence shows that the engine was drawing two trailers loaded with timber, and was proceeding up Buitenkant-street. As it neared the upper portion of this street, where there are still old-fashioned stoeps to the houses on either side, and where the street is in consequence somewhat narrower, the driver, in order to avoid a cart or buggy standing on the left or proper side of the street, steered the engine over on to his right or off-side of the street. This caused the trailers to come round with a curve or angle towards the other side of the street, and did not leave sufficient room for an ordinary vehicle, such as a cart or wagon, coming from the opposite direction and keeping on its proper side to pass with safety. There happen to be two granite slabs or blocks placed over an open and flat storm drain, each leading from the street to a stoep. When the trailers were approaching one of these slabs, the witness Bertram came up with his cart from the opposite direction and on his proper side of the street, and it was only by whipping up his horse and going over the slab that he escaped a collision with the second trailer. Meanwhile, the plaintiff's driver had come round from Roeland-street with a wagon drawn by two mules. He passed three wagons standing in Buitenkant-street, at Hoffman's stores, on the same side of the street, and, as the engine driver had by this time commenced to steer his locomotive towards the centre of the street, the driver of the wagon, by keeping to the left, passed the engine on the proper side. Seeing what was happening to Mr. Bertram's cart, the plaintiff's driver

pulled up between the two granite slabs, and almost immediately after that some planks loaded on the second trailer struck the load on the plaintiff's wagon, which turned the front wheels of the wagon half round. This caused the mules to rear and plunge, and one of the mules was so seriously injured that it had to be destroyed. The wagon, when the driver pulled it up, had its rear wheels on the side of the storm drain, and was consequently as close to the stoep on the proper side of the street as it could possibly be expected to be. There is a conflict of evidence as to whether there was sufficient room for the plaintiff's wagon to have safely passed the trailers. The defendant's witnesses maintain that there was, and the plaintiff's witnesses affirm that there was not. I am satisfied that while there was sufficient room for the wagon to pass the engine there was not sufficient space to enable it to clear the second trailer. The engine-driver, Lambert, says that when the wagon passed him on the proper side it was about two feet from the engine. The steersman on the engine states that in making a turn with the engine an extra space of three feet should be allowed for the second trailer to pass safely an object passed by the engine. It seems to me, therefore, that those in charge of the engine were at fault in making too wide a turn and keeping too much to the wrong side of the street, and not allowing sufficient room for a vehicle coming from the opposite direction to pass on its proper side. When it appeared that Mr. Bertram could not pass the second trailer, and only escaped a collision by jumping his horse and cart over the granite slab on the side of the street, the engine which was drawing that trailer along should immediately have been stopped. An engine with trailers attached to it should be handled with due care and skill, and on this particular occasion there was no one in the employ of the defendant on the back trailer to warn the engine driver or the steersman on the locomotive in front of what was going to happen behind. A man with a suitable whistle could at once have stopped the engine, and so prevented the damage done to the plaintiff. This seems to me a simple and reasonable precaution to have taken. The engine sets and keeps a number of trailers in motion, and if those in charge of the locomotive have in a public street to look in front of them, then seeing, as has been proved in this case, that danger may arise at the back, proper and suitable precaution should be taken to provide against that. The Harbour Board has, in my opinion, failed in its duty in this respect, and I think the plaintiff company has made out a *prima facie* case against the defendant. But now the defendant maintains that the plaintiff's driver was guilty of contributory negligence. The rule of law on the subject is clear. It is not enough for the defendant to assert that the plaintiff's driver was negligent. He must satisfy the Court that such negligence or want of diligence, if any, was the direct and immediate cause of the collision. Or, to put it in another way, although there may have been negligence on the part of the plaintiff's driver, if the defendant's servants could by the exercise of due and proper care have avoided the collision, the plaintiff will be entitled to recover. If, as the defendants desire to make uot, the driver of the wagon was to blame by driving against the trailer, I should have expected either that the off mule attached to the wagon would have been injured in a different manner, or that the wagon would not have been so much to the side of the street with its near wheels in the open drain. It was pressed upon us, with much ability, by Sir Henry Juta, that the plaintiff's driver, when he turned from Roeland-street into Buitenkant-street, should have kept to the right, that is in this instance the wrong side of the street, and so have passed on. No doubt he might have done that, but instead of doing so he first passed these wagons standing at Hoffman's store on his side of the street, and then seeing the engine being steered towards the centre of the street, he passed it on his proper side. It was only after he had done this that he noticed he could not pass the second trailer, and pulled up. Those in charge of the engine also knew that, and should have stopped the machine. The man walking in front of the engine with a flag, who is in the defendant's employ, did not warn the plaintiff's driver. It cannot be successfully maintained that the plaintiff's driver knowingly or carelessly put the wagon in danger. Under the circumstances, I think the act of the defendant's servants, and not that of the plaintiff's driver,, was the direct cause of what

occurred. The plea of contributory negligence therefore fails. As the value of the mule is not disputed, our judgment should be infavour of the plaintiff for £40 and costs.

[Plaintiff's Attorney's: Van Zyl and Buissinné; Defendant's Attorneys: Reid and Nephew.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZE.]

TRIAL CASES.

HUNT V. HUNT. { 1903. Aug. 17th.

This was an action brought by Douglas Hunt against his wife, Elizabeth Hunt (born Van der Hoven), for the restitution of conjugal rights, failing which a decree of divorce. Mr. Close was for the plaintiff, and the defendant was in default.

Mr. Close (for plaintiff): The defendant has been summoned by edictal citation. There was personal service. The parties were married in Johannesburg on the 29th September, 1892, under ante-nuptial contract. On the 3rd September, 1898, the defendant wrongfully and maliciously left the plaintiff, who now asks for a restitution of conjugal rights, failing which a decree of divorce, and forfeiture of all benefits under the marriage, with costs of suit.

Douglass Hunt stated that in 1898 a son was born in Johannesburg, issue of the marriage, and the parties afterwards went to England. In England the defendant announced her intention of going back to her parents. Witness objected, but she persisted, and finally left in the month of September, and had not since returned to him. In January last year she announced her intention of not returning at all. His married life had been a very unhappy one, owing to money matters. The defendant was the daughter of a very wealthy man, and witness was a clerk in the Standard Bank in Johannesburg. She was continually running him into debt, through her extravagant habits, and witness had unsuccessfully attempted to keep her within the limits of his income. He had to allow one policy of £500 on his life to lapse, but there was one of £300 still in force. In December, 1901, he understood that everything would be satisfactorily arranged by her father, but he suddenly discovered that she had again gone to England.

[De Villiers, C.J.: Who is Maud, referred to in this letter?]

Witness: My sister, my lord.

The defendant says that Maud had taken the part of a mother towards the child?—Yes, my lord, I had to leave the child with my sister.

Decree granted, the defendant to return on or before September 30, failing which a rule to be granted calling upon the defendant to show cause on the 12th October why a decree of divorce should not be granted, the plaintiff declared to have the custody of the child, the defendant to have forfeited all the benefits under the ante-nuptial contract, personal service to be effected.

Postea (October 12).

The Court granted a decree of divorce.

ALBERTYN V. ALBERTYN.

This was an action brought by Carl Albertyn, of Murraysburg, against his wife, Catherine Albertyn (born Benson), of Orange-street, Cape Town, for the restitution of conjugal rights, failing which a decree of divorce, the forfeiture of all benefits under the ante-nuptial contract, and the custody of the children.

The declaration set forth that the parties were married in September, 1899, under ante-nuptial contract. There were two children of the marriage. In January, 1903, the parties were living at Bredasdorp, and the plaintiff left for Murraysburg, to take up an appointment, the defendant agreeing to follow him. Thereafter the defendant refused to join the plaintiff, and had maliciously deserted him. The defendant's plea denied that she agreed to follow the defendant, and denied that she maliciously deserted him. The plaintiff had neglected and refused to support her, and had rendered her position intolerable. She claimed in reconvention the

proceeds of a certain sale of furniture, a decree of separation *a mensa et thoro*, the custody of the younger child, and a reasonable sum for its support. The plea in reconvention denied that the plaintiff refused to render an account of the sale of furniture, which was sold on the defendant's account. He was prepared to render an account, and pay over the amount.

Mr. Gardiner (with him Mr. C. W. de Villiers) for the plaintiff; Mr. Benjamin for the defendant.

Mr. Gardiner said that since the pleadings had been filed, £21 had been tendered.

Mr. Benjamin said that his client did not intend to defend the action for the restitution of conjugal rights. He was instructed to apply for the custody of the younger child, which was fourteen months' old.

Mr. Gardiner said that the plaintiff was willing to give the wife custody of the younger child, with the usual order of reasonable access. He thought the defendant's counsel should withdraw the allegations of cruelty.

[De Villiers, C.J.: We must assume he cannot prove them if he withdraws.]

Mr. Gardiner then called the plaintiff,

Carl Frederick Albertyn, scab inspector, residing at Murraysburg, stated that he was married to his wife in October, 1899, and they lived happily until May, 1901. About that time they quarrelled, but having become reconciled, they lived happily until the end of the year. Later on, he again had reason to find fault with his wife's conduct. In January, 1902, he got his present appointment in Murraysburg, and he left his wife, who was to follow him. In February all arrangements were made for his wife to come to Murraysburg, but she sent a number of telegrams postponing the date of her departure. On April 4 he received a letter stating that she had decided never to return to him. On the day he got the letter he came up to Cape Town, and found his wife was staying in Simon's Town. He saw her, but she twice refused to return. On April 18 he wrote to her saying that if she would return, his house was open to receive her, but he received no reply.

Mr. Gardiner asked that the plaintiff should be allowed costs, because he had to unnecessary expense, owing to the fact that the defendant had persisted in the charge of cruelty, of which no particulars would be given to the plaintiff.

[De Villiers, C.J.: Is defendant in a position to pay costs?]

I understand that the defendant herself has no money, but her relatives have. A sum of £21 has, however, been paid to the defendant by the plaintiff as the result of the sale of the furniture.

Mr. Benjamin said that the defendant had not received the £21.

Mr. Gardiner said that he had made a mistake; the £21 had been tendered to the defendant, but was refused. Under these circumstances, he would ask that the plaintiff be allowed to take that £21 as his costs.

Decree granted, the defendant ordered to receive the plaintiff on or before 30th September, failing which a rule to be taken calling upon the defendant to show cause on 12th October why a decree of divorce should not be granted; the plaintiff declared to be entitled to the elder child of the marriage, and the defendant declared to have forfeited all benefits under the ante-nuptial contract; no order as to costs.

Postea (October 12): The Court granted a decree of divorce.

HARRIS V. GAFFOOR.

This was an action brought by Elias Harris, stock and share broker, of Cape Town, to recover the sum of £1,949 15s. 5d., from Abdol Gaffoor, merchant, of Cape Town, in respect of certain share transactions.

The declaration set out that the plaintiff was a stock and share broker, carrying on business at Cape Town, and defendant was a merchant carrying on business at the same place. From time to time plaintiff had purchased shares in various companies for or on behalf of defendant, under a system which is known as "cover," the system being as follows: The defendant instructed the plaintiff from time to time to purchase shares, which shares plaintiff held until instructed to sell them. If at any time defendant's indebtedness to plaintiff in respect of the total amount of the purchase price advanced by the defendant and the interest due thereon exceeded the market value of the shares held by plaintiff, then it was and be-

came defendant's duty to deposit with plaintiff such amount of money as would cover the difference, which amount of money was commonly called "cover." By established and recognised custom, a stock and share broker purchasing shares on behalf of a client under the system of "cover" was entitled, after due notice, to sell the shares held by him on behalf of such client, if the client should at any time fail to provide the requisite amount of "cover." On or about 17th November, defendant's indebtedness exceeded the then value of the shares held by the plaintiff to the extent of upwards of £1,000, and thereupon plaintiff gave notice that he would sell the shares then held by him on behalf of defendant, unless defendant provided further cover to the amount of £500, which defendant failed to do; and again on 10th March, 1903, plaintiff again gave defendant notice of his intention to sell. Thereafter, in or about the month of March, 1903, plaintiff sold the shares then held by him for defendant, as he was entitled to do under the aforesaid custom. Defendant was indebted to plaintiff in the sum of £1,949 15s. 5d., being the balance due after deducting the amounts realised by the sale of the shares. As an alternative to the aforesaid claim plaintiff stated that on or about 24th September, 1902, the parties agreed to the terms and conditions contained in a letter annexed. Thereafter the defendant signed two promissory notes for the sums of £100 and £150 respectively, which notes were dishonoured on 29th November, 1902, the date when the said notes became respectively due. In or about the month of March, 1903, plaintiff sold the shares then held by him, as he was entitled to do under the said agreement, the amount of £1,000 therein referred to being then exceeded. Wherefore plaintiff prayed (subject to a tender to return the promissory notes) for (a) judgment for the sum of £1,949 15s. 5d.; (b) interest *a tempore moræ*; (c) alternative relief; (d) costs of suit. In case the Court should find that the plaintiff was not entitled to sell the shares, plaintiff was willing to deliver to the defendant upon the payment of the amount of defendant's indebtedness, viz., £10,353 10s. 5d., an equivalent number of shares to those sold by him in March, 1903, and claimed as a further alternative, judgment for the sum of £10,353 10s. 5d., interest *a tempore moræ*, alternative relief, and costs of suit.

Mr. Benjamin for plaintiff; defendant in default.

De Villiers, C.J.: In giving judgment, the Court must not be supposed to hold that the custom as to what is called "cover" exists. I should not wish to say that the custom exists without evidence. I know nothing about the custom.

Mr. Benjamin: That being so, I will ask for judgment for the sum of £1,949 15s. 5d.

Judgment was entered in terms of the first prayer of the declaration, with costs.

Ex parte BAKER.

Mr. Benjamin appeared for the petitioner.

The petition set forth that the petitioner was the pastor of the Wale-street Baptist Church, which was administered by the pastor and eight deacons, one of whom was absent in England. On the 23rd March last, at a meeting of members of the church, it was decided to consolidate the different loans on the church property, and for this purpose arrangements had been made to obtain a loan of £10,000. The Registrar of Deeds, however, refused to sanction the loan without the signature of the absent deacon, who was present at the meeting of the church members at which the resolution in question was arrived at. The church property was registered in the names of the pastor and eight deacons.

An order was granted as prayed.

Ex parte DIXON AND ANOTHER.

Will—Vesting of bequest—*Strydom* v. *Strydom* (11 Juta 425) followed.

This was an application for leave to pass transfer of certain property.

The petition set forth that the petitioners were William Cornelius Dixon (in his capacity as executor dative in the estate of the late Adriaan Allettus Johannes Coetzee, and of his subsequently deceased spouse, Jacoba Petronella Kotze), and Alletta Alida Regina Coetzee, in her capacity as executrix testamentary of the estate of her late husband, Cornelius Albertus Coetzee,

The late Adriaan Coetzee and his wife executed a joint will in 1870, whereby they bequeathed all their immovable property to the children born of the marriage, eight in number, of whom the late Cornelius Albertus Coetzee was one. The first named petitioner, for the purpose of carrying out the provisions of the will, signed a power of attorney authorising transfers to be passed to the eight heirs of the immovable property found in the estate. The second named petitioner, whose husband survived his father but pre-deceased his mother, claimed to have the share of her late husband transferred to his estate, irrespective of the five children at present alive. The Registrar of Deeds had, however, rejected the deeds of transfer. In their will the testators declared to nominate and appoint each other reciprocally executor or executrix of the will and administrator or administratrix of their estate, and also guardian of their minor children. They appointed the survivor heir or heiress of all the property of the first-dying, but stipulated that the survivor should be obliged or bound to give to the children of the marriage a proper education, and to maintain them until their majority, or marriage, when "to each of them, as, or in lieu of paternal or maternal portion shall be paid out or secured such sum of money as the survivor conscientiously, and according to the state of the estate, at that moment shall find due to him or her, the testators further securing and bequeathing after the death of both, all the immovable property in the estate to the joint children, together with their lawful descendants." In his report the Registrar referred to the will as most ambiguous, it being difficult to decide what the intention of the testators really was. The petitioners prayed for an order authorising the Registrar of Deeds to pass transfer to the estate of the late Cornelius Albertus Coetzee irrespective of the five children who have survived him.

Mr. Gardiner for the applicants.

In argument, Mr. Gardiner referred to passages in the will which referred to heirs, as proving that it was in the contemplation of the testators to appoint their children heirs. He also alluded to a condition in the will by which the survivor of the testators was given power to alter the same except in regard to the institution of heirs, and contended that the immovable property vested in the children on the death of the first dying, and not on the death of the survivor, and that the survivor only had a usufructuary and not a fiduciary interest. Counsel cited the case of *Strydom* v. *Strydom* (11 Juta, p. 425), in support of his contention.

De Villiers, C.J.: Upon the principles laid down in the case of *Strydom* v. *Strydom*, the Court is of opinion that there was a vested interest in the present case, and that the executor was justified in selling. An order will be made in terms of the petition.

EXECUTORS OF MOODIE v. CURATOR OF MOODIE. { 1903. Aug. 17th. „ 24th.

Legacy — Condition — Uncertain day — Vesting — Will — Construction—Gift to children on attaining twenty-one — Intermediate income for maintenance — Discretionary power.

A testator bequeathed to his daughter E. the sum of £20,000 "on attaining the age of twenty-one years," and directed that during her minority the interest or income of the legacy, "or so much thereof as may be necessary," shall be paid to his wife, "such interest or income to be paid or expended for or towards the maintenance or education of the minor." The daughter survived the testator, but died at seventeen, unmarried and intestate.

Held, *that the legacy had vested before her death and was transmitted to her heirs* ab intestato.

This was a special case stated for the judgment of the Court.

The statement of the case was as follows: (1) The plaintiffs are the executors testamentary in the estate of the late George Pigot Moodie, appointed under his last will and testament. (2) The

defendant is Sir Henry Hubert Juta in his capacity as *curator ad litem* of George Frederick Arthur, Charles Alfred and Minna Sophia, the minor children of the said George Pigot Moodie, hereinafter called the testator, and of his late widow Rosa Minna Pigot Moodie. (3) The testator died on the 2nd November, 1891, leaving a will duly executed on the 24th June, 1889, of which will plaintiffs annex a printed copy, and pray that the said copy may be considered as forming part of this case. (4) The testator left his wife, Rosa Minna Pigot Moodie and the three aforesaid minor children, and also his youngest child, Edith Rosa, him surviving, but his said wife died on or about the 17th January, 1896, and the said Edith Rosa died in the early part of the year 1903 at the age of seventeen (17) years or thereabouts, unmarried and intestate. (5) The testator bequeathed to his son, George Frederick Arthur (who was his eldest son), or to his eldest son surviving at the death of his wife, certain landed property described in the said will, and the sum of forty thousand pounds (£40,000) sterling, if and when he should attain the age of twenty-one (21) years. (6) He also bequeathed to each of his children other than the eldest son as aforesaid the sum of twenty thousand pounds (£20,000) sterling, in the case of sons on their attaining the age of twenty-one (21) years, and in the case of daughters on their attaining that age or marrying previously with the consent of their mother or guardians, as the case might be. He also made certain other bequests to relatives and others, as will appear from a copy of the said will. (7) He further instituted and appointed his children jointly and in equal shares to be sole and universal heirs of all the residue and the remainder of his estate, and directed that during the minority of any of his children the interest of any legacy or inheritance of such minor child or so much thereof as may be necessary should be paid to his said wife, and after her death to the lawfully appointed guardian of the minor, such interest to be expended for the maintenance or education of the minor. The plaintiffs contend that the legacy of £20,000 to the youngest child, Edith Rosa, as also her share of the residue of the estate of the late George Pigot Moodie were vested in her at the date of her death, and that an executor must be appointed to administer her estate, and to distribute the said legacy as in intestacy amongst her brothers and sister represented by the defendant, succession duty being payable thereon. The defendant contends that the said legacy to Edith Rosa and her share of the residue of the estate of the late George Pigot Moodie had not vested in her at the date of her death, and that the plaintiffs are entitled to administer and distribute the same amongst her brothers and sisters. Wherefore the parties pray for judgment upon their respective contentions, with the cost of this suit.

The will contained the following direction: I direct that during the minority of any of my children the interest or income of any legacy or inheritance of such minor child or so much thereof as may be necessary shall be paid to my said wife, or after her death to the lawfully appointed guardian of the minor, such interest or income to be paid or expended for or towards the maintenance or education of the minor.

Mr. Schreiner, K.C. (with him Mr. Gardiner) for the plaintiffs; Sir H. Juta, K.C., for the defendants.

Mr. Schreiner said that his contention was that on the death of Mr. Moodie, the right, both in respect of the £20,000 and in respect of the residue of the estate, vested in each of the children, although the enjoyment was postponed, and that there was no postponement of the vesting until the coming-of-age or marriage of the legatees. That was the neat point at issue between the parties.

The question is whether the survivor had a mere beneficiary interest in the estate or not. The terms of the will clearly show tht the testator meant to institute the children as heirs; on any other supposition, these terms would be contradictory. The children, therefore, were appointed as joint heirs. See *Oosthuizen* v. *Mock* (1 Roscoe, 330).

[De Villiers, C.J.: The whole question is, did the property vest on the death of the first dying or not?]

Yes; but see *Rahl* v. *De Jager* (1 Juta, 38). I admit that that case does not go as far as I ask the Court to go now, but see *Strydom* v. *Strydom's Trustees* (11 S.C.R., 423). See also *In re Zipp* (Buch. 1878, p. 132). The will shows

that the property was left to the survivor for the education of the children. We find a similar bequest *In re Henning, Ex parte Strydom* (7 Juta, 53), and *Wiese and Wiese* v. *Burger* (5 Searle, 253). That case is not quite in accordance with *Strydom's* case. The respondent does not wish to take up any position inconsistent with the doctrine laid down in the case of *Human* v. *Human's Executors* (10 Juta, 172). See also *Van Leeuwen's Censura Forin* (3, 8, 34) and *Sande on Restraints* (3, 4, 7). In *Strydom* v. *Strydom's Trustees* it was held to be a question of intention whether a testamentary right is to vest in the receiver immediately on the death of the testator or not, but that there is a conclusive presumption of immediate vesting where the gift is made to a person alive at the testator's death, and no mention is made of any supervision or postponement. See also *Van Breda* v. *The Master* (7 Juta, 360) and *Voet* (7, 1, 12). English law is not quite in accordance with our own law on this point. See *Theobald on Wills* (p. 506 and seq., 5th edition). As *Van Leeuwen* puts it, the only question is, was there any intention to postpone the enjoyment of the bequest. As to English cases, see *Fox* v. *Fox* (15 Ir. Ch., 89). See also *In re Wintle* (2 Ch., 1896—711). There it was argued that *Fox* v. *Fox* was wrongly decided, but that was not so.

Sir H. Juta, K.C. (for the defendants): These English cases are not in point. In the case of this will it is quite clear that the legacy did not vest until the son had attained his majority. If clause 8 of the will does not give the survivor a usufructuary interest, why was it inserted at all? Then as to the share of the residue of the estate, we say it vested in the survivor.

Mr. Schreiner (in reply): The eldest son survived the testator, and on the death of the testator he had a vested right unless he happened to die before his mother. Edith Rosa has a right under the will, and her right cannot be subject to any alienation. See *Strydom's* case (11 S.C.R., 423).

Cur. Adv. Vult.

Postea (August 24):

De Villiers, C. J.: The question raised in this special case is whether or not a legacy of £20,000 and a certain inheritance left by the last will of the late George Moodie to his daughter Edith, vested in her upon his death or was contingent upon her attaining the age of twenty-one years or marrying previously with the consent of her mother. Edith was one of the several children of the testator, and the legacy in question was given in the following terms: "I give and bequeath to each of my children, other than the eldest son, in the case of sons on attaining the age of twenty-one years, and in the case of daughters on attaining that age, or marrying previously, with the consent of their mother, the sum of £20,000." In regard to the eldest son the testator bequeathed to him the sum of £40,000, "if and when he shall attain the age of twenty-one years." The residue of the estate, after payment of legacies, is disposed of as follows: "Subject as aforesaid, I institute and appoint my children jointly and in equal shares to be sole and universal heirs of all the residue and remainder of my estate and if one or more of such children shall die in my lifetime having issue, such issue shall come into the place of the deceased parent." By a later clause (8th) the testator directs as follows: "I direct that during the minority of any of my children the interest or income of any legacy, or inheritance of such minor child, or so much thereof as may be necessary, shall be paid to my said wife, or after her death to the lawfully-appointed guardian of the minor, such interest or income to be paid or expended for or towards the maintenance or education of the minor." The testator died in 1891, leaving his wife and children, including Edith, him surviving, the wife died in 1896, and Edith died in the present year at the age of seventeen, unmarried and intestate. The plaintiffs, as executors testamentary, contend that the legacy to Edith and her share of inheritance vested in her during her lifetime, and have been transmitted to her heirs *ab intestato* while the defendant as the *curator ad litem* of her minor brothers and sister, contends that neither the legacy nor the inheritance vested, and that the amount should be administered as part of the estate of the late George Moodie.

In regard to the share of inheritance accruing to Edith there can be no doubt whatever that it vested in her on her father's death. There is no condition attached to the institution of heirs save and except that during their minority only the interest should be paid to

them, but such a condition cannot affect the question whether the inheritance itself vested in the heirs on the death of the testator.

A more difficult question is raised by the terms in which the legacy of £20,000 was given to each of the children, except the eldest son. The defendant contends that the bequest is conditional on the children attaining majority or marrying, and that, as Edith did not reach majority or marry before her death, the condition never was fulfilled in her case. The time fixed for the payment of the legacy is certainly an uncertain day, and *prima facie*, therefore, according to the rules of construction adopted in the Roman law, the arrival of the day should be treated as a condition attached to the legacy. I have, however, had occasion in previous cases to point out that this general rule is subject to indications of a contrary intention contained in the will. If the uncertain time was inserted in the will merely for the purpose of postponing the enjoyment of the legacy itself, it was held, under the Dutch as well as under the Roman law, that the bequest should be treated as unconditional. The rule, as stated in Digest 36, 2, 26, S 1, has been treated by *Voet* and other commentators, as applicable to the construction of wills under the Dutch law, and has been more than once recognised in this Court. The passage purports to contain the response of Papinian in reference to a case where a testator expressed his desire that a hundred *aurei* should be given to his foster child by his heirs, and that the money should be transferred to a third party in trust, to pay the interest to the child until his twenty-fifth year, and on his attaining that year to pay him the capital itself. The response was that, although the child had died before attaining his twenty-fifth year, he transmitted the *fidei-commissum* to his heir, and the reason given was that it would seem that a definite age had been prescribed for the payment of the capital and not that a condition had been attached to a *fidei-commissum* left unconditionally. The terms in which this reason is stated are: "*Nam certam aetatem sorti solvendae praestitutam videri, non pure fidei-commisso relicto conditionem insertam*," and are translated by Mr. McGregor in his excellent and useful commentary as follows: "Because this specified age was deemed to be the time fixed for the paying over of the capital, and did not seem to be a condition inserted in a *fidei-commissum* bequeathed subject to a condition." I venture, however, to think that the proper rendering of the term "*pure*" is "unconditionally," and not "subject to a condition." *Voet* adds that it is a question of intention in each case whether an uncertain day has been introduced as a condition, or for the purpose only of postponing payment. To illustrate this view, he cites a passage in the *Digest* (36, 1, 46), in which the opinion of *Javolenus* on the following case is given: "Sejus Saturninus, chief pilot from the British Fleet, had by will, instituted as his fiduciary heir Valerius Maximus, captain of a trireme, with the request that he would restore the inheritance to Sejus Oceanus on his attaining the age of sixteen years; Sejus Oceanus, however, died before attaining that age, whereupon his uncle claimed the estate as his next of kin, but Maximus, the captain, claimed it himself on the ground that the person to whom he had been directed to restore it had died. The opinion on the case was that the *fidei-commissum* vested during the lifetime of Oceanus, "that is to say, if in postponing the time of payment the testator should appear to have committed the guardianship to the fiduciary heir rather than to have attached an uncertain day to the *fidei-commissum*." It is clear, then, from this statement of the Roman rules of construction that even where a legacy was payable on an uncertain day, a very slight indication of an intention to the contrary was held to rebut the presumption that he intended the legacy to be conditional. The fact that the testator had directed the payment of interest to the legatee until the capital should become payable, was regarded as an indication of his intention that the legacy should vest before the legatee attained the prescribed age. I can find no trace in the Roman law of the distinction drawn by some of the English courts between cases in which the trustee is directed to apply the whole income for maintenance in the meantime, and those in which a discretion is conferred on the trustee to apply less than the whole income for that purpose. The ecclesiastical courts derived their rules of construction from the civil law, and the courts of equity followed the rules which had thus been

established, and the distinction to which I have referred must have been of later growth. It is, moreover, by no means clear that the distinction would still be recognised at the present day. In the case of *Fox* v. *Fox* (19 L.R. Eq., 266), Jessel, M.R., said: "Being opposed to the frittering away of general rules, and thinking that such rules, so long as they remain rules, ought to be followed, I hold that a gift contained in a direction to pay and divide amongst a class at a specific age, followed by a direction to apply the whole income for maintenance in the meantime, is vested, and not the less so because there is a discretion conferred on the trustees to apply less than the whole income for that purpose." That the learned Judge did not intend to confine this rule to the case in which there is a direction to divide the gift among a class is clear from a previous passage in his judgment, in which he expressly says that there is no valid distinction between such a case and that in which there is a gift to each of a class in equal shares on attaining the requisite age. The correctness of the Master of the Rolls' judgment has been doubted in some subsequent cases, but in the recent case of *Turney* v. *Turney* (2, Ch. Div. 1889, p. 739), Lindley, M.R., remarked: "I am by no means satisfied that *Fox* v. *Fxo* was wrongly decided. So far as I have considered it, my impression is that the decision is very good sense and very good law." But whatever the correct rule of the English courts may be, I am satisfied that the rule, as laid down by Jessel, M.R., correctly represents the state of our own law on the point.

In the present case, the direction was that, during the minority of the children, the interest or income of any legacy or inheritance of such minor children, "or so much thereof as may be necessary," shall be paid or expended for or towards the maintenance or education of the minor. The whole of the interest would have to be paid to the minor, unless the trustees should find that less would be sufficient for her education and maintenance, but in the latter case, I take it, the interest not so paid would have been allowed to accumulate for her benefit. The defendant's counsel, however, contends that the direction in the present case cannot be regarded as indicating an intention that the legacy of Edith should vest before she attained majority or married, seeing that the direction equally applies to the legacy given to the eldest son, which, it is assumed, cannot possibly vest until he attains the age of twenty-one years. It is not necessary to decide whether this is a correct assumption, for the terms in which the legacy is given to the eldest son are wholly different from those in which the gifts were made to the other children. The gift to the eldest son was to take effect "if and when he shall attain the age of twenty-one years," and it would by no means follow that if the legacy to him were held to be contingent on his being the eldest son at the time he reached that age, the legacy to the other children should be held to be contingent on their reaching the same age. I am clearly of opinion that in their case the legacy vested on the death of the testator, and that, consequently, the judgment of the Court should be in terms of the plaintiffs' contention. The costs will be paid out of the testator's estate.

Kotzé, J.: The question in this case is whether a legacy of £20,000, bequeathed by the testator, George Pigot Moodie, to his daughter, Edith Rosa, vested on the death of the testator. The answer depends upon the cardinal rule of interpretation applicable to every testamentary disposition. The intention of the testator, which must be gathered from the terms of the will as a whole is to be our guide. The clauses of the will which have a bearing on the point are as follows:

"(2) And I, the said George Pigot Moodie, give and bequeath (4) to my said son or to my eldest son as aforesaid, the sum of £40,000, if and when he shall attain the age of 21 years.

"(5) To each of my children, other than my eldest son as aforesaid, in the case of sons on attaining the age of twenty-one years, and in the case of daughters on attaining that age or on marrying previously with the consent of their mother, or in case of their mother's death, with the consent of their guardians, the sum of £20,000.

"(8) I direct that during the minority of any of my children, the interest or income of any legacy or inheritance of such minor child, or so much thereof as may be necessary, shall be paid to my said wife, or after her death to the law-

fully appointed guardian of the minor; such interest or income to be paid or expended for or towards the maintenance or education of the minor."

Edith Rosa Moodie survived the testator and died in the early part of the present year, at the age of seventeen and unmarried. Now, so far as she is concerned, the bequest to her is coupled with the mention of two periods of time, namely, the attaining of majority or marriage before attaining that age. This being so, regard must be had to the question whether the time mentioned relates to the bequest itself or merely refers to the payment thereof to the legatee. In the former instance, there is no vesting of the legacy, which lapses with the death of Edith Rosa; whereas in the latter instance there is a vesting, and on the death of Edith Rosa the legacy passes to her heirs. Which of these is the correct conclusion to come to in the present case depends, as I have observed, on the intention of the testator and the language he has employed in the will. This is plain from all the authorities, who give numerous instances, chiefly drawn from the *Corpus Juris*, illustrating this general rule. Thus, in Code 6, 53, 5, we find it laid down that a bequest in the following form, "I give and bequeath to my daughter 100 aurei, which she shall receive *when* she has attained the age of majority," is not a conditional legacy, but only the right of claiming it is postponed until majority. Huber likewise says that "I will that 400 guilders shall be paid to John after the death of my wife" is a conditional bequest; but "I bequeath to John 400 guilders, which after my wife's death shall be paid out of the proceeds" is a pure legacy, and is transmitted to his heirs, if John dies before the wife, for the words containing the bequest are distinct from the words relating to the payment. It was so decided in the case of A. Wolters, plaintiff, against T. Friesma, defendant, on the 27th October, 1637. (*Heed. Rechts.*, bk. 2, ch. 29.) Likewise where a testator said, "I bequeath 1,000 guilders to my niece, which my heir shall pay her on attaining majority or marriage," the legacy must be paid to her heirs if the niece should happen to die a minor or unmarried (*Van Leeuwen*, Com. 3, 9, 34). In the present case, if Clause 5 stood by itself it might be open to doubt whether the future day, which may or may not arrive and is wholly uncertain, does not amount to a condition having the effect of postponing the vesting of the bequest until the happening of the condition. Under such circumstances, *Voet* (36, 2, 2) says that if the legatee should happen to die there is no transmission of the bequest. So, if we read Clause 4 alone, it would appear that the testator, in dealing with the bequest to his eldest son, used words which, *prima facie*, show that he intended the legacy to him to be conditional, and only to vest *if* and *when* such son attained the age of 21 years; while in Clause 5 the testator worded the bequest differently, and said that he gives and bequeaths £20,000 to each of his children, other than his eldest son, "on attaining the age of 21 years, and in the case of daughters, on attaining that age or marrying previously." It may be contended that this difference in the wording of the bequest is not accidental but intentional, and that the testator had some reason for making the distinction with regard to his other children, and that, therefore, the time mentioned, that is to say, the words, "on attaining the age of 21 years or marrying previously," relate not to the bequest itself but to the day of payment, so that we have here to deal with a case of *dies cedit sed non venit*. But apart from this way of looking at the two bequests, the one in favour of the eldest son, the other to the remaining children, the different clauses of the will must be read together and construed as a whole in order to ascertain the real intention of the testator. Accordingly, it may happen that words which, taken by themselves, appear at first sight to be conditional or unconditional, may, when read in conjunction with the other clauses in the will, come to have an opposite meaning. This was very clearly pointed out by the Chief Justice in *Van Breda* v. *The Master of the Supreme Court* (7 Juta, 360). Clause 8 directs that during the minority of *any* of the testator's children the interest of any legacy or inheritance to any minor child, or so much thereof as may be necessary, shall be expended for or towards the maintenance or education of such minor child. This clause, it seems to me, manifests an intention on the part of the testator that the legacy or inheritance shall vest on his death, but that its enjoyment or receipt by the

legatee or heir shall be deferred until the arrival of the stated time. For the interest having been directed to be expended for the use and benefit of the legatee or heir, the effect of what the testator has said is to give the principal sum, that is, the bequest or inheritance itself, in any event, to the legatee or heir. *Van Leeuwen* (*Cens. for.*, 3, 8, 33) and *Voet* (*l.c.*) mention the case where a legacy was left to a foster-child, with a direction that it should be transferred to a third person, and that the child should up to his twenty-fifth year receive the interest, and on attaining that age the principal sum itself. It was held that on the death of the foster-child before the stipulated age the bequest passed to his heir. The reason for the decision was that the mentioning of the age of majority was for the purpose of paying out the legacy, and did not make the bequest conditional. The same principle is applicable to the present case. But it has been urged against this view that as Clause 8 refers to all the testator's children, it includes the eldest son. The clause, it is said, must have the same meaning with regard to him which it bears with respect to the other children, and as under Clause 4 the bequest to the son is clearly conditional, any argument sought to be drawn from the words of Clause 8 in favour of the other children is conclusively met by this circumstance. Now, this contention is open to a twofold objection. Assuming for a moment that the bequest in Clause 4 to the eldest son is conditional, that fact does not necessarily rebut the inference to be drawn from the words of Clause 8 in favour of the other children, for so far as they are concerned, there is nothing in the bequest to them in Clause 5 inconsistent with the construction which, both upon principle and authority, should be placed on the language of Clause 8. The testator may well have intended by Clause 4 that, although the eldest son should also during minority obtain the benefit of the interest of the bequest to him under Clause 8, the bequest itself should not vest until he attained the age of majority. In the next place, the mere use of the words "*if* and *when* he shall attain the age of twenty-one years" may be said to be controlled by what is stated by the testator in clause 8, and so these words which are *prima facie* conditional, do not after all import any condition. In the instance which I have quoted from the Code the words also were "*when* she shall have attained the age of majority," yet the legacy was held to have vested on the death of the legatee before attaining that age. Although this case must be decided according to our own law, it is satisfactory to know that the law of England, which seems to have borrowed much of the doctrine of vesting of legacies from the civil law, is in this respect similar to our own. In vol. 2 of *Williams on Executors*, at page 1098 (9th edition) I find several cases where the bequest was to the legatee *when* he or she shall attain the age of 21 years or marry with consent of executors and trustees, with a direction that in the meanwhile the interest shall be applied for the benefit of the legatee, and where it was held that the legacy vested on the death of the testator. I am of opinion that, both with regard to the legacy of Edith Rosa and her share of the residue of the testator's estate, the Court should declare that these were vested in her at the date of her death, and pass to her heirs. It is not necessary to say anything with regard to the appointment of an executor to her estate, or the payment of succession duty, for now that the question of vesting has been decided these matters will be regulated as by law provided.

[Plaintiffs' Attorneys: Syfret, Godlonton and Louw.]

APPEAL CASE.

CARLE v. DAWSON. } 1903. Aug. 17th.

This was an appeal from a decision of the Acting Resident Magistrate, of Wynberg.

Mr. Rainsford appeared for the appellant; respondent was in default.

The appellant, Carle, in his capacity as secretary of the Industrial Life Assurance Company, sued Dawson, a former agent of the society, for a refund of £14 12s. 6d., money received by him, and which he agreed to refund to the plaintiffs. Defendant was engaged by the company as an agent on an agreement terminable at 14 days' notice. The agreement provided that for each "life" insured through the instrumentality of the plaintiff, the defendant would at once be paid by the company, an amount equal

to six times the amount of the first weekly premium, as well as 20 per cent. for all weekly collections; but that, in case the premiums were allowed to lapse, such lapses should be made good by the defendant by a refund of the amounts of six times the weekly premium. In January defendant gave two weeks' notice of his resignation, and on that date the company informed him that various lapses, amounting to £7 or £8, had occurred. It was subsequently ascertained that the amount which had so lapsed up to the time of the resignation was £9 0s. 10d., and defendant refunded £3 of this. After the resignation, there were further lapses amounting to £5 11s. 8d. Defendant, at the opening of the proceedings in the court below, tendered the amount of £6 0s. 10d., being the sum which had lapsed previous to his resignation, and the Magistrate gave judgment for plaintiff for this sum, with costs, excepting costs of the day which plaintiff was ordered to pay. In his reasons the Magistrate stated that he held that the conditions of the agreement were no longer in existence after the agency had ceased. The defendant could not after that date have received any consideration from the plaintiff company for any collections made, and it was not now possible for the plaintiff company to recover, the agreement having ceased before the lapsing of the £5 11s. 8d.

After hearing argument on the facts, the Court dismissed the appeal.

De Villiers, C.J.: The only question of importance which arises in this appeal is whether the lapses referred to in clause three are lapses occurring during the subsistence of the agreement, or whether they would include lapses which occurred after the agreement has come to an end. Now clearly the ordinary reading of a contract of this nature would be that a party makes himself liable only for lapses which are the results of any negligence which might occur while he has himself a control, and I am of opinion that, if the parties had intended to extend defendant's liability to lapses which might occur after he has ceased to be an agent, the contract would have expressly said so If the appellant's contention is correct, then the plaintiffs would not be bound to take any trouble to collect the premiums; they would just allow the matter to run on, and afterwards claim the amount from the defendant, who had no further control. The appeal must be dismissed with costs.

Kotzé, J., concurred.

ENSLIN V. ZUIDMEER. { 1903. Aug. 17th

Interdict—Natural flow of water —Embankment.

The respondent removed an embankment on his own land which had been constructed about twelve years before by his predecessor in title, the effect of the removal being to allow more rainwater to flow in its natural course on to the applicant's land than had flowed while the embankment stood.

Held on motion, *that the applicant was not entitled to an interdict restraining such removal.*

This was an application to make absolute a rule *nisi* restraining respondent from allowing stormwater to flow from his property on to the applicant's ground pending an action to be brought for a perpetual interdict. The parties are owners of adjoining properties at the Paarl, and applicant complained that respondent allows stormwater to flow from his ground, which is immediately above that of applicant on to his (applicant's) ground, and has removed a certain embankment which hitherto had prevented the water coming down on to his property. It was deposed on behalf of respondent, who was not at present in the Colony, that the embankment was his property, and had been built by his predecessor in title to separate his property from that of the applicant. It was denied that there was more than the natural flow of water from respondent's land to applicant's, or that there was a greater flow than when the embankment existed.

Mr. Benjamin for applicant; Mr. McGregor for respondent.

After hearing Mr. Benjamin in argument, the Court, without calling upon Mr. McGregor discharged the rule.

De Villiers, C.J.: The learned judge to whom application was made for an interdict was very careful to confine the remedy to a rule. He granted a rule *nisi*, and I am satisfied that if the information which is now before the Court had been laid before the learned judge, he would not even have granted a rule. The applicant brought this application after the respondent had left the Colony, and the affidavits now put in show that the plaintiff had not even made out a *prima facie* case for an interdict. The embankment referred to seemed to be an embankment on the respondent's own property; placed there, apparently, by his predecessor in title, to separate his property from that of the applicant. The former owners of the property said that at the time they held the ground there was an embankment, which was the dividing line between the two properties, and that this could not prevent the rain or stormwater from being discharged on applicant's property from that of the respondent. So, according to this, the embankment did not prevent the stormwater flowing on to the applicant's property, but even if it had, it did not follow that the respondent was not justified in removing the embankment, which was placed there by his predecessor in title. If by the removal of this embankment the water flowed in a natural course on to the land of the applicant, he could not complain; he must take his land with all its disadvantages of situation, and if the lie of the land was such as to bring this water down, he must receive it. It was not alleged that the embankment was removed in such a way as to cause the water to take an unnatural course, and thus to flow on to applicant's land. The rule *nisi* must be discharged, with costs.

Kotzé, J., concurred.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

GENERAL MOTIONS.

LE ROUX v. VAN DER WESTHUYSEN AND OTHERS. } 1903. Aug. 17th.

Mr. Schreiner, K.C., moved for the awards of the arbitrators relating to certain farms in the division of Oudtshoorn to be made rules of Court, and for costs, in accordance with the 6th section of the award.

Order granted as prayed.

KELLER v. LE ROUX AND OTHERS.

Mr. Schreiner, K.C., moved for an award of arbitrators relating to the subdivision of water to lower farms in the division of Oudtshoorn to be made a Rule of Court.

Order granted as prayed.

Ex parte GLEESON.

Mr. Buchanan moved on behalf of the petitioner, as executrix, testamentary of her late husband, for leave to raise a further mortgage on the estate for £2,000, to meet certain debts, instead of selling part of the property. The major heirs consented to this course being adopted, but there were certain minors interested. The Master's report was favourable.

Order granted as prayed.

Ex parte SUTTON.

Mr. Alexander moved on behalf of the petitioner, who is a watchman in the employ of the Customs Department, at East London, for an order terminating a certain deed of trust, executed by the petitioner in 1899, in favour of his wife and children. It appeared that the net income accruing from the trusts, which were invested in shares, was now only about £32 a year, and the petitioner's wife was willing to forego her interest in the trusts, provided that the same were liquidated, and the money employed in the maintenance and education of the children. There was £550 on fixed deposit, and £960 was originally invested in shares, but it was not expected that the shares would now realise so much.

An order was granted declaring the trusts at an end, appointing Mr. Bolton, accountant, East London, and Mr. Fleumer, solicitor, East London, to liquidate the trusts, and hand over the proceeds, less liquidators' fees, to the Master, money to be paid by monthly instalments for the maintenance and education of the six children.

STRYDOM v. MARKOTTER.

Mr. McGregor applied, as a matter of urgency, for an order, re-investing the

applicant, Johannes Jacobus Gert Strydom, of Klein River, Kongh, in the district of Uniondale, with the possession of a certain mare. The applicant's statement was that on Thursday, August 6, he went to the town of Uniondale, a distance of about 30 miles, with his cart and two horses, for the purpose of taking his sick child to a doctor for treatment. The horses had been in his lawful possession for a considerable time as his sole property. On his arrival at the town of Uniondale, he obtained permission from a storekeeper—Abraham Pieter Hansen—to place the two horses in his stable reserved for customers. On Saturday, the 8th August, while the petitioner was attending to his sick child, Christoph Carl Markotter, a clerk, in the employ of John Thomas Stone, of Uniondale, proceeded to the stable, and, secretly and without the applicant's knowledge or consent, removed one of the said horses, a Colonial mare. Markotter took the mare to another stable in the town, and he was still in possession of the animal, and refused to give up the same, although requested to do so. Markotter alleged that he lost a Colonial mare in the protection camp during the administration of martial law, resembling the petitioner's mare in colour and in other respects. The petitioner said that the mare was born in November, 1898, and that in or about May, 1901, he handed over the mare to the military authorities, in accordance with instructions, for the purpose of being sent away to the protection camp. After the cessation of hostilities and in or about August, 1902, the said animal was returned to him by the military authorities as his own legitimate property, and it had since remained in his quiet and lawful possession up to the month of August, 1903. The said mare was the *bona fide* property of the petitioner, and was taken possession of unlawfully by the respondent, Markotter.

A rule *nisi* was granted, calling upon the respondent to show cause on the 31st August why he should not be ordered to restore the horse to the applicant, and in the meanwhile an interdict was granted restraining the respondent or any other person in possession of the horse from disposing of or parting with the same.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

ESTATE OTGAAR v. HAUPT. { 1903. Aug. 18th.

Contemplation of insolvency—Act 38 of 1884, Secs. 6 and 84 — Undue preference — Pledge—Agency.

The trustees of O.'s insolvent estate sued H. for £10, paid to H. when (as it was alleged) O. contemplated insolvency. The payment was made within six months of the date of sequestration. The trustee further demanded the restoration of certain goods which had been pledged to H. by O. and delivered.

Held *that as at the time O. made payment to H. of the said £10, he expected to be able to satisfy his liabilities, such payment was not an undue preference.*

Held further, *that as on the evidence it appeared that the goods aforesaid had been handed to the defendant that he might raise money by selling them and not as a pledge, the agency of defendant terminated on O.'s insolvency, and that consequently the said goods formed part of the insolvent estate.*

This was an action for the delivery of certain goods, a declaration of undue preference, and the defendant's forfeiture of proof against the plaintiff estate.

The declaration stated that the plaintiff estate was declared insolvent on 10th March, 1903. On the 11th February, Otgaar, being then in contemplation of insolvency, paid the defendant £10, being part of an alleged debt of £29 15s. 10d.,

and subsequently delivered to the defendant certain goods to the value of £115 15s. 3d., to be sold by public auction. The plaintiff wrote to stop the sale, but the defendant refused to deliver up the goods. Wherefore plaintiff claimed (1) delivery of the said goods, (2) a declaration that by being a party to an undue preference, defendant had forfeited his right to prove in the insolvent estate, (3) alternative relief, (4) costs of suit.

The defendant's plea admitted the formal allegations of the declaration, but set out that Otgaar purchased a cart and horse at a public auction on the 16th January, for the sum of £29 15s., the conditions of sale stipulating that the purchaser should pay in cash, which Otgaar had failed to do. Otgaar being pressed for payment, promised to hand over certain goods as a pledge. On 28th March, 1903, the defendant sold certain goods, which realised £17 13s. 3d. All the transactions with Otgaar were in the usual order and course of trade and business. On 7th May and 19th May the defendant tendered to the plaintiff the amount realised for the goods and the remainder of the goods, subject to his right to prove preferentially against the estate. It was admitted that Otgaar requested a return of the goods, but their alleged value, £115, was denied.

The replication of the plaintiff set out that the tender was insufficient to satisfy the claim.

Mr. Gardiner (with him Mr. Bisset) for the plaintiff. Mr. Benjamin for the defendant.

Cornelius J. Muller, clerk in the insolvency branch of the Master's Office, produced the papers relating to the insolvency of Otgaar. The petition was signed on February 24, the order of sequestration was issued in March, and the trustee was elected on the 27th March, the appointment being confirmed on the 16th April.

Harry Otgaar, the insolvent, said he was a grocer and general dealer, and he started business about May, 1902. The business went all right at first, but after the New Year it slackened off. He was sued by Percy Strutt and Co., and received a summons for the 10th February. He wrote to Mr. Haupt and the latter's clerk (Mr. Marshall) came to his shop. In the letter he asked Mr. Haupt to sell some goods by auction for him. He denied that he sent the goods to Mr. Haupt as a pledge for a debt. His desire was to obtain money to pay his creditors. A list was prepared of the goods. On the 12th February Strutt obtained judgment against him in the Stellenbosch Magistrate's Court. He first ascertained that his position was not sound two days after the judgment. He came to Cape Town to try to raise money, and he knew at that time that if he did not succeed he would be insolvent. About three or four days after he had sent goods to Mr. Haupt to be sold by auction, he determined to surrender his estate. He sent two letters to Mr. Haupt. He first wrote about the 15th or 16th February, asking Mr. Haupt to stop the sale and return the goods at once, because he wanted to make up his schedules. In his second letter he asked the defendant to send back his goods. The defendant replied that he (Otgaar) could make up his schedules from the duplicate list. About the 26th February he again wrote to Mr. Haupt, telling him that he had completed his schedules, and he wanted the goods returned. He took the values from the invoices. His assistant swore to the value of the goods.

[Maasdorp, J.: You shuld have a disinterested appraiser.]

Witnese said he bought a cart and horse at an auction sale held by Mr. Haupt in January. The cart he bought for £2 15s., and the horse for £27. He did not know what the conditions of sale were. He took the property away without paying for it. He was first asked for payment about two days afterwards. He saw the defendant personally the following day. There was an item in his book of £10 paid to the defendant for the cart and horse. He thought that entry would be very nearly correct.

[Maasdorp, J.: Upon your own showing, you were not contemplating insolvency.]

Witness said that the entry in his book might be incorrect as to a day or two. The payment might have been made on the 13th February. He sent his goods on the 11th February, but he was not quite sure that he made the payment on that date.

Cross-examined by Mr. Benjamin: He did not know that the sale of the cart and horse was for cash. He had some-

times got credit at auction sales. He thought he should have credit in this case. He was surprised when Mr. Marshall, the defendant's clerk, came round to him for the money a day or two afterwards. He could not pay the money at the time. It was not arranged that he should send his goods to Mr. Haupt in order to liquidate the debt. He told Mr. Marshall that he would send up these goods, as he wanted them sold to meet the claims of Messrs. Strutt and other creditors. The goods were of the value of £120, and he expected that they would realise at auction about £80.

By the Court: He had expected that the goods would be sold on the day after he sent them, the 12th.

Cross-examination continued: He came to see his father-in-law at Observatory in February to try to raise money after he had received Messrs. Strutt's summons. He scheduled the goods at cost price. He thought he would be able to raise about three-quarters of the cost price of the goods at the sale by auction. An estimate of £56 would be under the value. About this time he paid Mrs. Wiener £40.

By the Court: He knew that his position was hopeless after his attempts to raise money had been unsuccessful in Cape Town. He thought he might still carry on if he had got money for the goods at auction. Two days afterwards he received other summonses.

He paid the £10 before the goods were delivered to Mr. Haupt.

Johannes Jacobus van Wyk, sole trustee in the insolvent estate of Otgaar, said the assets were £926 9s. 2d., and the liabilities £1,123 4s. 4d. At the end of December the assets were the same, and the liabilities about £11 less. This was the state of affairs until the surrender. It was difficult to say what the estate would pay—roughly, he estimated, from 8s. to 10s. in the £. Witness had found the values in the schedules very fair, so far as he had realised them. Insolvent had not paid his clerks since October. After witness's appointment, at the end of April, witness sent for insolvent, who brought a list of the goods which Haupt had received. Haupt had two sales to witness's knowledge. He used to hold a sale every Saturday. After witness's election as trustee, but before the confirmation of the appointment, Haupt called and asked witness if he had a list of goods attached to the schedule. Witness said he had not received the papers. He asked Haupt if he was going to prove his claim, and Haupt replied that there was no need to prove his claim, as he had secured himself in time, having received goods from Otgaar to cover his claim. He said Otgaar's wife had sent him the goods. On the 2nd May witness wrote Haupt a letter asking that the goods should be returned, or their value paid. Haupt replied, stating that the goods could be had at the auction room, and enclosing an account of the dealings between Otgaar and himself, showing a balance of £2 1s. 9d. Further correspondence ensued between the attorneys. Witness had seen the statement of account sent by Haupt. Witness, on comparing this with lists, found a number of items short. These amounted in value to £4 13s. 6d. There was a difference of £14 3s. between the value given in the stock list and the sale price stated by Haupt to have been received by him.

Cross-examined by Mr. Benjamin: Haupt did not tell witness that the goods were sent to him because Mrs. Otgaar, who had managed that branch of the business, was going to give it up. No portion of the business belonged to the wife. Witness did not know what steps Haupt took in regard to advertising the sale of these goods. Witness had attended one of the two sales, and was struck with the cheap way in which the goods were being sold.

Mr. Benjamin: Quite so; you were struck with the cheap way in which the rival auctioneer was selling. You could have got much higher prices?

Witness: Quite so.

By the Court: At the time of the sale witness did not know that the goods being sold were those from Otgaar's shop. He had since come to the conclusion that there were, after having examined the vendue roll.

Wilhelm J. Mooy, former foreman to insolvent, said he made up the schedules of stock. He took the values from the invoices.

Mr. Gardiner closed his case.

Mr. Benjamin called

Edward Marshall, clerk in the employ of defendant, who said: The only notes witness had received from the insolvent were after the goods had been received. To the best of witness's recollection, the first note contained an intimation that Haupt was not to sell any more goods, as

Otgaar was handing in the schedules and a request for the return of the goods. Witness wrote on the back of the note a message to the effect that he could not return the goods, as Mr. Haupt was away. He sent this back by the same messenger. There was a second note, which witness did not keep. It was to the same effect. The sale of the horse and cart was advertised in the "Cape Times" to take place on the 16th February. They were purchased by Otgaar for £29 15s. Witness called to see Otgaar twice during the same and the following day, and said he wanted the money. Witness did not know anything of the £10 paid to Haupt. Witness "worried" Otgaar a good deal for money, and Otgaar said he would send the goods. He gave witness to understand that the proceeds of the sale of these goods were to cover the price of the horse and cart. The list of goods put in was substantially correct. There were three small errors. Witness valued the whole of the goods shown in the list at £56 10s. 5d. The goods sold realised £19 odd. Witness considered that the prices obtained was very good for an auction sale—infinitely better than those which would be obtained on the Parade at Cape Town.

Cross-examined by Mr. Gardiner: It was unusual to allow credit at Government sales. He was not positive of the words Otgaar used, but there was no doubt that his intention was that the goods should cover the debt for the horse and cart. Otgaar was not to deduct the money, but witness understood that he expected a balance. No one ever dreamt of getting the value of goods sent to an auction room. Sold from a shop, they might realise £65 or £70, and Otgaar's valuation was absurd. He was not time-checker at Garlicks, he was assistant in the wholesale department. Coloured men often gave double the value on a Saturday afternoon, and that was his explanation of the difference of fifty per cent. between his valuation and the actual realisation.

Re-examined by Mr. Benjamin: He considered that he got a good price for the goods, and, if necessary, he could return the balance in stock.

By Maasdorp, J.: Taking £19 as a fair value of the goods sold, the remainder would fetch £56.

Re-examined by Mr. Benjamin: The insolvent took the horse and cart without the consent of the aucitoneer. Some of the goods were old fashioned, and a good many of them would be difficult to sell.

Cross-examined by Mr. Gardiner: Witness did not give the insolvent permission to take the horse and cart. He did not see him take them.

By Kotzé, J.: Witness asked for the money a day or two afterwards, but not for the horse and cart.

F. Haupt, the defendant, stated that he was an auctioneer, carrying on business at Stellenbosch. The insolvent bought the horse and cart at a Government sale at Stellenbosch. Special conditions were printed for the sale, including "strictly cash." The insolvent took the horse and cart without permission. Cash had not been paid for the horse and cart, and witness then gave Mr. Marshall instructions. Subsequently, on February 7, he was paid £10 on account for the horse and cart. Some time before the cash was paid the goods were delivered at the store. Previous to the cash being paid, witness instructed Mr. Marshall to worry Otgaar for the money. About a week after the sale Otgaar suggested sending up the goods to be sold, from which witness could deduct his account. Witness did not like the idea of it, and then Otgaar suggested that he might take the goods until he (Otgaar) would pay him the cash. Witness received no word from Otgaar as to the return of the goods. The insolvent got credit for whatever goods were sold, and witness disposed of them because they were his property. Witness offered to tender the remainder of the goods subject to his right to prove preferentially against the estate.

By Maasdorp, J.: About the 6th or 7th March he knew that Otgaar had an intention of surrendering his estate.

Cross-examined by Mr. Gardiner: He did not know that it was necessary, after sequestration, to have the pledge valued and handed over to the trustee. He found out aftterwards that he had made a mistake in selling the goods. He was positive that the goods were delivered before the money was paid. There was no definite time fixed that he was to hold the goods. Witness said that his clerk was perfectly right in refusing to release the goods. There was nothing to debar witness from selling all the goods, even if all the money

had previously been paid. It was not on account of the sequestration that he sold the goods as soon as possible. He did not say in the letter to the attorneys that the goods were with him as a pledge, but stated that the goods were said to belong to Otgaar. Otgaar might have sent other people's goods, yet he took them as a pledge from Otgaar. In order to make what the auctioneers call "a sporting lot" certain underclothing that was missing might have been sold.

Re-examined by Mr. Benjamin: He would return everything, so long as he had the right to claim preferentially on the insolvent estate.

This closed the evidence, and counsel having been heard in argument,

Maasdorp, J: In this case the plaintiff claims from the defendant the recovery of certain goods alleged to form part of the property of the insolvent estate of Otgaar, which he alleges are at present in possession of the defendant, and he also claims the sum of £10 paid by the insolvent to the defendant, which he alleges to have been paid under circumstances that constitute an undue preference. Now, the first question that we have to decide in this case is whether, when the payment of £10 was made by the insolvent to Haupt, the insolvent contemplated the sequestration of his estate. Under section 6 of Act 38 of 1884 it is provided that when any payment is made within six months of the sequestration of the estate that the insolvent shall be presumed then to have contemplated the sequestration of his estate, but that presumption may be rebutted by proof to the contrary given by the defendant. It appears, under section 84, where a payment is made by an insolvent to any creditor at a time when such insolvent is contemplating the sequestration of his estate, and if by such payment he intends to prefer the creditor, to whom such payment is made, such payment will be regarded as null and void, and the trustee shall be entitled to recover the value of the amount of such payment from the creditor who received an undue preference. We have therefore to decide whether, when this payment was made by the insolvent to Haupt, he contemplated the sequestration of his estate. We must take it a payment was made as alleged by Mr. Haupt on the 7th of February. It would seem that the insolvent had carried on a very good business up to the end of last year, but, as he admits, business grew rather slack during January, and, in consequence, he had some difficulty in satisfying his creditors, and in February they began to press him. We find a summons was issued against him by Strutt and Company on the 10th February. The insolvent says that not being then possessed of ready cash to meet the demand he placed in the hands of Mr. Haupt some goods, which he wished him to sell in order to secure means to satisfy this debt of Strutt and Company. On the 12th judgment was obtained by Strutt against him for the sum of £51 18s. 4d., and even then he says he believed that, with the assistance of some friends, he would be in a position to satisfy that claim, and he proceeded to Cape Town to see whether he could raise a loan in order to meet the demands that were then pressing. He felt that he would succeed in raising such a loan, and then be in a position to satisfy the pressing creditors. If those were really the feelings entertained by the insolvent at that time he could not be said to have, up to the 12th February, contemplated the sequestration of his estate. Now, the manner in which the insolvent gave his evidence in this case impressed me with his truthfulness, and I quite accept the evidence as given by him, it being our object to ascertain what it was that passed through the mind of the insolvent at the time when he made this payment. The best person to inform us on this point, if he be regarded as truthful, would be the insolvent himself. Now, the insolvent has stated that by the 12th he would be able to carry on his business, and he did not then anticipate insolvency when his assets amounted to £926 and his liabilities amounted to £1,122. He would, therefore, consider the position as what might be regarded as a not very great access of liabilities over his assets, and I quite believe that the insolvent, whose business was then running, contemplated that he might be able to overcome his difficulty, and so avoid sequestration. Upon the whole, I come to the conclusion that the insolvent did not contemplate the sequestration of his estate until the 14th or 15th February. The defendant has therefore succeeded in rebutting the presumption of contemplation of sequestration which is spoken of in the 8th section of Act 38 of 1884. In the absence of such contemplation, the

payment of the £10 made by the insolvent to Haupt was a good payment, and cannot be set aside as an undue preference. The next and more important claim for the Court to decide upon is that part of the plaintiff's case in which he demands the restoration of the goods held by the defendant, and alleged to be the property of the insolvent, and at present vested in the trustee. The defendant's plea to that claim is that the goods were pledged to him for a debt which was due, and that he still holds them as a preferent claim, and is entitled to retain the property as against the trustee. There is a tender of this property by him to the trustee, but that is a conditional tender upon certain terms which the trustee was not bound to accept, and, consequently, the Court has now to decide whether the goods must be handed up as belonging to the estate of the insolvent. The defendant having set up this claim of pledge, the onus of proving it now lies upon him. Here there is certainly some conflict of evidence between the insolvent and the defendant, but, under the circumstances, and after carefully scrutinising it, it does not appear to be a very serious conflict. The insolvent says that when he found he was in want of cash to pay pressing creditors, he handed over to Mr. Haupt a certain quantity of goods, with instructions to sell them so as to enable him to pay these creditors. Mr. Haupt also states that these goods were delivered to him for the purpose of being sold, and he also admits that he was then contemplating that out of the proceeds certain creditors should be paid. He further says that it was understood between them that he should satisfy himself first out of the proceeds. Now, I come to the conclusion that, upon the facts which are proved in this case, even upon the statement of the defendant himself, that no pledge has been established. If instructions were given to Mr. Haupt to sell these goods for the purpose of raising funds to meet the claims of creditors, and even amongst them to satisfy his own claim, that does not amount to a pledge; it merely amounts to an agency to raise funds out of the proceeds of certain goods. If the goods had been given as a pledge, Mr. Haupt would have been obliged to retain them, and under ordinary circumstances, would not even, without an order of Court, have been entitled to sell them. Upon the whole of the evidence, I come to the conclusion that the goods were handed to Mr. Haupt for the purposes of sale, and that the proceeds were afterwards, either wholly or in part, to be paid back to the insolvent. If that is so, then the agency so constituted ceased upon the occurrence of the insolvency, and the property in the goods vested in the trustee. The trustee is, therefore, now entitled to recover the goods which belong to the insolvent estate, and which are in the hands of the defendant. There is some question as to the value of the portion of the goods which were disposed of by the defendant. The defendant seems to have sold some of the goods at two of his commission sales, and realised the sum of £19. The rest of the goods are still in his possession, and there would be very little difficulty now, in compliance with an order of Court, to restore the rest of the goods. As to the value of the goods disposed of, we are inclined to come to the conclusion they realised what they would have realised if they had been disposed of by the trustee. Consequently, no loss has been incurred by the estate, if we order that the goods now in possession of the defendant should be restored to the trustee, and that he also pay over the sum of £19, in view of such of the goods he has sold, together with the sum of £4 for some goods, which, in some manner unknown to the defendant, must have gone astray. Judgment will therefore be given for the plaintiff for the restoration of the goods still in possession of the defendant, and for the payment of the sum of £23, the defendant to pay costs of suit.

Kotzé, J., concurred.

[Plaintiff's Attorneys: Reid and Nephew; Defendant's Attorneys: Faure and Zietsman.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE]

THERON v. THERON. { 1903. Aug. 19th.

This was an action for the restitution of conjugal rights, or, failing compliance, a decree of divorce. Mr. Burton appeared for the petitioner, and the respondent was unrepresented.

The evidence taken on commission showed that the parties resided in the division of Clanwilliam, and that they were married in the Dutch Reformed Church, without community of property, on the 21st January, 1889. The petitioner, Esther Maria Jacoba Antoinette Theron stated that her husband maliciously deserted her in 1895, leaving the farm in anger, and declaring that he did not want petitioner to be his wife any longer. In 1898 the defendant sued her for divorce on the ground of unfaithfulness, but he failed to prove the charges. In 1899 they appeared before a Commission of the Dutch Reformed Church, but the defendant then stated that he would not return to petitioner, and that he did not want her as his wife any longer. Defendant had taken 7 horses, 48 cattle, and 100 sheep, which petitioner had got from her parents.

A decree of restitution of conjugal rights was granted, defendant being ordered to return to the petitioner on or before the 30th September, or, failing compliance, to show cause on the 15th October why a decree of divorce should not be granted against him.

Postea (October 15th) : The Court granted a decree of divorce.

JEFFERY v. KOTZE. { 1903. Aug. 19th.

Lease—Documentary evidence.

This was an action for the execution of a certain lease or payment of the sum of £300 damages, and for the return of certain movables or the value thereof.

The declaration set out that the plaintiff was a builder, and the defendant a farmer, both residing at Glen Lily, in the Cape Division. About February, 1902, one, Thomas Henry Johnson, entered into a lease with the defendant, which they both agreed to sign, but the defendant neglected to do so. In July the plaintiff and Johnson entered into a contract by which the former became lessee of the latter's rights with the defendant. Johnson was willing to execute the original contract, but the defendant refused to do so, and also to deliver to the plaintiff the movables, which were valued at £68 16s. The agreement set out that the defendant let certain land and premises at Elsie's River Halt for a period of three years and four months for the purposes of brickmaking to Thomas Johnson, the latter to pay a royalty of four shillings for every 1,000 bricks manufactured. Wherefore the defendant claimed (a) The sum of £300 as damages, (b) An order for the return of certain moveables retained by the defendant or their value.

The plea denied that defendant let any portion of the farm to Johnson. It was agreed that Johnson could take clay and manufacture bricks during the defendant's pleasure on condition that he paid four shillings on every 1,000 bricks. The defendant knew nothing of the sale of the rights to the plaintiff, and was always ready to deliver the said movables to Johnson on payment of the sum of £50 as a royalty on the bricks already manufactured.

The replication was general.

Mr. Gardiner (with him Mr. Bisset) for the plaintiff. Mr. Upington for the defendant.

Thomas Henry Johnson, brickmaker, said he knew the defendant's farm. In February last year he bought Vicary's plant, which was working on the farm, and he went to see Kotze. He asked defendant whether he could grant a lease to him, and Kotze agreed to do so for three years and four months, letting him have five acres or more ground on payment of a royalty of 2s. per 1,000 to the defendant. It was arranged that witness should draft a lease, to be afterwards submitted to a lawyer. The lease said that he should pay a royalty of 2s. per 1,000 bricks, and if Kotze supplied wood the terms should be 4s. per 1,000. Kotze assented to the document, and on the following Saturday they went to the office of Mr. Du Preez, attorney. Mr. Kotze took the draft of the lease to Mr. Du Preez, and instructed him to draw up the lease. Before the lease was prepared, Mr. Du

Preez died. It was afterwards stated that they might get it drawn up by Mr. Du Preez's clerk. He commenced work in March, and paid his first royalty on the 10th. In April witness went to Du Preez's office, and he arranged for the clerk to draw up a lease, which he took early in April to Kotze. Witness was accompanied by a Mr. Tadman. He asked Kotze to sign the lease, but the latter refused, saying that witness must first pay up his royalties. Witness admitted that he had kept back a certain amount, because the lease had been unsigned. He paid the royalties in arrear a week later. Kotze then said he would let him know about the lease when he went to town. Kotze subsequently promised several times, but he did not get the lease signed. Witness in May desired to lay down machinery, and it was arranged that he should pay Kotze 4s. per 1,000 bricks royalty. They went to Mr. Glynn's office, and Kotze instructed Glynn to draw up an agreement similar to the other, excepting that the royalty was to be altered to 4s., and the provision as to wood was to be struck out. Witness afterwards took the lease to Kotze, who, however, said the lease must be signed before a proper authority, a solicitor. Kotze always made promises that he would sign the agreement, but he always found some pretext. Witness afterwards resolved to go to Johannesburg and he arranged to sell the lease and movables to Mr. Jeffery for £70. He sold at a low price, because he was anxious about the lease being unsigned, and he thought things were better in Johannesburg than here, as bricks were fetching a big price there. He made a profit of close upon £300 on the property during the four months he was there. He considered that the lease, if signed, would be worth £300. If the lease were signed brickmaking on the property should produce a profit of £1,000 a year. The yearly product should be 500,000 to 600,000 bricks. Before he left for Johannesburg he asked Kotze if he (witness) owed him any money, and the defendant replied that he did not.

Cross-examined by Mr. Upington: The agreement to enter into a lease was made on or about the 7th February. He was told that Vicary and Gamber had a lease to expire on the 30th April, 1902. Vicary was the only person whom witness saw. Vicary was anxious to go Home. He denied that it was arranged between witness and Vicary that witness should carry on the unexpired portion of Vicary's lease. He bought the plant on the condition that he should be given a lease. He arranged with Mr. Du Preez's clerk to draw up a lease in March. He believed he handed it over to Mr. Glynn. He owed the defendant about £8 for royalties when he presented the lease to Kotze to be signed. He paid the arrears on the 12th April. He asked Kotze again to sign, but Kotze refused, saying that there were no witnesses present. Kotze promised to let him know when he went to town, so as to get the lease signed. Kotze did not let him know. He left 26,000 bricks on the ground when he sold out. He paid a royalty of 2s. per 1,000 bricks on the bricks he made there. Vicary did not tell him that he had a lease. Vicary told him that he was paying a royalty of 2s. per 1,000 bricks. Witness's father effected the sale to Jeffery. Kotze ordered witness and Jeffery off the property on the 19th July. Witness went to Johannesburg the same night.

Re-examined by Mr. Gardiner: He did not use the shrubs as fuel, and the consequence was that he only had to pay 2s. per 1,000. He made no bricks after it was agreed that he should pay 4s. per 1,000, in case he laid down machinery.

John Warren Glynn, broker and commission agent, said the document produced was handed to him to be copied about the last week in June of last year. The two Johnsons and Kotze brought a document, the last named handing it to witness, instructing him to typewrite it, and to make duplicates. Witness had the document typewritten, and handed the copies to Kotze and the Johnsons. Kotze asked witness to strike out a clause, and witness did so, writing "cancelled" against it.

Cross-examined by Mr. Upington: No final agreement was arrived at in witness's office. Witness did not arrange to go out to Kotze's farm in connection with this matter.

Richard Owen Johnson, said that when he went, in company with others, to see Kotze about his son taking the land, the latter agreed to lease the land for three years and four months, on condition that two shillings royalty was paid for every 1,000 bricks manufactured. If shrubs

were used, an extra two shillings were to be paid. Witness worded the contract, and Kotze agreed to the terms of it, and when the attorney died the defendant said that they could go on brickmaking. Witness arranged the sale with the plaintiff for £70, and the money was paid over by cheque. Before the money was paid Jeffery asked the defendant if he would sign the lease in favour of him, and the defendant replied in the affirmative. The defendant arranged an appointment to have it signed before a solicitor. He corroborated his son's evidence as to the value of the movables, and the amount of damages.

Cross-examined by Mr. Upington: Mr. Jeffery got a very good bargain. In Du Preez's agreement, the royalty was 2s. It was understood that the lease was to be for three years and four months, with the option of a renewal. Mr. Glynn was wrong when he said that the defendant was present to sign the agreement.

By Kotzé, J.: He was quite sure of that, although Mr. Glynn said the defendant was present.

Cross-examination continued: It was arrangend because of Kotzé's absence that Glynn should go to defendant's farm with the agreement for his signature. It was in March that he went with his son to see the defendant. Mr. Smith was also in the house. The defendant did not tell him to clear out, but, on the other hand, he agreed to sign the agreement. The defendant always had a "shuffling" excuse when witness called.

Re-examined by Mr. Gardiner: £8 would have been the full value of the plant he bought from Vicary.

By Maasdorp, J.: He thought his son gave instructions to strike out the clause against which "cancelled" had been written. Kotze was not then present in Glynn's office at the time.

Thomas Jeffrey, the plaintiff, said that while he was negotiating the agreement with Johnson to buy the plant, he knew there was difficulty with Kotze about the lease. Witness accompanied Johnson to Kotze's house, and asked him to sign the lease. Kotze looked through it, and said he would sign it. He said he wanted to take it in to his solicitor to get it signed. After witness met Kotze, and questioned him about the matter. Kotze then affected surprise at the information that witness had bought from Johnson, and repudiated having made a promise to sign the lease. Kotze said Johnson had no business to sell, as he owed him royalties. He told witness if he returned to the ground, he would kick him off. This was on the Saturday after the interview at Kotze's house. Afterwards Johnson and witness saw Kotze, who, in reply to Johnson, said the latter did not owe him any money. Kotze again promised to go into town to sign the lease, but failed to keep his promise, sending a man to say he was too busy. The appointment was made the previous day. When witness returned from town, where he had been to meet Kotze, he found that Kotze had removed his things. Witness would not have bought the lease if he had not been satisfied that Kotze would sign. Witness wanted bricks at the time for a large building he was erecting, and which he intended to be used as an hotel, provided he could get a licence. Witness altered "Johnson" to "Jeffreys" in the lease.

Cross-examined by Mr. Upington: Witness removed about 4,000 burned bricks from the ground. He paid no royalty on these; the royalty had been paid. He paid £70 for the plant, and the plant was worth that amount. He did not merely buy the chance of getting a lease.

Re-examined by Mr. Gardiner: The bricks he bought were made by Johnson.

Mr. Gardiner closed his case.

Mr. Upington called

John George Vicary, who stated that in November, 1901, witness and Mr. Gamber entered into a lease with Kotze of the brickfield at present in dispute. He remembered meeting young Johnson in February, 1902. Prior to that Gamber had gone out of the contract, and witness was carrying it on on his own behalf. Johnson wanted to buy the farm and the plant, and witness said that he could take over the remaining term of the lease. Witness took him to Kotze's house. Old Mr. Johnson was also there. Kotze agreed to Johnson taking over the farm for the remaining term, but there was no mention of giving a lease for three years and four months. Under his lease, he was paying

4s. a 1,000, which included wood and water.

Cross-examined by Mr. Gardiner: As far as he could recollect, Johnson did not remain longer with Kotze than witness. He thought Mr. Gamber was working the brickfield last season. Witness was bookkeeper to Mr. Gamber at present, but he could not say whether Gamber had at present the right over the farm.

Frederick Jacobus Kotze, defendant, said that in January last year Gamber and Vicary had a lease that was still current with him. Vicary introduced Johnson, and asked witness to transfer the agreement to the latter. He agreed to Johnson continuing the agreement. Johnson continued to work the brickfields until April 30, when he paid an amount of money as royalty. Johnson asked for an extension, and witness said he would consider the matter if the arrears were settled. Early in May Johnson and his son brought a paper, in the form of a contract, with which witness was dissatisfied. Witness said, except he saw a better proposal, he would not sign it. He never remembered going to see Mr. Glynn about this matter. Witness told the plaintiff that Johnson had no lease at all.

Cross-examined by Mr. Gardiner: The royalty was 2s. per 1,000. Johnson was unable to pay, and witness had to give him an account for any amount of cash given to him. Gamber was paying 4s. a thousand for bricks last season.

Re-examined by Mr. Upington: He merely agreed to allow Johnson to remain on to finish his bricks, when his transfer from Vicary was up.

Margheretta Magdalena Kotze, wife of the defendant, said she had previously seen Johnson and Jeffrey. Her husband had leased the brickfield to Gamber and Vicary. She remembered the two Mr. Johnsons and Mr. Vicary coming to see Mr. Kotze. Vicary asked if Johnson could continue his lease for the remaining few months, and that was agreed to. When the lease expired, she did not remember Johnson coming to pay a royalty. She remembered the two Johnsons coming to the house with a paper which they gave to her husband. Her husband did not agree to the terms of the document.

Cross-examined by Mr. Gardiner: She was not in the room all the time Vicary was there. She had not talked seriously with her husband about the case.

Francis Gamber said that at the end of 1901, with Mr. Vicary, he had a joint lease from the defendant. He left Vicary to continue the lease. Last season witness was working a bit of property as a brickfield on the same farm. Witness removed 21,000 bricks from the farm for Mr. Jeffery. He valued the plant at between £5 and £6.

Cross-examined by Mr. Gardiner: It would be difficult to make 30s. profit on bricks in that district.

Counsel having been heard in argument on the facts,

Maasdorp, J.: The plaintiff, in his declaration, alleges that an agreement was entered into between Johnson and the defendant in terms of the document, which is annexed to the declaration. Upon reference to that document it appears to be a lease whereby the defendant let to Johnson a portion of his farm, with the right to make bricks thereon, the defendant promising to pay a royalty of four shillings for every thousand bricks made by him. The plaintiff claims specific performance of the contract. The defendant, in his plea, denies that such agreement was ever entered into. Upon looking at the evidence in this matter, I think the plaintiff has to meet several difficulties. He has to put before the Court clear and definite evidence of the contract, which he alleges in his declaration, and we find that his difficulties commence with the very form of his declaration. It will be necessary for the Court to decide at what particular time a final agreement—if any—was entered into between the parties, and then to decide upon its specific terms. Now it is alleged in the declaration that the contract was entered into in March, 1902 and one of the important terms alleged in the annexed document is that a royalty of four shillings in the thousand was to be paid by Johnson to the defendant. No sooner had we gone into the evidence which has been adduced in this case, when it appears that some agreement was entered into in the month of February, 1902, and the plaintiff says that the royalty under that agreement which he contracted to pay was the sum of two shillings per thousand bricks. Here we find that the declaration is in conflict with the evidence in two very material particulars,

I think it is not difficult to explain the discrepancies which we find here. It is caused in my opinion by the fact that there is a considerable amount of doubt and uncertainty in the mind of Johnson, who assigned his contract to Jefferys, as to when a final contract was entered into, and what the terms of that contract were. Johnson has said, in evidence, that in February, 1902, he made an agreement which the defendant agreed to reduce to writing, and to sign, and in that month the terms of that agreement were definitely settled. Two months afterwards we find the parties are still negotiating, and are at variance on very important points. Then the question is raised whether two shillings should be paid for every thousand bricks, or four shillings, and we find Johnson consents to pay the advanced sum of four shillings for every thousand bricks, although he alleges he had already entered into a binding contract with the defendant for the payment of two shillings. Now, I cannot accept it that, if Johnson was convinced that he had a contract which he could enforce against the defendant, in which the terms were very favourable, he should agree to alter these terms two months afterwards to others that were less favourable. But the difficulty does not end there. Some time after that again we find the parties apparently still negotiating. They go to Mr. Glynn's office, and there a document is produced, which contains certain terms which the parties, after consideration, agreed to strike out as not forming part of the contract which they were negotiating. Another document is produced, which Johnson took to the defendant, and which the defendant agreed to with the alteration of one of the terms of it. To my mind, the parties had not yet themselves come to a definite and final agreement as to the terms of the contract which they wished to enter into. Mr. Glynn, in giving evidence as to the interview, contradicts the two Mr. Johnsons in a very important particular. They say that a final agreement was arrived at, and Mr. Glynn was to take it to the defendant, and the parties would there meet and finally conclude the contract by their signatures. Mr. Glynn says nothing of the kind took place, and after the document had been reduced to type, he had nothing further to do with it, and he never undertook to get the document finally settled by the defendant. Now, we take a further step, and come to the alleged agreement between Jefferys and the defendant. It is said Jefferys, having purchased from Johnson his rights under the contract, went to see Mr. Kotze to get his consent to this assignment. It has been argued by counsel that, however much doubt there may be as to the finality of the former negotiations, here at least we have something which establishes a clear contract of lease. If we refer to the evidence of Jefferys, we find this: He went to Mr. Kotze and produced a written agreement, and asked whether he would consent, and after he had talked it over, Mr. Kotze, in just one or two words, said, "Yes, I shall go to my attorney and sign that document," but, says Jefferys, on the next occasion Kotze was so dissatisfied with the whole business that he said he would feel obliged to kick him off the farm. Here, you would fancy that the parties had such a difference that they could not proceed to a settlement of the matter. But Jefferys says immediately after that Mr. Kotze again consents to go into town, and finally settle the agreement, but no sooner does Jefferys leave, than he takes possession of the plant left by Johnson, and removes it from the brickfields, with the evident intention of putting a stop to any further work. I am not satisfied that the conduct of the parties was such as to establish a final agreement between Jefferys and the defendant. It is said it is very difficult to understand Mr. Kotze's conduct through the whole of this business, but after hearing Mr. Kotze's evidence, I find no difficulty in explaining his conduct. He seems to be a man who finds it difficult to make up his mind, and I am prepared to accept the evidence of the witnesses for the plaintiff that he had from time to time vaguely promised that he would go to town to see his attorneys, and see whether he could not fix up some agreement; that he from time to time put off carrying out his resolution, and never had at any time so fixed his attention upon the matter as to come to any definite conclusion as to the terms upon which he would enter into this contract. The uncertainty in his mind gave rise to the consequence that no final agreement was entered into between the parties, and upon that

point of the case the plaintiff has failed. But he has a further claim for the plant that was left on the ground, and which he alleges he bought from Johnson. The defendant, in his plea to that part of the claim, alleges that he retains possession of the goods, because there is a further debt due by him from Johnson under the lease. If any money by way of rent was due to the defendant, he would have been entitled to a lien on the goods, but in the absence of proof to that effect he was wrong in retaining the goods. Upon that part of the case, the Court will have to give judgment for the plaintiff for the restoration of the goods. There seems to be some little difficulty in assessing the value of the property. Looking at the list, it is of a very meagre and simple character, and the values set opposite the items certainly strike us as very high, and when we remember that for this plant and for the bricks, worth £91, Jefferys paid £70, I am satisfied that the plant that he bought could not be of anything like the value put upon it by the plaintiff. Seeing the unsatisfactory nature of this evidence, we have to reduce the value, and we find, if we allow the plaintiff £15 it would cover the full value of such goods. The defendant will pay all costs, except those of the witnesses Glynn, Johnson, sen., Cadman, and that of the commission to take Wake's evidence.

Kotzé, J., concurred.

[Plaintiff's Attorneys: Tredgold, McIntyre and Bisset; Defendant's Attorney: C. W. Herold.]

SUPREME COURT

[Before the Chief Justice (the Right Honourable Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1903. Aug. 20th.

Mr. Alexander moved for the admission of Richard Davis Gately as an attorney and notary.

The application was granted, the oaths to be taken before the Resident Magistrate of East London.

Mr. J. E. R. de Villiers moved for the admission of Victor Kotze as an attorney.

The application was granted, and the oaths administered.

PROVISIONAL ROLL.

SCHRODER V. BENTLEY.

Sir H. Juta, K.C., moved for the final adjudication of the defendant's estate.

Order granted.

HAWORTH V. CARLISLE.

Mr. Alexander moved for provisional sentence for the sum of £43 9s. 6d., being a judgment of the Magistrate's Court, and £1 18s. 1d. taxed costs, and also that certain landed property be declared executable.

Order granted, subject to the production of a proper certificate of service.

WOODS V. CARLISLE.

Mr. Alexander moved for provisional sentence for £20, on a judgment of the Resident Magistrate's Court, and £2 3s. 1d. taxed costs, and also for landed property to be declared executable.

Order granted, subject to production of certificate of service.

HUGHES V. CLIFFORD.

Mr. Benjamin moved for a decree of civil imprisonment against the defendant, upon an unsatisfied judgment of this Court, under which sums of £33 0s. 5d. and £50 11s. 5d. were due on certain taxed bills of costs, taxed by the plaintiff, an attorney, against the defendant.

Defendant complained that the plaintiff, Mr. Price Hughes, had charged him with costs which ought to have been paid by the co-defendant in the divorce suit, who had gone into liquidation, and was now carrying on business in the maiden name of witness's wife. Mr. Price Hughes agreed to do the work for £100, and his bill amounted to £300. He actually charged witness 5s. for speaking to him over the telephone for two seconds. Witness had no means whatever. He was earning £25 a month. He had offered, and was still prepared to pay 50s. a month.

The Chief Justice (to Mr. Benjamin): How is it the money was not obtained from the co-defendant in the divorce suit?

Mr. Benjamin: He has gone insolvent.

Defendant: He is in business at the present time in my wife's maiden name.

Mr. Benjamin asked for an order of £5 a month.

Decree of civil imprisonment granted, with costs, to be suspended on payment of £2 10s. per month, until the judgment debt and costs be paid, first payment to be made on the 15th September, with leave to plaintiff to apply subsequently to increase the amount.

LE SUEUR AND OTHERS V. JACKSON.

Mr. Alexander moved for provisional sentence on a certain mortgage bond for the sum of £1,000, with interest from January 1, 1903, and that the property be declared executable.

Order granted.

PEYCKE AND CO. V. BATH.

Mr. Alexander moved that the provisional order of sequestration against the defendant's estate be made final.

Order granted.

BRAND AND OTHERS V. VAN DER MERWE.

Mr. van Zyl moved for the provisional order of sequestration in the defendant's estate to be made final.

The defendant appeared, and put in a paper to the effect that he owned a farm, and was practically solvent.

The matter was ordered to stand over to the 12th October, the defendant in the meantime to endeavour to find a purchaser of the farm.

Postea (October 12).

The matter was again ordered to stand over.

ILLIQUID ROLL.

BENNETT AND LOUW V. SPARGO. { 1903. Aug. 20th.

Mr. Close moved for judgment, under Rule 329d, for the sum of £88 14s. 8d., balance of account for goods sold.

Order granted.

DOMINICUS V. SALIE.

Mr. Alexander moved for provisional sentence for £30 and costs, being balance of the purchase price of certain land.

Order granted.

MULLER V. BEST.

Mr. Buchanan moved for judgment under Rule 319 in default of plea to declaration in reference to two lots of land sold by defendant to plaintiff, who hereby tendered payment of purchase price against transfer.

Order granted.

ZEEDERBERG AND DUNCAN V. BRONDE

Mr. Buchanan moved for judgment under Rule 329d, for the sum of £103 18s. 7d., for goods sold and delivered to the defendant at his request, with interest at the rate of 7 per cent. and costs of suit.

Order granted.

CLAN LINE V. MCKENZIE AND CO.

Mr. Schreiner, K.C., moved for judgment in terms of declaration for £147 10s., expenses of lighterage and landing on quay, and £157 12s. 8d., by way of demurrage or damages for detention.

Order granted.

RICH V. FITZGERALD.

Mr. Close moved for judgment under Rule 319, on declaration for moneys received by defendant on behalf of plaintiff, together with interest and costs.

Order granted.

FAURE AND ZIETSMAN V. GIBBONS.

Mr. Bisset moved for judgment for £28 10s. 6d., with interest *a tempore moræ* and costs.

Order granted.

REHABILITATIONS.

Mr. Greer moved for the rehabilitation of Gabriel Jacobus Wolfaardt.

Order granted.

GENERAL MOTIONS.

Ex parte MATTHEE. { 1903. Aug. 20th.

Mr. Upington moved for the rule *nisi* under the Derelict Lands Act to be made absolute.

Rule made absolute.

Re THE GRAND JUNCTION RAILWAYS.

Sir H. Juta, K.C., presented the report of the official liquidator, and moved for the usual order as to lying for inspection, and as to the printing of the report.

Usual order granted.

ANNEAR V. ANNEAR.

Mr. J. E. R. de Villiers moved on behalf of petitioner (the wife) for leave to sue the husband by edictal citation for divorce, on the ground of malicious desertion, which was alleged to have taken place in Johannesburg in 1898.

Leave granted, personal service to be effected, and citation to be returnable on the 12th October.

Ex parte LESSING.

Mr. Benjamin applied for the return day to be extended to the 12th September, in order to enable the rule to be served upon the executors in the estate Lessing.

Application granted.

Ex parte WALPOLE.

Mr. Nightingale moved for an order authorising the Registrar of Deeds to issue certified copies of certain mortgage bond and deed of transfer.

Order granted.

Ex parte COMMAILLE.

Mr. Close moved for an order authorising the Master to pay over the sum of £400 from the petitioner's father's estate The petitioner would attain the age of 21 years in February, 1904, and as he found it difficult to support himself in his present position, the money was required for the purchase of certain property.

Order granted.

Ex parte DE WET AND ANOTHER.

Mr. Nightingale moved for leave to sell certain property, in which minors were interested.

The Master's report was favourable.

Order granted in terms of Master's report.

Ex parte STEER.

Mr. J. E. R. de Villiers moved for the attachment of certain property, and for leave to sue by edictal citation. The whereabouts of the defendant was unknown.

Leave granted, citation returnable on the 12th October, personal service to be effected, failing which, two publications in a Cape Town newspaper.

Ex parte BARTLETT.

Mr. C. W. de Villiers moved for leave to sell certain property, which had been purchased by petitioner in her individual capacity from the estate of her late husband, John Henry Bartlett, for £1,350.

Leave granted.

HARRISON V. HARRISON.

Mr. Benjamin moved on behalf of petitioner for leave to sue her husband by edictal citation for restitution of conjugal rights, failing which, a decree of divorce on the ground of malicious desertion. It was stated that defendant deserted plaintiff in 1899, and that when last heard of he was at Aldershot, England. He had been in the Army, but had deserted.

Order granted, citation returnable on the 1st November, personal service to be effected.

SWART V. SWART.

Mr. Benjamin moved on behalf of petitioner for leave to sue her husband by edictal citation for restitution of conjugal rights, failing which a decree of divorce, by reason of the defendant's malicious desertion. The defendant was now believed to be in the Orange River Colony.

Leave granted, citation to be returnable on the 12th October, personal service to be effected.

Ex parte MAASDORP. { 1903. Aug. 20th.

Attorney—Service of articles—Military service—Holiday.

M., an articled clerk, had been absent from the service of his principal for three months on active military service. Application was now made to have this period of three months reckoned as a reasonable holiday, and deducted from applicant's period of service.

Held, *that the application must be refused and the applicant ordered to complete an extra three months' service.*

This was an application on behalf of one Charles Hermanus Maasdorp for an order declaring that the petitioner's articles of clerkship be determined on the 11th August, 1903, and that his service was sufficient for the purposes of admission as an attorney of this Court. The petitioner, it seemed, had been absent for three months on active service with the Western Province Rifles.

Mr. Schreiner, K.C. (for applicant). The applicant was entitled to take a three months' holiday without thereby breaking the continuity of his service. If he thought fit to spend his holiday in military service at the front why should he be made to suffer for this.

[De Villiers, C.J.: I don't know whether we can accept that, Mr. Schreiner; the view would be then that everybody who has been out fighting for His Majesty has been out for a holiday.]

Mr. Upington (for the Law Society): The position the Law Society has taken up is that if an articled clerk has been absent on active military service the period of such absence will not be deemed a breach in the continuity of his service, but that he serve a corresponding period of extended service. *In re De Beer* (10 Shiel 515).

[De Villiers, C.J.: Why cannot the applicant complete his service?]

He wishes to may other arrangements which will enable him to earn something during these three months. He was articled on August 17, 1900. We raise no difficulty on the ground of want of continuous service; but we do say that he should serve his full time. This case is by no means similar to *Re Will* (7 Juta 67).

Mr. Schreiner was heard in reply.

De Villiers, C.J.: The application, raised by counsel on motion, is that the three months should be taken as holiday, but there is no evidence whatever that it should be taken by way of holiday to complete period of service. The applicant will not be called to be admitted until the 16th November, and he is at present articled, and I confess I don't see why he should not continue these articles until he is of age, and by that time he will have served the additional three months, which would bring the period of service up to three years. The Court will, therefore, declare that, for the purposes of his admission as an attorney and notary, the applicant's articles of service will expire on the 14th November. Under the new rules of the Court, the 14th day of November will be the last day of term.

Mr. Schreiner asked his lordship to alter the date to the 13th November, so as to enable the applicant to get his papers in order for the last day of term.

The Chief Justice consented to alter the date to the 13th November.

SCHAVEREIN v. WEINTROB.

This was an application brought by Morris Schaverein, of the Paarl, against Louis Weintrob, also of the Paarl, to have an interdict obtained by the said Weintrob set aside. The interdict restrained Schaverein from making certain alterations, and interfering with certain building materials at the Paarl, pending on action, to be brought forthwith by Weintrob against Isaac J. de Villiers, the original vendor of the property, and against Schaverein, as the subsequent purchaser.

The applicant's affidavit stated that the property was suffering because of the operation of the interdict, and that the respondent Weintrob had delayed bringing the action against De Villiers and applicant. Applicant was desirous of obtaining transfer of the property from De Villiers.

The affidavit of the respondent stated that he had been delayed in commencing the action because of his want of funds. He had had to dispose of certain portions

of his landed property. He had been delayed in having transfer carried out, owing to the illness of the secretary of the Paarl Board of Executors. He had now made necessary arrangements, and a summons had been issued against the applicant and Isaac J. de Villiers, the latter of whom, deponent claimed, had already sold the property in dispute to him.

Mr. C. W. de Villiers (for the applicant) submitted that the previous order, which said that the former applicant (Weintrob) should proceed with an action against Isaac de Villiers forthwith meant that that action should be proceeded with this term. Only on the 12th of this month had the applicant taken out a summons, and it was impossible for the action to come on this term. In the meantime, the property was suffering injury and deterioration. There was no necessity for the respondent to have waited, because the cost of a summons would only be a few shillings. Schaverein was willing to take the responsibility of continuing these building operations.

Mr. Bisset (for the respondent) said the delay which had taken place had been due to the defendant being short of funds to proceed with his action, but he had now succeeded in passing transfer of certain of his property, and obtaining funds wherewith to proceed with the action. In view of the fact that delay was not due to Weintrob's negligence, he asked the Court to refuse the application, and continue the interdict against Schaverein.

De Villiers, C.J.: The respondent seems to have had funds to put the law in motion, and to apply for an interdict against the applicant, and having obtained that interdict, thus prevented the applicant from dealing with this property. Now the order of Court is clear: "That the interdict continue pending an action to be forthwith brought by the applicant against Isaac de Villiers for transfer of the land in question, and against Schaverein as subsequent purchaser of the land." This order was made on the 25th June last; nothing was done until on the 6th of this month notice is served upon the respondent that an application would be made for the discharge of the order, whereupon he issues a summons. He says now he had not the means to issue a summons, although he had the means two months since to set the law in motion, and to put the applicant to the inconvenience of having this interdict against him. Two months have elapsed, and those two months are certainly not "forthwith." The respondent, having failed to comply with the conditions upon which he obtained the interdict, I think the Court should now order that the interdict be discharged with costs.

[Applicant's Attorneys: Fairbridge, Arderne and Lawton; Respondent's Attorneys: Faure and Zietsman.]

Ex parte VAN NIEKERK.

Mr. Benjamin moved for leave to execute a certain deed of servitude in favour of the Colonial Government for the conveyance of water across the farm Prinsloo to Cookhouse Station, in consideration of the payment by the Government of £200 as compensation. Petitioner applied in his capacity as usufructuary, and as guardian of the minor heirs. The Master's report was favourable.

Order granted in terms of Master's report, money to be deposited with the Colonial Orphan Chamber.

Ex parte SIPIKA AND OTHERS.

Mr. Russell moved on behalf of petitioners, who are natives, resident in Griqualand East, for leave to transfer certain property.

The Chief Justice said that no order could be granted at the present stage. There should be notice given to all the parties interested, and some official statement as to the native custom and the law applicable to such cases.

THOMPSON V. THOMPSON.

Mr. Benjamin moved for a commission *de bene esse* to take the evidence of certain witnesses in England, and for the appointment as commissioner of Mr. Mackie.

Granted.

HARRISON V. HARRISON.

Mr. Benjamin moved on behalf of Helen Harrison to make absolute a rule *nisi* restraining her husband, Wm. Edward Harrison, from disposing of property in the joint estate pending an action to be brought for judicial separation, and for an order against

him to pay £30 in order to enable applicant to proceed with her action.

Mr. Upington appeared for the applicant.

In the petition and affidavit allegations of drunkenness and ill-treatment were made against respondent. Respondent made an affidavit, in which he stated that he had not been served with a copy of the petition and supporting affidavit, and had no knowledge of the allegations made against him. He was willing to enter into a deed of separation, and to make applicant an allowance of £30 a month, but applicant had refused to agree to this, requiring half the estate as well.

De Villiers, C.J., said that the matter would be ordered to stand over until Thursday next for proof of service of the petition and affidavits, the interdict to continue in the meanwhile. His lordship trusted that the parties would come to some terms without further action. The £30 must be paid at once.

[Before the Hon. Mr. Justice MAASDORP.]

ARENZ V. ARENZ.

Mr. Russell appeared for the applicant, Susan Henrietta Arenz, and moved for an order for leave to sue for restitution of conjugal rights by edictal citation. Applicant alleged that her husband deserted her in 1901. The present whereabouts of respondent was unknown; he was last seen at Salt River.

Leave was granted to sue by edictal citation, the return day being on the 1st November, personal service to be effected.

Ex parte LISMORE.

Mr. Buchanan moved for the appointment of a curator. The applicant was the father of a minor, who was entitled to an undivided share in certain property. Applicant wished to have a curator appointed to represent the minor at the meeting of heirs called for the division, and suggested the appointment of Mr. Botha, uncle of the minor.

Granted.

WOOD V. LOVEGROVE.

This was an application for the attachment of the respondent for contempt, he having failed to comply with an order of Court. A writ of execution had been issued, and a return of *nulla bona* made. The original action was for rent, for which plaintiff obtained judgment, and defendant succeeded on a claim in reconvention for damages for non-user of certain rooms, which were not habitable. Mrs. Lovegrove was ordered to pay the costs in convention and Mr. Wood the costs in reconvention, the total costs amounting to £224. A balance was due to the applicant of £68 12s., which Mrs. Lovegrove had not paid.

Mr. Close for the applicant. The respondent in person.

Respondent said she had understood that the judgment of the Court meant that the applicant could not call upon her for rent until he had put the defective rooms in proper order. They were still in a condition unfit for use, and she had been unable to carry on her business as a boarding-house keeper in consequence. In evidence upon oath respondent said she had no income or means of paying the amount due.

Maasdorp, J., said that no order would be made The Court had proof that defendant had neither property or income.

VAN NIEKERK V. VAN NIEKERK.

This was an application calling upon the respondent to show cause that day why respondent to show cause that day why he should not be required to pay £2 per month for the maintenance of the petitioner's children. The petition of Mrs. Van Niekerk set out that in November, 1898, the Court granted an order dissolving the marriage between herself and the respondent, and ordered respondent to pay £2 per month for each of the girls until they attained the age of 18 years, and the boys 16 years, with leave to make special application for increased maintenance. The girls were at present in such a delicate state of health that they were unable to support themselves. The petitioner was also in a delicate state of health. The girls had reached the age of 18 years, but owing to the medical expenses and the increased cost of living the petitioner was unable to maintain them. The respondent was in a good business.

The respondent's answering affidavit set out that he had carried out the order of the Court, and had paid £8 per month from November, 1899, to May, 1901, when the eldest child became of the age of 18 years. Thereafter, he paid £6 per month until July, 1902, at which date the next eldest child discontinued having deponent's support. Until September, 1902, he paid £4 per month until December, 1902, when the applicant did not avail herself of the money at her disposal. He was still ready and willing to give the required amount. After the eldest girl became of age he gave additional assistance beyond the order of the Court. He was earning a salary of £5 per month, and a little extra in mending boots, and was totally unable to pay any more. The eldest girl was about to be married, and the next girl would take her place at school as a teacher. The application for additional assistance was unnecessary.

The applicant's replying affidavit stated that on August 1, 1902, the respondent, through his attorneys, agreed to pay £6 per month, and on the 21st August, 1902, the respondent sent her £4, which amount was returned. The respondent afterwards left the Paarl, and she was instructed through his attorneys that he would only pay £4 per month. The respondent had since married, and sold his property for £780. One of the girls was earning £1 per month, but beyond that they were entirely dependent on the applicant.

Mr. Buchanan for applicant. Mr. Upington for respondent.

The matter was allowed to stand over pending further information as to the salary of one of the girls, and as to the statement *re* her impending marriage.

SOLOMON V. REID AND MURRAY.

Mr. Schreiner, K.C., moved for an order calling upon the respondents to quit, give up, and restore to the applicant possession of his premises, situated at 21, Loop-street, and for an interdict restraining the respondents from further interfering with the applicant's servants in constructing the property.

Counsel put in the affidavit of the applicant, Joseph Solomon, which set out that the respondents entered into a contract to complete certain buildings in Loop-street by 15th June, and had failed to do so. One of the partners had since died, but there was an affidavit of service on the second partner, Murray, and counsel contended that the service was sufficient. Under clause 7 of the agreement the employer had the right, in case the respondents should fail to carry out the contract within the stipulated time, through their own want of diligence, to determine the contract.

The affidavits of the architect and clerk of works testified to the unsatisfactory progress of the work.

Order granted as prayed.

Ex parte ROETS.

Mr. Buchanan moved for leave to sell certain property in the interest of five minor legatees of the estate. There were nineteen legatees altogether, and, with the exception of one, they all agreed to the application on account of the smallness of the estate. The Master's report was favourable.

Order granted in terms of the Master's report.

Ex parte PRETORIUS.

Mr. Buchanan moved for an order interdicting Johannes Diederick Pretorius from transferring certain property. The sale was advertised for the 26th inst., and under the joint will the respondent could not dispose of the property.

A rule *nisi* was granted, returnable on the 12th September, to operate in the meantime as an interdict.

Ex parte AURET.

Mr. Russell moved for an order amending an order of Court, granted under the Derelict Lands Act.

Order granted.

Ex parte RICHARDS.

Mr. Pyemont moved for leave to sell certain property belonging to petitioner and his wife, who were married in community, on the grounds of the applicant's inability to support his children and to maintain the property in a proper state of repair. The Master's report was favourable.

Order granted in terms of the Master's report, costs to come out of the estate.

Ex parte METELERKAMP.

Mr. Gardiner moved for an order authorising the Master to pay out certain sums to support a minor out of her late father's estate.

Order granted in terms of the Master's report.

Ex parte KAISER BROS.

Mr. Buchanan moved as a matter of urgency for an interdict restraining Geo. Shaw and Joseph Heggarty from removing any goods from certain premises, for which the respondents had failed to pay the rent for the month of August.

Interdict granted, pending an action, with leave to the respondent to have it set aside.

APPEAL CASE.

REX v. OSPOWAT. { 1903. Aug. 20th.

Conflict of evidence—Magistrate's finding as to credibility of witnesses.

This was an application to set aside a judgment given by Mr. Lotter, A.R.M., of Cape Town, in which the appellant was ordered to pay a fine of £3, or in default, to undergo 21 days' hard labour, for the theft of 4s. 6d., the property of Charles Benjamin.

Mr. Howel Jones appeared for the Crown; Mr. Alexander for the appellant.

Mr. Alexander: The accused in the Court below (the present appellant) seems to have brought an action against the complainant. Our ground of appeal is that the evidence on the record does not support the conviction. The complainant's evidence is very unsatisfactory, and he contradicts himself several times. His story as to his having first spoken in Dutch, and translated what he had said into Yiddish and Hebrew is very improbable. Again, it is admitted that he took 4s. 6d from the prisoner, but there is no evidence that the prisoner had taken this from the till. The prisoner's statement is clear, and consistent, and his subsequent conduct supports his story. Surely he would not have taken out a summons if he knew that he was a thief. I submit that the complainant had the prisoner arrested simply from motives of revenge. The Magistrate should have given the prisoner the benefit of the doubt. See *Rex* v. *Swartz* (13, C.T.R., p. 638). In this case, the money was not marked, and the complainant could not possibly identify it.

Mr. H. Jones (for the Crown): The Magistrate had only to decide which witnesses he would believe. The whole case was simply one of conflict of evidence.

Mr. Alexander was heard in reply.

Maasdorp, J.: This is a case brought on appeal, on the ground that the conviction is not supported by the evidence. Now we must take it, the Magistrate, in finding the accused guilty, relied on the evidence given by the witnesses for the prosecution. There is, no doubt, a conflict between evidence given by these witnesses and that given by the defendant himself. But the Magistrate, who heard the evidence and saw the witnesses, believed the evidence given by witnesses for the prosecution, and the question now arises whether their evidence supports the charge of theft against the accused. The complainant himself says that he saw the accused come to the drawer, and he took money from the drawer with his left hand, and put it in his pocket. "I caught him with the money in his hand." Then, as to what took place afterwards, he is corroborated by Fontein, who does not appear to have seen the money actually taken; but from that time we have the evidence of both Benjamin and Fontein, and they say that the complainant accused the prisoner of theft of 4s. 6d., and that the complainant went to fetch a police constable, and Fontein adds, that after Benjamin had left, the accused went out of the back door and ran away. Now, if the Magistrate believed that evidence, then there was actual taking of the money by the accused. There was some evidence given which may perhaps have suggested that he had the right to take money out of the drawer for the purpose of giving customers change, but this is not the defence set up by the accused. He claimed the money as his own property, and he denied at the time having abstracted any money from the drawer. The Magistrate, under the circumstances, came to the conclusion that the money was actually taken from the drawer, and after it was taken, the accused denied having taken it, and when the complainant went for police assistance, the accused ran away out of the shop. The Magistrate was justified in coming to the conclusion that he had sufficient evidence before him to prove

the charge of theft against the accused. It is impossible for the Court, under the circumstances, to interfere with the finding of the Magistrate, and the appeal must be dismissed, with costs.

[Applicant's Attorneys: Friedlander and Du Toit.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., and the Hon. Mr. Justice KOTZE.]

STORK V. STORK. { 1903. Aug. 21st.

Mr. M. Bisset applied, on behalf of the petitioner (the husband), for the evidence of his witnesses, resident at Kokstad, East Griqualand, to be taken on commission in the divorce suit which he had instituted against his wife. Petitioner pointed out that the travelling expenses would be about £40 for each witness, and he was unable to bear such a large outlay.

De Villiers, C.J., said that a letter had been received by the Registrar from the defendant, in which she said that on the 11th April, 1902, her husband issued a summons against her in the Supreme Court of Natal, and she appeared to defend the action, but her husband did not proceed with the case, and he had never obtained judgment. If the case were heard in Cape Town she must ask leave to defend *in forma pauperis*, as she absolutely denied that she had been guilty of adultery, or had done anything to entitle her husband to a divorce, and she had no means. Nothing could be done in the matter for some time, and he thought the application had better stand over for the present, so that the Registrar could communicate with the defendant, and inform her that she should communicate with an attorney in Cape Town, so that she might be defended at the trial. There was no hurry really, because the case could not be tried until next term.

MCINTYRE V. ROBINSON BANK.

Mr. Searle, K.C., moved, upon notice of application, for the removal of this trial set down for hearing on Wednesday next to the next Circuit Court at Port Elizabeth. Counsel said that the action was for £100 damages, because a cheque was dishonoured by the Port Elizabeth branch of the Robinson Bank, and he put in an affidavit sworn by Mr. Leighton, chief agent of the Robinson South African Banking Company, Ltd., to the effect that the principal witnesses resided at Port Elizabeth, that the incident occurred at Port Elizabeth, and that it would be beneficial for both parties for the trial to be heard there.

Mr. Schreiner, K.C., for the plaintiff, opposed, and read an affidavit sworn by Mr. Trollope, attorney, to the effect that the Circuit Court at Port Elizabeth was a busy one, that it was difficult to confer with counsel, and that it was probable that any judgment of the Lower Court would be the subject of an appeal.

De Villiers, C.J.: The balance of convenience appears to be in favour of the trial at Port Elizabeth. It is said that the plaintiff or other party would probably appeal, but, even in case of an appeal, I think the expenses of a trial at Port Elizabeth, plus the expenses of an appeal, would be less than having the case tried, in the first instance, in Cape Town. Upon the whole, the Court is of opinion that the case should be removed, costs to be costs in the cause.

HANSEN AND SCHRADER V. COLONIAL GOVERNMENT. { 1903. Aug. 21st.

Railway—Servitude—Expropriation—Amended title under Act 9 of 1879.

In 1873 the Government expropriated certain land forming portion of a farm for railway purposes, and paid due compensation to the owners. The portion expropriated was cut off from the rest of the land by means of fences, but the Government did not use the whole of the land so expropriated and no transfer of the portion expropriated was made to the Government, although a

diagram shewing the portion cut off was attached to the transfer in the Deeds Office. The plaintiffs bought the farm with knowledge of the fact that portion had been cut off for railway purposes. In 1902 the plaintiffs obtained an amended title under Act 9 of 1879, which included the land expropriated, but stated that the grant was subject to conditions contained in previous transfers and the diagram attached to the grant shewed the portion expropriated for the railway.

Held, *that the plaintiffs were not entitled to eject the Government or to claim compensation for expropriation.*

This was an action brought by Hansen and Schrader, merchants, Port Elizabeth, against the Colonial Government, for a declaration of rights, ejectment and damages, in respect to a certain plot of land enclosed by the Railway Department on the line between Port Elizabeth and Bushman's River.

The declaration set out that the plaintiffs were the registered owners of a certain piece of land, which was originally granted, and known as Deal Party, situate near Port Elizabeth. In 1873 certain consents were entered into by the mortgagees of this land, the Provincial Trust Board and Church. In 1874 certain other persons, who were interested as heirs, and others in the estate, gave their consent to the expropriation of a certain piece of land. The consent given by the mortgagee was as to 13 acres of land on the estate Deal Party, to be utilised for the purposes of a railway between Port Elizabeth and Zwartkops River. According to that consent they agreed to 13 acres being deducted from the estate. In the Deeds Registry Office there was a plan marked (a), which showed the extent as being 13 acres. Under these consents the Government was entitled to only 13 acres, and not more, but they had taken possession of a great deal more, which was shown on the plan, and the plaintiffs said that, by reason of the Government taking possession, they had sustained damage, and they claimed £1,000. They said that, if the Court held that the Government were entitled to take possession of the land, they were only entitled to take as much as was required for railway purposes, and that they had taken a 100-feet strip, and that the plaintiffs were entitled to damages in respect to the excess in the sum of £750. In the alternative, plaintiffs prayed for an order for ejectment from the land, except as to the 13 acres, and a sum for damages.

The defendants' plea admitted the consents, but said that the owners of Deal Party did not specify 13 acres, or any other extent of ground. The extent of ground to which the Government were entitled was delineated on the plan annexed, and if it exceeded the 13 acres, it had been in legal possession of the Colonial Government, pursuant to the said consent papers. The defendants denied the correctness of the plan attached to the declaration.

[Sir H. Juta, K.C. (with him Mr. Benjamin), for the plaintiffs; Mr. Schreiner, K.C. (with him Mr. H. Jones), for the defendants.]

Sir H. Juta put in the amended title obtained by the plaintiffs, and proceeded to read correspondence which had passed between the Hon. Mr. Chase and Mr. Robinson, the Chief Inspector of Public Works at that time, and the plaintiffs predecessors in title. It appeared that the terms agreed upon for the servitude across the ground was £250.

John Anthony Chabaud, attorney, Port Elizabeth, said he was sent out to purchase the property now held by plaintiffs, and draw out the deed of sale. In passing the deed to the plaintiffs, he had no knowledge of the plan marked (a). He bought the land in 1891 or 1892. He first became aware of the plan about four months ago. They had correspondence with the Surveyor-General's office, and they then found that the encroachment had taken place. He did not notice the endorsement until about a week ago.

Cross-examined by Mr. Schreiner: About four months ago he heard from Messrs. Van Zyl and Buissinné that the Railway Department had objected to the amended transfer going through.

He believed that the transfer went through, because the Surveyor-General said that it must go through.

Mr. Schreiner said that there had been no deduction from the property. Between the parties to this suit, there was no abandonment of the rights claimed by the Railway Department.

De Villiers, C. J., commented on the want of harmony between the Surveyor-General's Department and the Railway Department, and said that the former department had actually given the plaintiffs a grant against the Railway Department. It was a pity, he added, that there was not more harmony between these two Government departments.

Mr. Schreiner said that the Surveyor-General would be called, and he would be able to give an explanation, no doubt.

The witness Chabaud said he had not seen the old title-deed of 1841. He had seen the endorsement as to the expropriation of land. He looked into the title in favour of Berry when he drew up the deed of sale in 1892. He bought on that title, which he found to be a freehold title. He did not go back beyond the title of Berry.

Mr. Schreiner: It is no use saying that, because you know that it is not freehold, but is a quitrent.

Witness: It has been so declared by the Government.

Mr. Schreiner: You know it is quitrent, and not a freehold title.

By the Court: It was put down as a quitrent. That mistake was evidently made by some former magistrate at Port Elizabeth. How they discovered that the Government had taken 34 acres, instead of 13 acres, was in consequence of the Surveyor-General handing them a redeemed quitrent, instead of a freehold title.

Mr. Schreiner said it was not freehold, and had never been freehold; it was quitrent.

[De Villiers, C. J.: But they redeemed it.]

Mr. Schreiner: But that does not make it freehold.

George Wm. Smith, Government Land Surveyor, Port Elizabeth, said that in September, 1902, he was requested by the Government to prepare a diagram of certain land at Deal Party. He was to cut off 13 acres claimed by the Railway Department. He went to Deal Party, and he found that certain land, greatly exceeding 13 acres, had been fenced off. He had communicated with the Railway Department, and he received the documents produced. The plan accompanying the letter from the Railway Department did not show a ballast pit at all.

Mr. Schreiner said that that was a sketch of the line as it ran subsequently, but it did not show the original sketch of land taken in 1873.

Sir H. Juta said the plaintiffs did not object to the ballast pit, but they objected to such an excessive area of ground being fenced off.

Witness, in further evidence, said that the distance of the railway line on Deal Party, as shown on the plan was 8,650 feet, though, by survey, it was 9,440 feet, so that the plan showed less than the actual quantity. The actual amount of ground taken by the Railway Department was 34.76 acres. The width of the strip of land enclosed by the fence was 100 feet; it was double line at that point. He should say that the railroad and ballast pit actually occupied a width of about 25 feet.

Cross-examined by Mr. Schreiner: There were about 16 acres of the land as ballast pit, so that 18 acres remained for the line crossing Deal Party. He did not suggest that there had been any alteration of the original condition of things. He was first asked to go into the matter now when an amended title was asked for, though he had been in Port Elizabeth since 1862, with the exception of an interval of 12 years.

Re-examined by Sir H. Juta: He believed the extent of the ballast pit was 13 acres.

Mr. Schreiner said he did not understand his learned friend's position, as a short time ago he had told them that he did not object to the ballast pit.

Sir H. Juta said that what he meant was that he could not object to the ballast pit as being for railway purposes.

Arthur Herbert Waite, plaintiffs' manager, said the property was bought in 1892, and had since become very valuable. He had first become aware of the plan (a) within the last six months; it was after the amended title had been granted. They had sold about 6 acres at various prices; the average was about £400 an acre. They

had been selling the land principally to merchants, who were erecting stores. At the last sale they had they received £900 an acre. If they had the strip in dispute it would greatly increase the value of the ground adjacent. They had had good facilities for leasing.

By the Court: When they bought they supposed that the land in dispute belonged to the Railway Department.

By Sir H. Juta: It was only when the amended title came to be drawn that they found this excess out. Although the title deed gave them a certain extent, they found what they actually got was considerably less.

Cross-examined by Mr. Schreiner: The property was now known as New Brighton. The ballast pit was not of much use in its present form, but it might be filled in, and then it would be valuable, as it was close to the line. He did not deny that the high value of the ground was due to the fact of the railway being there. It was a double line of railway, and over this particular section the Midland traffic, the Uitenhage traffic, and the Graham's Town traffic were carried. He was not aware that it was intended to lay down a third set of rails to cope with the growing traffic from the port. What they desired was to narrow down the strip fenced by the department to 13 acres in all. The high value was determined by the length of frontage to the railway. They had at present got this length of frontage.

Sir H. Juta closed his case.

Carl H. M. Jurisch, Surveyor-General, produced a copy of the amended titles. He said that the rights of the Railway Department were protected by means of the servitude, consequently they could not exclude it from the land to be deducted. They could make no deduction, so that they had to make a grant of the full area with a servitude upon it as per old transfer deed. It was not customary to state in the new deeds all the conditions contained in the old deeds. It was as if they annexed the old deeds; they did not recite all the old conditions when a new deed was granted.

Cross-examined by Sir H. Juta: It was the practice not only in the Surveyor-General's office, but also in the office of the Registrar of Deeds, to refer to previous transfers without reciting the details.

Re-examined by Mr. Schreiner: As a rule the Railway Department had held their land under servitude, but as this was found inconvenient they had now decided to obtain transfer.

James Bisset, retired civil engineer, Wynberg, said he was the resident engineer on the construction of the Eastern districts railway in 1871. He spoke as to the plan prepared at the time of the expropriation of the land. That plan showed a ballast pit. It was not fenced at that time. The area was determined by pegs when they prepared the plans. The plan he prepared showed a ballast pit, and also that the extent of land taken for the railway was 100 feet wide. The first intention was to take a strip of 71 feet 6 inches, but he found that would not be sufficient, and he expropriated 100 feet; he thereupon delineated the 100 feet width and the ballast pit. He never spoke to Mr. Chase about 13 acres. Mr. Robinson got the idea of 13 acres from the original intention to expropriate 71 feet 6 inches. The settlement for £250 did not pass through his hands.

Cross-examined by Sir H. Juta: He was not aware that the land was mortgaged. He was not aware that the consent of the mortgagees was given. All the legal questions were settled in Cape Town. He told Robinson that he was taking more than 13 acres. He could not tell the Court why the Government did not take transfer of the land.

Gowan S. Cresswoll Clarke, Chief Traffic Manager of the Railway Department, said that the land fenced in at Deal Party was the same as was fenced in in 1882. Both the ballast pit and the strip for the line were the same.

Sir H. Juta, K.C., having been heard in argument, the Court intimated that it would be unnecessary to hear Mr. Schreiner.

De Villiers, C. J.: Before dealing with the rights of the plaintiffs, I wish to say a few words in regard to the rights of their predecessors in title. It would appear that these properties passed from hand to hand until the plaintiffs became the owners, and that in the year 1873 the Chases were the owners of this property, and communications took place between them and the Government regarding the expropriation of certain land for railway purposes. Compen-

sation was, in point of fact, actually paid to the then owners of the land in respect of the expropriation by the Railway Department. It is not quite clear how much was paid in respect of this land, because £275 was paid in respect of this land and other land, but, certainly, this is clear, the compensation actually paid was for land, including the land expropriated for railway purposes. It would appear also that at that time compensation was paid, not so much for the value of the land, as for the inconvenience to the then owners of being cut off from one portion of the land. That inconvenience would have been equally great whether the width of the railway was 100 feet or much less. There seems to have been some mistake as to the acreage, but there was no mistake about the land taken by the Government, which was clearly indicated by the fences placed there in 1873, and still standing in 1903. It is clear, therefore, that the owners, in 1873, after the expropriation by the Government, and after the payment by the Government of compensation, would have had no right either to eject the Government or claim further compensation. The land which had been cut off showed exactly what was required, and the then owners would not have been entitled to say that the land was not required for railway purposes. Now, the question is whether the present plaintiffs, who had nothing to do with the communications between the Government and the then owners, are subject to the same obligations as the former owners. After the compensation had been paid to the former owners, a diagram was attached to the transfer in the Deeds Office, showing the extent of land expropriated. The transfer deed of the plaintiffs stated that the transfer was subject to conditons of previous transfers, but, which is of greater importance, the plaintiffs knew when they purchased, that part of the land was in occupation of the Railway Department. Subsequently the plaintiffs obtained an amended grant under the Act of 1879, but that grant also referred to previous conditions, and cannot be held to have freed the land from servitudes existing before the grant. The diagram attached to the grant clearly shows the railway line. The Government never acquired the ownership of the land taken, but they paid full compensation for the use of the land, and they are entitled at all events to a servitude thereon as against the plaintiffs, who had full knowledge before they bought, that the land in dispute had been cut off for purposes connected with the running of railways. There has been no expropriation of additional land since 1873, and the plaintiffs are not, in my opinion, entitled either to eject the Government, or to claim compensation for land expropriated. The judgment of the Court will be for the defendants, with costs.

Kotzé, J. concurred.

[Plaintiffs' Attorneys: Van Zyl and Buissinné; Defendants' Attorneys: Reid and Nephew.]

GENERAL MOTION.

REYNOLDS V. NEW CAPE CENTRAL RAILWAYS, LTD.

Mr. Benjamin, for the defendants, applied for a postponement of the trial from Friday next, and for the appointment of a commissioner to take the evidence of a material witness in the case, who was at present in the Orange River Colony.

Mr. Schreiner, K.C., opposed the application on behalf of the plaintiffs, and put in affidavits setting forth that there was no reason for any departure from the ordinary course.

The case was allowed to stand over to September 8, by which time there is to be an effort to have the witness in Cape Town.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

GENERAL MOTION.

NYMAN V. RABIE. { 1903. Aug. 21st.

Mr. Buchanan moved as a matter of urgency for an interdict restraining the respondent, Arthur Rabie, from removing any articles from certain premises at Sea Point. The house had been let by the applicant to the respondent at a rental of £18 per month, but no rent had been

paid since April, and since the respondent had been given notice to quit it was feared that he would remove his only property, and the applicant would have no redress.

Interdict granted, pending an action, with leave to the respondent to apply to have it set aside.

TAYLOR v. LOWRY BROS. { 1903. Aug. 21st.

Manager—Sales on credit—Adoption of manager's acts by principal—Evidence.

The appellant had been sued in the Magistrate's Court by the respondents for the price of certain shop goods sold by him while acting as manager of one of the respondents' stores, on credit: (as the respondents maintained), contrary to their instructions. A portion of these book debts had been (with appellant's assistance) recovered by the respondents who, however, had in the Court below obtained judgment against the appellant for the balance of the debts not recovered.

Held, *that as no evidence had been given to show that appellant had been instructed not to give credit, and that even had he been so instructed, the respondents had adopted his acts by themselves recovering, with his aid, a portion of the outstanding debts, he was not liable for the balance, and that the appeal must be allowed with costs in both Courts.*

This was an appeal against a decision of the Resident Magistrate of Tsolo, in which the respondent was awarded a claim of £31 14s. 9d., against the appellant, being an amount of book debts at a native store, at which the appellant acted as the respondent's manager.

The evidence for the plaintiff in the Court below was to the effect that the defendant was instructed not to give any credit. Defendant, before he left the store, said that he had outstanding debts to the amounts of £25 or £35, but, when the plaintiff looked over the books, he found debts to the extent of £200. A considerable sum was recovered, but the defendant had given no satisfactory explanation of the outstanding debts. The defendant stated that the plaintiff had complained of the business at the store. He had instructions to give credit, and it was usual to do so at native stores. When the plaintiff pointed out that the store was not prospering, he gave instructions to give more credit. The plaintiff did not instruct him to collect the debts before he left. The Magistrate, in his reasons for judgment, left the question open as to whether the plaintiff gave instructions with regard to credit or not, and decided that the defendant was legally bound to account for the goods. The Court thought it unreasonable to suppose that the law would allow the manager to give unlimited credit at native stores, and, in support of his judgment, he was guided by the case of *Biddulph* v. *Yates* (2 Sheil, 387).

Mr. Upington (for the appellant) cited *Biddulph* v. *Yates* (10 Juta, 32). In that case the magistrate overruled the exception, and gave judgment, and there the facts were very different from the facts in this case. There the plaintiff recovered £200 for which the defendant was unable to account, and there was a deficiency of £238. In this case there are no debts outstanding from the £200 save some £31 14s. 9d., and this sum is made up of small debts, none of which exceed £6.

Mr. Close (for the respondent): The chief point is, did the principal allow his servant to give credit or not? On that point the magistrate does not seem to have given judgment. The case of *Rymer* v. *Solomon* (2 Sheil, 350), shows that the appellant has failed to prosecute his appeal within reasonable time. I would suggest that the case should be remitted back to the magistrate for further evidence.

[Maasdorp, J.: It is only a question of whether you, having collected these debts, can now proceed by this form of action?]

We never took over the debts not collected. In so far as we have recovered, we have waived our claim for damages.

[Maasdorp, J.: You have waived nothing. You have recovered all you could.]

The appellant was instructed to collect debts as manager, but there is nothing to show that the principal ratified his action.

[Maasdorp, J.: You say that he gives no explanation as to what has become of the goods; but he has told you to whom he sold them, and says that he cannot now find the purchasers?]

Any man may make up an imaginary list of debtors, and say that he cannot find them; that would open the door to any number of frauds. The magistrate finds that the appellant made no effort to collect these debts.

Mr. Upington was not called upon in reply.

Maasdorp, J.: The plaintiffs in this case sue the defendant for the recovery of £31 14s. 9d., said to be due by the defendant to the plaintiffs for goods from their store, the said goods having been supplied to the persons named without the consent or knowledge of the plaintiffs. Now, it appears that the defendant in this case was the manager at the business station of the plaintiff's, where the chief part of his work was to dispose of the goods in the shop to customers. He seems to have sold some of the goods on credit, and when the owner came to take possession of the place at the time when the defendant ceased his service, he found that there was on the books about £200 due for goods sold, and delivered to customers. Thereupon, attempts were made to collect these debts, and the plaintiff, with the assistance of the defendant, collected a considerable amount, reducing the uncollected debts ultimately to the sum of £31. The plaintiff claimed the recovery of this £31 from the defendant. Now, the allegations in the summons certainly are not borne out by the evidence. It would appear from the summons that goods were wrongfully removed from the store, but the plaintiff had failed in proving that, because it appears that the goods were sold and delivered to customers. Now, the real point in this case is that the defendant had sold the goods on credit, when he had got instructions not to do so, and that, consequently, he is now bound, at all events, to account to the plaintiff for the moneys due upon goods sold upon credit. The question might or might not have been of importance whether this instruction had actually been given by the employer to his manager. If it were of importance to decide whether the manager had been forbidden to give credit, then that fact is not one upon which the Magistrate has made any finding, and, if it were necessary that the plaintiff should prove it, the plaintiff, having failed in that proof, the case must now go off as if such proof had not been given. It does not seem to me, however, to be of importance to decide whether these instructions were actually given, because, when the employer found that credit had been given to a considerable amount, he did not repudiate these transactions and claim from his manager these moneys upon the ground of misfeasance. But he actually adopted these sales, and so far, he must be taken to have ratified the action of his manager to the extent of £200. We find that he successfully recovered in respect of a large portion of these sales upon which the moneys had not been collected, when he took possession of the business. The conduct of the plaintiff was such that we must take it that the purchasers of the goods have become the debtors to the plaintiff, and he must now look to them for the recovery of these debts. It is said that the defendant has made no effort to account for the goods which were placed in his custody by his employer, and that, consequently, upon the authority of the case which has been cited from 10 Juta, 32, he is now bound to pay whatever balance is still due to his principal. But it appeared in that case that for a certain amount for which there was a deficiency, no account had been given at all by the manager. In this case, however, when the manager is called upon to account, he gave the explanation which I have already mentioned: that he sold these goods on credit, that he had not yet recovered the amounts of these accounts still outstanding. The plaintiff, accepting an explanation by his manager, adopts his action in the matter, and takes steps to recover these moneys from the debtors. Under these circumstances, I think he has wholly failed to substantiate the allega-

tions in the summons that goods have been removed from the store which are unaccounted for, and that goods have been removed from the store without his consent and knowledge. The evidence proves that the goods were disposed of in the ordinary course of business, and as often happens, there was some difficulty ultimately in obtaining payment of the debts. There is one point more. Mr. Close has contended that, as more than a reasonable time had elapsed in prosecuting this appeal, that the case should not be entertained. Now, it seems to me, it is too late to raise that question. Under the Rules of this Court, the question ought to have been raised in another form. When the respondent found that an unreasonable time had elapsed, he could have moved the Court, upon setting forth the circumstances of the matter by affidavit, to have the proceedings discharged. The appeal will be allowed, and the judgment altered to one of absolution from the instance, with costs here and in the Court below.

[Appellant's Attorneys: D. Tennant, jnr.; Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

VAN NORDWYK V. ROTHMAN. { 1903. Aug. 21st.

Conflict of evidence—Magistrate's finding on facts.

The appellant was the plaintiff in an action decided by the Resident Magistrate of Riversdale, in which he sued for the recovery of a certain ostrich or its value. The evidence for the plaintiff was to the effect that he bought a number of birds when young, the ostrich in question being one. This bird strayed, and plaintiff alleged that it was now in possession of defendant. He identified it by a scar on the thigh, and by a burn on the neck. The evidence for the defendant went to show that the ostrich in question was one of a lot purchased by him, and was a few months old when he bought it. Subsequently the bird was lost, but it afterwards turned up on the farm. It was identified by defendant and his witnesses by its peculiar head. The bird had since died. The defendant further stated that the bird went away before it could be branded. It came back about four months after it was missed. Both parties swore positively that the bird belonged to them. The Magistrate, in his reasons, stated that the bird was not branded, but plaintiff alleged that he identified the bird by a wound of some four months' standing; while defendant said this wound was one of about 15 days' standing. The statements were conflicting, but he believed the evidence of Field-cornet Rothman, the father of the defendant, that the ostrich was the property of the defendant, and that the wound was of recent date.

Mr. Burton for appellant. Mr. Upington for respondent.

After hearing Mr. Burton in argument and without calling upon Mr. Upington, the Court dismissed the appeal.

Maasdorp, J.: I do not think the Court can interfere with the judgment of the Magistrate in this case. The Magistrate had to decide whether the plaintiff had succeeded in proving that the ostrich in question was his property, and he (the Magistrate) found that he had failed to do so. Now it seems to me that the arguments advanced by Mr. Burton, on appeal, could have been brought before the Magistrate with great force, and the Magistrate would then have been able to deal with all the points raised. But they cannot have the same effect upon appeal. There is no doubt that there was a *bona fide* dispute between the plaintiff and the defendant as to the ownership of the ostrich, and it seems that the principal point to which the Magistrate had to direct his attention in coming to his decision, was as to the appearance of a scar on one of the legs of this bird, which the witnesses on both sides swore to as a mark proving the ownership either of the defendant or of the plaintiff. It is certainly peculiar that when this mark was a matter of such importance, the plaintiff is supported only by one witness upon that point after the dispute had arisen between the parties. Another witness, who was actually upon the farm of the defendant, and saw the bird in his (defendant's) camp, never even took the trouble to raise the feathers, and examine the bird to ascertain whether the wound was such as he had seen upon the plaintiff's bird; and another important witness, Mr. Kuhn, who is said to have sold this bird to the plaintiff, was not even required to visit the farm for the purpose of examining the bird in order to give his

opinion as to its identity. Under the circumstances, I think that the finding of the Magistrate upon this conflict of evidence must be accepted, especially when we see that he points out that he places particular reliance upon the evidence of one of the witnesses, who gave very pointed evidence upon his knowledge of this bird as the property of the defendant. The Court will not lightly interfere with the finding of the Magistrate upon such a question of fact, but I think, in this case, I might go even further, and say that after hearing the evidence read, it seems to me that the great weight of evidence in this case is upon the side of the defendant, and under the circumstances, the appeal must be dismissed with costs.

SUPREME COURT

[Before the Chief Justice (the Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice KOTZE.]

ESTATE CRAFFORD V. WATSON. { 1903. Aug. 24th.

Mr. Burton (with him Mr. De Waal), for the plaintiff, applied for an order referring this matter to arbitration. He said that the parties had come to an arrangement whereby the case was to be withdrawn from this court upon an undertaking by the defendant to go to arbitration, the basis of which was settled in terms of a letter written by the plaintiff's attorney to the defendant's attorney. Counsel mentioned the name of Mr. W. A. Currey, of the General Orphan Chamber, as arbitrator.

Order granted referring the matter to arbitration in terms of consent, and appointing Mr. Currey as arbitrator.

SHAW V. FOCK.

Mr. Upington, for the defendant, applied for the hearing of this case to be postponed on account of his client's illness.

Mr. Burton, for the plaintiff, said he did not object to a postponement, but he thought the defendant ought to give an undertaking to bear the costs of the day.

Mr. Upington said that in the case of *Kornig* v. *Landeshutt* (13 C.T.R., 420), where the plaintiff was too ill to appear, it was thought that it was unreasonable to ask that he should pay the costs of the day.

De Villiers, C.J., said that he thought there must have some some special reason in that case. This was the trial day in the present case, and costs had been incurred.

Mr. Burton said that under all the circumstances he would not object to the question of costs standing over.

The hearing was set down for the 7th September, the question of costs of the day to stand over.

FISHER V. ATKINS. { 1903. Aug. 24th.

Land agent—Remuneration.

The plaintiff, a land agent, who had been requested by the defendant to find a purchaser for a certain property, informed the defendant that B. was willing to buy for £3,500, but the defendant said he wanted £4,500. The plaintiff informed B. of this price, and some days afterwards the defendant asked B. whether he would buy the property, to which B. consented on obtaining a reduction of the price to £3,900. The Court, finding that the defendant had entered into communication with B. in consequence of the introduction of A.

Held, *that the plaintiff was entitled to his commission.*

This was an action brought by Adolph M. Fisher, broker, Cape Town, against Henry Atkins, commission agent and general merchant, Cape Town, to recover £97 10s. for brokerage upon the sale of certain properties.

The declaration set out that in or about March, 1903, the defendant placed in plaintiff's hands for sale as broker a certain property in the Gardens, and shortly afterwards certain other property belonging to him, namely, two cottages in Mill-street, Cape Town. Plaintiff entered into negotiations for the sale of the properties, advertised the same in the newspapers, expended time and labour thereon at defendant's special instance and request, and dealt with one Dr. Budd for the sale and purchase of the property. He offered to purchase the property for £3,500. The defendant was absent at that time in Europe, but when he returned the plaintiff submitted Dr. Budd's offer to him, but the defendant refused to sell for £3,500, and said that he wanted £4,500 for the property. Thereafter, the defendant sold the property himself to Dr. Budd for £3,900. Plaintiff claimed 2½ per cent. on the purchase price, the usual and customary brokerage charged by brokers on the sale of landed property, the sale having been effected through the plaintiff in consequence of the introduction aforesaid.

The defendant, in his plea, admitted the parties and the sale of the property, but denied that he placed the property in the hands of the plaintiff for sale as the broker. He said he had no knowledge of the allegations as to the trouble expended about the matter by the plaintiff, and that, even if plaintiff did act as therein alleged, which he did not admit, he so acted without the knowledge and instruction of the defendant. In March, he said, the plaintiff inquired from him the price of the two cottages, and he told him £4,500. He denied that the plaintiff mentioned Dr. Budd's name to him. He admitted that he refused to pay, but specially denied that the sale was effected through the plaintiff's agency.

Wherefore he prayed that plaintiff's claim be dismissed with costs.

The replication was general.

Mr. Searle, K.C. (with him Mr. M. De Villiers), for plaintiff. Mr. Schreiner, K.C. (with him Mr. Benjamin), for defendant.

Adolph Mark Fisher, plaintiff, stated that between February and March last year he asked plaintiff if he wanted to sell certain property in Hope-street, and the defendant, after mentioning the price at £5,600, or £5,500 suggested that the plaintiff might try and dispose of two cottages in Mill-street, with the option of selling them singly, but, at the same time. Witness got dimensions, and advertised the houses in the daily papers, and also circularised the sale to his clients. The defendant was quite prepared to pay 2½ per cent. brokerage. About six months later Atkins went to England, and in February, 1903, while witness was negotiating with Dr. Budd about another house, he suggested that the two cottages would suit him better. It was arranged to complete the proceedings on the defendant's return, and in March witness met the defendant, and told him that Dr. Budd offered £3,500, but the offer was refused. About the 30th March, Dr. Budd purchased the property from the defendant for £3,900. Witness wrote for his brokerage on the 1st April, and eight days later the defendant expressed his surprise at the demand, and informed him that he had sold the property privately to Dr. Budd. The actual cost of advertising would be about £5 or £6.

Cross-examined by Mr. Schreiner: He would tell the Court that all the property he advertised in his lists had been given him by the sellers. He considered that when he asked a man if his property was for sale that it was in his hands. Witness was told by a client that he would like to buy a house in that neighbourhood, but he did not ask the plaintiff in St. George's-street if he would sell the two cottages. It was unnecessary to have any documents in the matter, and he usually relied on a casual conversation. He never had any transactions with the plaintiff before. Several brokers probably got the same instructions. Witness did not stop the plaintiff in St. George's-street, and he had never said anything about the cottages up till the time the defendant left for England, and on his return the defendant said he would not take £3,500. It was usual to name the buyer to the seller. It was not unusual for brokers to give all the information they had immediately to the seller. It was not the ordinary broker's precaution to say that they had a purchaser without giving the name. The defendant required no introduction to Dr. Budd, as the latter was his tenant.

By De Villiers, C.J.: He did not mean to say that he would sell the property without consulting the owner.

He considered that he had no authority at the time of the sale to sell for £3,500 on account of the state of the property market.

Dr. Budd stated that in the month of March he had negotiations with the plaintiff about the purchase of the property. That was the first intimation he had of the property being for sale, but, on account of the healthy state of the market the plaintiff said he would wait for the return of Mr. Atkins. On the day plaintiff returned witness was interviewed by Fisher, who said that the defendant wanted £4,500. Witness would probably have given £3,500 for it.

[De Villiers, C.J.: Probably? Certainly, you mean. You gave more for it later on.]

Witness: Yes, my lord.

He met Atkins on the 30th March, when the defendant gave him the refusal of the property until the next morning. Atkins said that Fisher had nothing to do with the property. Next morning witness purchased the property for £3,900, and he afterwards told Fisher about the purchase.

Cross-examined by Mr. Schreiner: He was negotiating for another house when he saw Fisher. Witness first inquired of Fisher about the houses about the beginning of March or the end of February. Fisher was to find out if the property could be purchased for £3,500, and the plaintiff could not have closed the transaction without reference to him. Fisher could bring no better offer than £4,500. Nothing occurred with Fisher in reference to that property between the 17th and the 30th March.

Mr. Searle closed his case.

Mr. Schreiner called

Henry Atkins, the defendant, who stated that he had never put property in any broker's hands. Fisher never had any business with him. In February, 1902, the defendant met him in St. George's-street, but he had never been to defendant's office. That was the only occasion on which he had any interview with him. Fisher asked him if Windsor-terrace was for sale, and then inquired about the two cottages in question. Witness had no recollection of the plaintiff mentioning a purchaser to him for his own house. Plaintiff passed witness several times, and the words attributed to him by the plaintiff he never made use of. On the day of his return the plaintiff saw him in a tram, and asked witness if he would still take £3,500 for the property. Witness said that he would not, and the plaintiff promised to see him next day, but failed to keep his appointment. He would swear positively that Fisher never mentioned the name of Budd. On the 30th March he met Dr. Budd, and talked over the matter, and the latter asked for an option on £4,000 till the next morning. Dr. Budd said, "Shall I see Fisher about this?" and witness replied, "What has Fisher got to do with it." The doctor said that the property was offered to him by Fisher for £4,500. The following evening the sale was effected for £3,900.

Cross-examined by Mr. Searle: When Dr. Budd mentioned the name of Fisher witness considered that the sale was practically effected. He looked upon Fisher's demand as a piece of downright impertinence. He did not notice the property in the advertisements. He admitted that he had told Fisher that he would take £3,500 for the property, and if he had brought a purchaser at the time the brokerage would have been paid. Every broker had the particulars, and it was customary for them to stop an owner in the street and ask questions about any property that was for sale. Fisher did not tell him in the tram that £3,500 could be had for the property. He did not mention the matter to Dr. Budd because Fisher had given him the information that the former was a purchaser. Brokers, as a rule, did not divulge the name of the purchaser.

Mr. Schreiner closed his case, and counsel were then heard in argument on the facts.

De Villiers, C.J.: The defendant in his evidence admitted that before he left for Europe he had authorised the plaintiff to find a purchaser for the property in question for £3,500. He also admitted that if within a short time afterwards the plaintiff had found a purchaser at £3,500, and sent him the broker's note, he would have considered himself bound to accept the broker's note to conclude the purchase. No purchaser was found before the defendant left for Europe; but, during his absence, the plaintiff had communications with Dr. Budd, and he informed Dr. Budd that he had this property for sale for £3,500, and he understood from Dr. Budd that he would be

prepared to pay that price. Dr. Budd does not remember the agreement arrived at, but he seems to consider he would have been bound to accept the property for £3,500, after what had taken place between him and the plaintiff. On the defendant's return the plaintiff met him, and they had a conversation in a tramcar, and the most important question in the case is really what took place in the course of that conversation. The plaintiff positively swears that he informed the defendant that not only could he find a purchaser for £3,500, but that the intending purchaser was Dr. Budd. The defendant admits there was a conversation, but he denies that Dr. Budd's name was mentioned. In my opinion, Dr. Budd's name was mentioned, and, in consequence of the mentioning of the name, the defendant afterwards approached Dr. Budd and concluded a sale for £3,900. Now, there is a direct conflict of testimony, and in that conflict the Court should endeavour from other communications in the evidence to conclude whose evidence was the more trustworthy. I cannot lose sight of the fact that the memory of the defendant is extremely treacherous. His communication with Dr. Budd took place on the 30th March, and ten days later he wrote a letter to the plaintiff in which he says: "I have sold the property to Dr. Budd personally, and at the time of the purchase your name was not mentioned." Now, that is wholly incorrect, because at the time of the purchase his name had been mentioned; and the defendant is bound to admit now that the name had been mentioned. His explanation is a very ingenious one. He says that the sale had actually taken place, and that the name of the plaintiff was mentioned afterwards; but, in point of fact, no purchase was concluded that day, and at the time of the negotiations the name of the plaintiff had been mentioned. If the defendant's memory was so treacherous then, ten days after the conversation, I should think it would be considerably more treacherous after the lapse of a considerable time. The only point in his favour is that there is a certain amount of improbability in the broker declaring the name of the principal until there is a fair probability of the sale being completed; but, however improbable it may be, it is not impossible. The cases that have been cited show that it is very often done, and in the present case there might be a good reason why the name should be disclosed, because Fisher, knowing that Dr. Budd was a tenant of the defendant, might think he would forestall him. I have come to the conclusion, with considerable reluctance, that the plaintiff's version is correct, and that he did in conversation in the tramcar inform the defendant that Dr. Budd was the intending purchaser. If this is the case, then I think the plaintiff is entitled to succeed. Mr. Schreiner has contended that the agency had practically ceased, but, in my opinion, the agency had not yet ceased. Supposing the plaintiff had succeeded in inducing Dr. Budd to pay £4,500, and had closed the bargain there and then, and drawn up a note, surely the defendant could not have repudiated the sale. The plaintiff is entitled therefore to recover for the services rendered to his client the amount of commission on the sale to Dr. Budd. Judgment will therefore be for the plaintiff, with costs.

Maasdorp, J., and Kotzé, J., concurred.

[Plaintiff's Attorneys: Friedlander and Du Toit; Defendant's Attorneys: W. E. Moore and Son.]

DORAN V. DORAN.

This was an action brought by Maud Edith Elizabeth Doran against her husband, Charles Doran, for judicial separation on the grounds of cruelty.

The declaration set forth that the parties were married in Cape Town in October, 1902, and there had been one child issue of the marriage. Since the date of the marriage, the defendant had made cruel and unfounded charges of infidelity against the plaintiff, and rendered cohabitation with him dangerous. Plaintiff claimed judicial separation *a mensa et thoro*, a division of the joint estate, and custody of the minor child.

The plea denied the allegations of cruelty, or that he had ever used threatening language to the plaintiff. On the 30th June last the plaintiff wrongfully deserted him, and in reconvention, he claimed an order calling upon the defendant to return to him, failing which a decree of divorce, forfeiture of the benefits under the marriage, and custody of the child.

The plaintiff, in her replication, denied that she wrongfully deserted him, and admitted that she had refused to return on account of the defendant's cruelty.

Mr. Upington for plaintiff; Mr. Close for defendant.

Maud Edith Elizabeth Doran, plaintiff, said that on the 24th October, 1903, she was married to the defendant. After the marriage, she lived near her parents' house. From the commencement, the marriage was unhappy. There were continual quarrels, and the defendant charged her with extravagance. As time went on, things got worse and worse. The defendant ordered witness to leave the house, and said that he would make her an allowance, and repeated the order on several occasions. On March 4th this year she went to England with her husband, and at that time there was one child of the marriage. She visited the defendant's relatives in Sheerness, and there the defendant became very abusive, and called her names. The defendant's people were extremely nasty, and his mother threatened to blacken her eyes, and the defendant did nothing to protect her. Several times she complained to her husband, but he took no notice. The defendant's mother turned her out, and on three occasions the defendant threatened to shoot her. He left her with £3 10s. at Liverpool-street Station, London, and told her if she was not at Waterloo Station at half-past ten on Saturday, he would leave for South Africa without her. He did not provide her with any accommodation. Witness then wrote to her mother about the ill-treatment. She found her husband at Waterloo Station, and proceeded to the Cape with him. They scarcely spoke on the way out, and she was met at the Docks by her mother and brother. She proceeded to her father's house, and remained there ever since. Her husband threatened to shoot her, and she was afraid to return to him.

Cross-examined by Mr. Close: Her husband had made repeated attempts to see her, but he had not been threatened with the police. He had not since attempted to molest her. She did not look down upon her husband. He got angry over everything. The trouble was not caused through witness and the plaintiff having different views of the household duties of a wife. She did not object to him saving money. The chief cause of the primary trouble was whether witness was extravagant or not. She could do nothing to please her mother-in-law. Witness never made little of her mother-in-law for her quiet way of living. The defendant never cared for the child. The defendant's people succeeded in making mischief between witness and her husband. She did not tell her mother-in-law that the defendant was penniless when she married him, and that he was only a draper, and in Plein-street at that, and that he was so subservient to his employer that the latter used to put his foot on his neck. It was not the result of a violent quarrel that the defendant told her to procure abortion. If witness should tell anything about his mother out here she was to be shot, and on another occasion he said he would swing for her before he was 40.

John Stewart, accountant, said that the plaintiff was his daughter. The plaintiff had never complained up to the time she left for England. In case plaintiff and defendant were not reconciled on their arrival here witness had a letter ready, and it was handed to the defendant in order that he would understand that the plaintiff would not return to him again. The defendant asked to see the plaintiff in order to settle matters, but witness would not allow it.

Cross-examined by Mr. Close: His daughter would never complain. He had noticed that his daughter had been crying on several occasions. The defendant was a quiet sort of man, and it was difficult to have conversation with him. When he wrote to the defendant's mother he stated under provocation that the defendant was an "unmanly cad." He could not let his daughter return to the defendant unconditionally.

Mr. Upington closed his case.

This closed the evidence for the plaintiff.

Chas. Hy. Doran, defendant, denied ever having threatened to shoot his wife. Witness cautioned his wife against her supercilious airs in Sheerness, and the remark he passed about abortion was in the heat of a moment, and was never intended. It was simply on her own grumblings that witness told her that she could go home to her mother. Witness never made any remark about the

intimacy with a sanitary inspector, and would not accuse his wife of such a thing. He did not use foul and abusive language towards his wife. If the plaintiff had never written that letter to her father the case would never have occurred. Witness tried to keep the plaintiff within his income, but she travelled beyond that.

Cross-examined by Mr. Upington: He never ordered the plaintiff out of the house. Witness said that except she could carry out the duties of a married woman she might go to her mother and he would give her half his income. She was extravagant notwithstanding the fact that she saved £95 out of his salary in a couple of years. Witness told his mother that the women in the Cape were on a higher level than those in England, and that allowances must be made for her. The passage back to the Cape was certainly a trifle cool. The plaintiff knew London better than he did, and he left her at Liverpool-street Station with the baby and £3 10s. in her possession.

Counsel having been heard in argument on the facts,

De Villiers, C.J., said that there was not sufficient ground for granting a decree of judicial separation, and granted a decree of restitution of conjugal rights, the plaintiff to return or receive the defendant on or before October 1, failing which the Court would grant a rule calling on the plaintiff to show cause by the first day of next term why a decree of divorce should not be granted, the plaintiff to have custody of the child, or any child that may be born of the marriage. No order as to costs.

Their lordships concurred.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

LEFFLER V. PHILLIPS. { 1903. Aug. 25th.

Mr. Schreiner, K.C., applied for leave to take the evidence of the defendant (Mrs. Phillips) and her son, Arthur Phillips, residing at Kenilworth, on commission in preparation for the trial set down for Friday next. Counsel put in a certificate from Dr. Beck as to the condition of the defendant and her son.

Sir H. Juta, K.C., for the respondent, said he could not object to the application so far as Mrs. Phillips was concerned in view of Dr. Beck's certificate, but he did not see any necessity for her son's evidence to be taken on commission.

The Court directed Mrs. Phillips' evidence to be taken on commission, with Mr. Russell as commissioner, costs to be costs in the cause.

WORCESTER MUNICIPALITY AND OTHERS V. COLONIAL GOVERNMENT.

Mr. Schreiner, K.C., applied to the Court for a day to be fixed for the hearing of this action, set down in the list for Friday next. Counsel said that this would be a very lengthy case, as a good deal of evidence would be heard. It was a case in connection with the supply of water to the railway, and it involved an investigation of the entire relations in that matter back to the year 1824. The Municipality, together with three other plaintiffs, who were erf-holders and holders of rights to water, were claiming to enforce a notice given about a year ago to the Government to cease taking Municipal water, and the Government were contending that they were perpetually justified in taking water.

De Villiers, C.J., said that he did not see how the case could be set down for this term. The new rules of Court had been sent in to the Government, and they had not yet been confirmed, so that it was impossible to fix a day at present. He thought the case should stand over till next term.

BRAUN V. POWRIE. { 1903. Aug. 25th. „ 26th.

Servitude — Remission — Permitting acts inconsistent with servitude.

In an action for an interdict restraining the defendant, the owner of land over which the plaintiff had a duly registered right of road, from placing a

fence across the road, the evidence shewed that the defendant had for two or three years made a garden on the strip of land set apart for the road, but the strip of land was fenced off from the rest of the defendant's property, and there was no evidence that the owner of the plaintiff's property knew of the trespass.

Held, *that the work done on the strip of land was not of so permanent or substantial a nature as to justify the inference that the plaintiff had relinquished his right of road, and held consequently that the servitude had not been lost by reason of the owner of the dominant tenement having permitted acts inconsistent with the servitude.*

This was an action brought by the plaintiff, who is a property owner in the Gardens, to recover £100 damages from the defendant, the owner of adjacent property, for wrongfully obstructing a road to which plaintiff claimed a right of way under a servitude.

The declaration alleged that the parties were the registered owners of land adjoining Breda-street in the Gardens, the defendant being the owner of the remaining extent of the original grant. There was registered upon the title deeds of the defendant a servitude of road of a certain width (14 ft. 6 in.), in favour of the plaintiff. The road led from the plaintiff's property on to a public street, and was so surrounded that there was no acess to his property except by this road. In or about April or May, the defendant wrongfully obstructed the said road, and prevented the plaintiff from having access to his property, and refused to remove the obstruction, and plaintiff was still prevented from having access to the property, whereby the plaintiff had sustained damage. The plaintiff claimed an order compelling the defendant to remove the obstruction, and damages in the sum of £100, alternate relief and costs of suit. The defendant's plea admitted ownership of the servitude, but said that the plaintiff and his predecessors had not made use of the servitude for 30 years, and that the plaintiff and his predecessors had allowed trees to grow across the road, so as to make it impossible to use the same, and that the land was fenced off from Breda-street, and used for gardening, and for a poultry run. The defendant contended that the plaintiff had lost the servitude, and in reconvention claimed full ownership and £50 damages. The replication admitted that certain trees had been allowed to grow there, but denied the rest of the allegations.

Sir H. Juta, K.C. (with him Mr. Buchanan) for plaintiff. Mr. Close (with him Mr. J. E. R. De Villiers) for defendant.

Sir H. Juta said that the defendant's case was that the plaintiff and his predecessors had lost the servitude by *non user* for a period of 30 years. He submitted that upon the pleadings the onus of proof lay upon the defendant to show that the servitude registered upon the title had been lost.

Mr. Close said he could not object to that contention.

Evidence was then called for the defendant.

Thomas C. Murray, Government land surveyor, said he had made a survey of the property of Mrs. Powrie, of Osborne Lodge, in Breda-street. There was a row of oak trees growing within Mrs. Powrie's ground. In the roadway there were two trees growing, there being a space of ten feet between them. Those trees were in a line with the trees in Mrs. Powrie's ground.

Cross-examined by Sir H. Juta: He did not see any pear trees on the other side of the road in dispute.

Mrs. Helen Powrie, the defendant, said she was the owner of Osborne Lodge, Breda-street, having purchased it in 1902 from Mr. Currey. She made an inspection at the time. With regard to the road, she found it fenced with galvanised iron and branches on the Breda-street side. Mr. Bean had a fowl run there, and a fowl-house stood in the roadway. The remaining half of the roadway was occupied by Mr. Walters, of Osborne Lodge, who had potatoes growing there. When she bought the property, she asked Mr. Bean to take away the fowl-house and

run, and told him to take away the material. She then fenced the road in with wire-netting on two sides—Mill-street side and Mr. Bean's house side. Across the road on the lot A side, five oak trees were growing. A cart could not have come in. There were twelve rows of barbed wire rising from the ground to the height of a man. It cut off the entrance from the lot A side. The wire did not appear to have been newly put up; in fact, the bark had grown over it. On the Osborne Lodge side of the road, there was a wooden fence, with a gate into Osborne Lodge. At that time the gate was being used by the tenant of Osborne Lodge, Mr. Walters. Mr. Currey told her (witness) when she bought it that she could not build on the roadway. She did not understand what the nature of a servitude was at that time. She went into the premises on the 1st September last year. From that time up to April she used the road. It remained fenced off. There was no traffic over it. Nobody used the ground except themselves. In April last Mr. Braun bought the adjoining property, and he proceeded to cut down three trees on the lot A side, and removed the fence on one side. She showed the plaintiff her diagram, and told him she thought he was wrong. The plaintiff simply swore, and said he would do as he liked. Witness put up the fence again, and the plaintiff then drove through it, and had it pulled up. Witness then had barbed wire put up where the trees had been growing. She claimed the oak trees which had been cut down as her own. A pillar was also knocked down by the plaintiff. She claimed £50 damages.

Cross-examined by Sir H. Juta: She purchased the property from Mr. Currey, of the General Estate and Orphan Chamber, acting for Mr. Anderson. Mr. Currey told her that she could not build on the land in question, and that there was a servitude on it. She thought at the time that the servitude meant that if the Town House wanted the ground for a street or to put lamps there, they could compel her to sell it to them. She did not remember Mr. Currey saying that the owners of the adjoining property had a right-of-way over the land adjoining. Mr. Braun brought building material over the road. She tried to stop him, and stood in front of the horses, and he threatened to drive over her.

Robert Powrie, nephew of the defendant, gave evidence as to the incidents of April last. The trees he judged were about 30 years old.

Frederick Charles Walters, formerly of Osborne Lodge, said that he was living there in 1900. As to the strip of road at the bottom of the ground, there was a gateway opening into it. On the Breda-street side, the road was closed up with a fence. On the Orange Grove side there was a wire across the trees. The road was used as a potato patch and a fowl run.

Cross-examined by Sir H. Juta: He had always understood that the road belonged to the owner of Orange Grove. They recognised that they were using it on sufferance.

Holford Bean said he occupied property on the lower side of Mrs. Powrie's place for eight years, from 1895. The road on the Breda-street side at that time was always closed, and also on the Orange Grove side. He occupied nearly half of the roadway with his poultry run.

Cross-examined by Sir H. Juta: He was there on sufferance; he was prepared to remove the fowl-house and run any time when requested.

Catherina van Breda said that she had lived in the neighbourhood of the house Osborne Lodge for about 18 or 19 years. She had never seen the roadway open until during this year.

Cross-examined by Sir H. Juta: She remembered Mr. Myburgh occupying that house. She had not noticed the roadway particularly; her observation was simply casual.

Marthinus L. Wessels said he was born at Orange Grove, immediately above Osborne Lodge, in 1853, and lived there until 1860. Witness often used to visit his grandfather, who lived near Osborne Lodge, from 1858 until 1870. In 1872 or 1873 witness's cousins went to live opposite Osborne Lodge. It was when witness was a minor. He frequently visited his cousins—nearly every week. The land from Mill-street up to Osborne Lodge was witness's grandfather's property. There was no roadway, as far as witness knew. On his grandfather's ground, there were oak trees, spars being fixed across from one to another to keep the cattle off the

ground. Witness knew of no road, and never saw the ground used as a roadway.

By the Court: Witness could not recollect what the strip of land was used for. He could not say positvely no one ever walked over it, as he did not live there; he only visited the place. The land was blocked at the Breda-street end.

Abraham Felix, a coloured man, who said he was the oldest man on the land, also gave corroborative evidence.

Mr. Close closed his case.

Sir Henry Juta called,

Wm. Arthur Currey, who said he sold the property on behalf of Mr. Anderson to Mrs. Powrie. Witness told her there was a servitude in favour of the owner at the back, although the land was included in the area transferred to her. Witness had seen the land cultivated, and had stopped one person (Bean) from cultivating it, telling him it was a road.

Cross-examined by Mr. Close: To the best of witness's recollection, the land was always closed up at the Breda-street end.

Henry A. Bidewell Edwards, land agent, said he had lived in the vicinity in 1880 and in 1886. Witness approached Mr. Myburgh, who owned the property now held by plaintiff, for the purpose of hiring the roadway. Witness rented the ground from Myburgh. Myburgh claimed the ground, and used it as he pleased.

Oswald Christie Phillips, son of a former tenant of Osborne Lodge, said that he lived there between 1887 and 1894. He knew the roadway in dispute. Osborne Lodge was marked off by a 6 ft. fence from the road at that time. He did not remember a gateway from Osborne Lodge to the road. They did not use the road. It was used by the Myburghs. The Myburghs used the road in dispute as their own.

Cross-examined by Mr. Close: The fence on the Breda-street side was always crossed during the time they were there. Oaks were growing on the Orange Grove end of the road right across. The Myburghs had a vineyard there, and he understood they used to do their best to keep this place blocked up to prevent thieves breaking through.

By the Court: The Myburghs would have to clamber over the fence to get into the roadway.

Stephanus Papenfus, broker and auctioneer, Cape Town, said he owned Orange Grove and the portion of land now belonging to the plaintiff between 1896 and 1903. He occupied the property till 1901, and he afterwards let it. He knew the road from the vineyard to Breda-street. He had walked over the land whenever he wanted; he was never hindered by any owner of the property now belonging to Mrs. Powrie. He had blocked up one side because he found that his grapes were being stolen. That was on the side of the property occupied by Mr. Bean. He did not let the roadway during his time. He stopped other people from using it.

By the Court: He did not claim the strip as his own property, but he had a right of way over it. There were only two people had a right of way there —Mrs. Anderson and himself. Mr. Bean took French leave, and used the ground while witness was in England.

[De Villiers, C.J.: The fact of you having had a right of way did not enable you to prevent other people from using the road. The strip belongs to Mrs. Powrie's property, if it belongs to anybody, and you and the Myburghs seem to have regarded it as your property.]

Louis Arthur Myburgh, of Myburgh and Thomas, brokers, Cape Town, son of the late Mr. Myburgh, former owner of Orange Grove, said he had walked across the land in question hundreds of times to go from the vineyard to Breda-street. His brothers and friends had frequently used it. He did not remember manure being brought in by that road from Breda-street. They only used to grow mealies on the land. They kept the hedges in repair, except the fence of Osborne Lodge.

Cross-examined by Mr. Close: He was speaking of days when, as schoolboys, they used to play on this ground. They had always looked upon the land as their own property.

The plaintiff, Julius Braun, said he bought the property known as the Vineyard from Mrs. Cosay. The only access he had to the public road was over the ground in dispute. He bought the ground for building purposes. He went there with his workmen about April, and they continued to go over the ground for a fortnight, when they were stopped by Mrs. Powrie. He pointed out to her that he had a right of way over the land. The defendant would not have it, other-

wise than that the land belonged to her. The defendant put some wire netting across the road from the Breda-street side. He took that down again, and defendant afterwards put it up again. Mrs. Powrie afterwards erected a substantial fence. He had been put back with his building operations through Mrs. Powrie's interference, and had been prevented from taking materials there. He was intending to erect nine houses there and to let them. In any event he would be three months late in the erection of the houses. He estimated the damages he had suffered at £100.

Cross-examined by Mr. Close: He had been taking stones on to land a little higher up, by permission of Mr. Cosay, for about a fortnight. He removed two oak trees from the strip of land in dispute. He did not knock a pillar down at the entrance. He denied that he told the cart driver to go over Mrs. Powrie, who was standing in the way.

Christian Peters, gardener, Kenilworth, said he used to be in the service of Mr. Myburgh at Orange Grove. He had mended the fences and the road several times. He had seen his master's sons come over the road many times and play with their school-fellows.

Sir H. Juta closed his case.

Sir H. Juta (for plaintiff): Upon the documents this application should be granted. The road was closed for a time, but that does not give the respondent any rights. I submit that Myburgh's affidavit is much more satisfactory than that of the respondent. No tory than that of the respondent.

Mr. Close (for defendant): The applicants abandoned their right of servitude, and set up a claim as owners. See *Edmeades* v. *Scheepers* and *Edmeades* v. *Mostert* (1 Juta, 334). This is certainly no case for an interdict, since no clear right has been shown.

Sir H. Juta (in reply): Our right is shown on the title, and the *onus* of disproving it rests with the respondent. The former owners used this road. It has been argued for the applicant that we have lost our rights by *non user*, but old inhabitants all testify to the fact of this road having been used continuously. If I have a right of way, and do not take a vehicle over the road, I do not lose my right of way, provided I continue to avail myself of the footpath.

[De Villiers, C.J.: What do you say about the trees?]

The trees never obstructed the use of the road or the sowing of mealies.

Mr. Close (for defendants): The plaintiff has established his claim to a declaration of rights by reason of *non user* on the part of the persons who claim the servitude. For the preservation of a servitude, it is necessary that it should be preserved *per modum servitutis et qua servitus*. The Myburghs always regarded this road as a nuisance; in fact, the ground was not used as a road. People went on it to repair fences, but that had nothing to do with a servitude. The so-called road was used once in 1896 for bringing in a manure cart, and a few schoolboys used it and jumped over a fence to get to the road; but such a use by schoolboys does not constitute a user of the servitude. As to the loss of a servitude, see *Van der Linden* (1-11-4), *Voet* (8-6-7, 8 and 9) *Digest* (8-6-22 and 25), *Van Leeuwen* (Vol. 1, p. 306, Kotzé's Trans.), *Vinnius ad Constit.* (Tit. 2, Sec. 3, p. 242), *Voet* (8-6-9) is very explicit as to the way in which a servitude must be exercised. All authorities are agreed that a servitude will be lost by *non user* unless used *qua servitus et secundum modum et tempus*. As to loss by adverse acts, see *Van der Linden* (1-11-4), *Grotius* (3-37-4), *Voet* (8-6-5), *Digest* (8-6-8), *Pothier's Digest* (loc. cit.), *Van Leeuwen* (Vol. 1, p. 300, Kotzé's Trans.), *Vinnius* (Tit. 2, Sec. 3). Acts contrary to a servitude do fall under the rules of prescription, *Hunter's Roman Law* (p. 422). All that is required for the loss of the servitude is a substantial adverse act continued for a substantial time. Here the evidence shows that the ground was closed up, and that Mrs. Powrie has made out a clear case both on the ground of non user and of consent. I submit she is entitled to a declaration of rights, and to damages for loss of her oaks, and for injury done to her gate pillar.

Mr. Buchanan (for plaintiff) was proceeding to refer to the various deeds of transfer to the respective predecessors in title of the parties, in order to show that the alleged servitude in favour of the defendant had been granted;—when he was stopped by the Court.

De Villiers, C.J.: It is common cause between the parties that in 1861 a servitude was constituted in favour of the

plaintiff's property in respect of the defendant's property. The transfer to the defendant's predecessor in title refers to this servitude as being laid down on the diagram, and the diagram which was attached to the previous transfers clearly shows this road in dispute passing through what is now the defendant's property. It therefore lay upon the defendant to prove that this servitude to which the plaintiff is entitled by virtue of his ownership of this land has been lost in one of the ways in which, under our law, servitudes can be lost. The defendant's contention is that it was lost in two ways; first of all by non-user for thirty years, and secondly by the plaintiff or his predecessor in title having allowed acts to be done which are inconsistent with the existence of this servitude. Firstly, in regard to non-user. As I said in giving judgment on the previous application in this case, where there is a right of road, and the person entitled to that right uses it as a foot-path, that is a sufficient assertion of his right to keep alive the servitude. In the present case, it appears that the owners of the plaintiff's property did even more; they seemed to claim this strip of land as their own, and they seemed to ocupy it as their own. They fenced it in, and it does not appear that anyone, until the defendant became the owner, except the plaintiff's predecessor in title, claimed possession and ownership of this strip of land. Now, an important question might arise, whether that would be sufficient to keep alive the servitude. It might fairly be contended that the greater includes the less, that if a person occupies land as being his own property, that would include also occupation for the purpose of a servitude, but that point I do not think need be decided. It raises a question which, so far as I am aware, has never been decided. But this I am prepared to say, that if a person occupies land subject to a servitude as his own it would require very slight evidence of the use of the land for the purposes of the servitude. In the present case the Myburghs not only occupied the land as their own, but on one or two occasions they drove a manure cart through this road from Breda-street to the vineyard. We have the evidence of Mr. Bidewell Edwards that this was positively done in the year 1880, that is nineteen years after the transfer to the defendant had been given, and the servitude recognised afresh. This act therefore of driving his manure cart over this road would be a sufficient interruption of any right which the defendant might claim by reason of non-user. Not only that; there is evidence that Mr. Myburgh himself used this road (that is, the father of the young men who gave their evidence before me), that he used this road, especially on Sundays, and that the sons used this road for the purpose of going from the vineyard on to Breda-street. They were children of the owner. The father is dead now, and we are unable to have his evidence; but there is no reason to suppose that the sons used the road without his consent. Whether the sons went there for the purpose of play, or for some other object, they used this road for the purpose of going from the vineyard to Breda-street. Now, if these had been the only acts by which they asserted their rights, it might have been a doubtful case; but coupling the user of this road for a manure cart, and for the boys going to school from the vineyard to Breda street—coupling these facts with the fact that Mr. Myburgh claimed this piece of land as his own, I think the Court could not possibly hold that there has been such a non-user for the period of thirty years as to amount to a remission of the right to the servitude. In my opinion, therefore, the defendant has not obtained a right to claim that this servitude should be put an end to on the ground that plaintiff's predecessors in title have not for a period of thirty years used the road. Coming next to the second question raised as to whether the plaintiff's predecessors in title have allowed acts to be done inconsistent with the continued existence of the servitude, I think there is really no evidence to justify such a view. The question was fully considered in the case of *Edmeades* v. *Schecpers* (1 Juta, 334), but the circumstances of that case were widely different from those in the present case. In that case, for sixteen years the then plaintiff had seen and known that the then defendant had been in occupation of this land, and that he had fenced in the whole of the land, and had actually built upon it. The suit was raised between

the parties themselves. After sixteen years it was claimed that the land should be restored to its original uses, namely, for the grazing of a certain number of the plaintiff's cattle. The Court held that it was really too late, and that what had been done debarred the plaintiff from claiming the rights. The Court guarded itself against expressing any opinion as to whether other erf-holders had lost their rights. The Court held that the then plaintiff had lost his rights by reason of what he had done. In the present case it is difficult to see what has been done by the plaintiff to deprive him of his rights, or, rather, what has been done by his predecessors, because he has only been in occupation since March. It is true that there is a small portion of the land which was occupied by Mr. Bean for a fowl run, but this seems to have been done when the then owner—Mr. Papenfus—was away. There was no recognition of the right of Mr. Bean to do this; and there was no recognition by any one of the predecessors in title of the right to put any fence across the road. And what is so important in this case is the fact that there was a high fence, six feet high, which separated the property of the defendant from this piece of land in respect of which a right is claimed. Mrs. Powrie says that when she became owner there was a gateway in this fence, but that would prove nothing, because the owners of the defendant's land would be entitled to come upon this road and use it. The defendant for a few years running used to enter on the strip of land through the gateway and planted potatoes on it. It does not appear that the then owner of the plaintiff's property was aware of this trespass, but even if he had been, his acquiescence would not necessarily have proved any intention to remit his right to a servitude. For that purpose, there should be proof of some more permanent or substantial interference with the right of road than has been proved in the present case. The defence, therefore, in my opinion, fails also upon the second ground. With regard to the claim for damages, I do not think it is a case for damages. There will be no order as to damages, but as to the rest of the claim, the judgment of the Court should be for the plaintiff with costs.

Mr. Buchanan said the question of the costs of the motion had to be decided.

The Chief Justice said the defendant would have to pay these. He had clearly indicated that unless the defendant could produce conclusive proof of actual non-user for the full period, it would be better not to defend the case. Judgment would be entered for plaintiff in terms of prayer "A" of the declaration with costs; judgment for the defendant in reconvention on the claim in reconvention.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller; Defendant's Attorney: J. Ayliff.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

CHAMBERLAIN V. CHAMBERLAIN. { 1903. Aug. 25th.

This was an action brought by Wm. Ernest Chamberlain against his wife for restitution of conjugal rights.

The declaration set forth that the parties were married in Essex, England, in November, 1901. Shortly afterwards they came to South Africa, and on the 26th May, 1903, the defendant wrongfully, unlawfully, and maliciously deserted the plaintiff. Plaintiff claimed restitution of conjugal rights, failing compliance a decree of divorce, and an order declaring the plaintiff entitled to the custody of the child.

Mr. Upington for the plaintiff; the defendant in person.

Wm. Ernest Chamberlain, plaintiff, said that shortly after his marriage he left England for South Africa, and settled with the military at the Paarl. The child was about fifteen months old. In December, 1902, with his wife he started a boarding-house. In March, 1903, one Louis Bishop came to stay at the house, and at the end of April he had to complain to his wife about her intimacy with Bishop. Bishop was ultimately ejected from the house by a constable, and the defendant packed up her luggage, and followed Bishop to an hotel at Lady Grey Bridge. Subsequently, the defendant promised to return, but failed to do so.

Frederick Nicholson gave corroborative evidence of the intimacy between Bishop and the defendant.

The defendant gave evidence to the effect that the plaintiff had been repeatedly cruel to the baby and herself. If the case were postponed she thought the doctor and nurse would testify to the ill-treatment.

The Court granted an order that restitution of conjugal rights be made by the last day of September, failing which cause to be shown on the 12th October.

MOOLMAN v. DE WET. { 1903. Aug. 25th.

Debtor and creditor—Onus of proof — Receipt — Proof of debt from books of creditor's agent.

The defendant, who owed a certain sum of money to plaintiff, alleged that he had paid in full to one L., plaintiff's agent. Though he had told various persons he had proofs of this payment in his possession, he was unable to produce either a receipt or any other documentary evidence at the trial. L., whose account of what took place on occasion of the alleged payment and whose evidence on certain collateral points was confirmed by that of defendant, produced a pocket book containing entries made on the said occasion, showing that there was still an outstanding balance due from defendant to plaintiff.

Held, *that as the onus of proving payment of an admitted debt was upon the defendant, which onus he had failed to discharge, judgment must be given for plaintiff for the amount claimed with costs.*

This was an action brought by Petrus Johannes Moohlman, farmer and speculator, of Fraserburg, against Petrus de Wet, speculator, of Carnarvon, for the recovery of certain money, the balance arising out of a certain joint transaction between himself and the defendant, and for interest on money due.

The declaration set forth that in September, 1902, plaintiff and defendant agreed to speculate in donkeys, cattle, and sheep, and by reason of the agreement, plaintiff purchased 23 donkeys for £207 12s. The donkeys were delivered to the defendant in October, 1902, and in November he sold them for £231, leaving an amount due to the plaintiff of £209 6s. In settling other accounts, the defendant only paid £151 16s. out of the £209 6s., leaving a balance of £57 10s., and plaintiff claimed this amount, together with £8 8s. 11d., as interest on the other debts and costs of suit.

The plea denied that there was any stipulation as to interest in the previous transactions, and denied that one Louw, the plaintiff's servant, was paid anything short of the £209 6s.

Mr. J. E. R. de Villiers for plaintiff; Mr. Burton (with him Mr. C. W. de Villiers) for defendant.

Petrus Johannes Moohlman, plaintiff, stated that towards the end of November last year the defendant owed him £209 16s., in respect of certain donkey transactions. There was also owing to him £315, in respect of certain sheep, which debt was incurred before the partnership was entered into. The defendant promised to pay on the third or fifth day after the acknowledgment of debt. He sent his son-in-law to recover the money, together with interest on the promissory note and pasturage, but he returned with only £456 16s. Witness knew that was not the full amount, but he thought the defendant had paid a debt of plaintiff's. Subsequently, he found that De Wet had not paid the auctioneer's account. When the defendant was asked to settle the balance, he said that he had previously done so, but refused to produce the receipts.

Cross-examined by Mr. Burton: Witness bought the sheep himself, and the auctioneer looked to him for payment. Previously, the defendant had given him £100 in cash for some sheep, and the defendant promised to pay the balance on the third or the fifth day after the sale. The partnership did not prevent the defendant selling the sheep at once. The defendant gave him to understand that

the balance would be paid when the sheep were disposed of. The defendant paid another £100 on the 30th September, £650 on the 19th November, and £315 at the end of November, and witness claimed interest on the two latter amounts. He thought the defendant had paid the auctioneer, and that was why no action was taken until April. When the account was brought to him, he said that the defendant ought to have settled the account. De Wet said subsequently that he had paid all he owed.

Johannes Louw stated that when the plaintiff sent him to the defendant to collect the account, he was to get the purchase price of 15 donkeys at £10 each—£315—or an acknowledgment of debt, and half the profit on 23 donkeys. Defendant paid £466 16s., and witness knew that he had not settled the account in full. The defendant was surprised that the plaintiff could charge for interest and grazing money when they were in partnership.

Cross-examined by Mr. Burton: He was to get a full settlement, but he did not think it necessary to make a note of the details given to him by the plaintiff in his book. He put them down on a piece of paper after verbal instruction had been given by the plaintiff. When the defendant was charged with the amount of £72 12s., he said that witness's entries in the book were incorrect, but he did not remember the defendant asking how he could owe the money when the two donkeys that had strayed away had returned to the plaintiff's farm. The defendant did not pay the full amount of £209 16s. in respect of the donkeys.

Jacobus Stoffberg said that on the 7th April the defendant, plaintiff, and Louw were in his office, where the defendant produced a receipt from Mr. Banardie for £72 12s. The defendant said there was a discrepancy in Louw's account, and that he had taken the latter's receipt for the money. Subsequently the defendant said that Louw did not give a receipt for the money.

Cross-examined by Mr. Burton: The defendant did not say that he lost the receipt. The plaintiff asked him where his books were, but the defendant kept none. The defendant repudiated the pocket-book entry of Louw's, and firmly asserted that he had paid the full amount to the latter.

Mr. De Villiers closed his case.

Petrus de Wet, defendant, said that he entered into partnership with the plaintiff in respect of the purchase of donkeys last September. About the same time he paid the plaintiff £100 on account for certain sheep, and he never made any definite arrangement about paying the balance, beyond promising that it would be met when the sheep were sold. Louw showed him a list of the accounts from the plaintiff on a piece of paper. Witness paid £209 6s., but would not pay any interest or grazing money. Louw went away satisfied.

Jacobus Bruwer said that in February last he was in Carnarvon, when he met Banardie, who sent him to Moolman for an account, but the latter said that he owed Banardie no money. The account was for donkeys that plaintiff bought from Stoffberg. In Stoffberg's office, the defendant said that Louw's book was false. Louw said that he had received the profit, and not the capital.

Mr. Van Zyl said that he explained to Mr. Stoffberg that the defendant had not got a receipt in the true sense of the word, and that all his papers had been torn up.

Mr. Burton closed his case.

Counsel having been heard in argument on the facts:

Maasdorp, J.: The plaintiff alleges that there was due to him upon a number of transactions and upon accounts between him and the defendant, a balance of £524 6s. in November last, and he admits that towards the end of that month the defendant paid him the sum of £466 16s., leaving a balance due of £57 10s. The defendant, in his plea, admits the correctness of the accounts as they stood in November, and says that he did then owe the plaintiff £524 6s., but he says towards the end of November he paid the whole amount of that balance to Louw, who received it on behalf of the plaintiff. Now, the question between the parties is whether, when Louw received payment from the defendant, he received the sum of £524 6s., or £466 16s. In transactions of this kind and payments of such large amounts passing between men of business as the plaintiff and the defendant undoubtedly are, you would expect that production would be made of the best evidence of payment and the best

evidence would, of course, be the receipt given by the plaintiff to the defendant. Such receipt has not been produced, and I think it is common cause between the parties that such receipt in a formal shape was never given. Now, in the absence of that receipt, which would be the best proof, other proof might be adduced by the defendant of payments made by him, and the question arises whether any documents in any shape passed between the parties, which would support the defendant in his case. The defendant says that when Louw arrived at the farm, it was necessary for them to enter into a calculation to find out exactly what was due, and the statement of account so made or arrived at between the two of them was put upon some rough scraps of paper, and left in possession of the defendant. These rough scraps have not been produced. The defendant says, some little while since he destroyed all his documents, and these rough scraps might have been destroyed amongst other documents. Now, the defendant finds himself, therefore, in this unfortunate position, that he has got no documentary evidence to support him. On the other hand, we have the statement of Louw, which largely agrees with that of the defendant, that when he arrived on the farm they had a discussion as to the defendant's indebtedness, that they entered into a calculation to arrive at the amount that was due, and that these statements were put upon paper, but he stated that he had in his possession at the time a note-book, in which he himself entered the items, and the result arrived at, and that he did so for the purpose of giving an account to his principal, Mr. Moohlman, of the moneys received by him. Now, that seems to me a very natural course to adopt by Louw, under the circumstances. He has produced this account, and though it does not seem to be a very well-kept book, it seems to contain other transactions which he has thought fit from time to time to enter, and I see no reason to believe that the statement entered by him in this book is a false and a fabricated one. I am disposed to accept his statement, because it tallies with what the defendant himself says. Mr. De Wet says when they were discussing these statements he brought it to the notice of Louw that two of the donkeys had strayed away, and no charge should be made against him, and we find in this book they were consequently taken off the capital amount of the price of the donkeys, as the account stood between the defendant and the plaintiff. We also find that the profit which had been calculated in the total was taken off with respect to these donkeys. So far this statement, as made by Louw, agrees with what Mr. De Wet himself says. Louw says he had been instructed to make some allowance for the cost of certain donkeys in case he should find payment had been made in respect of them to Mr. Stoffberg, and when, upon inquiry, he had found out that the payment had been made by a man named Banardie, he did not call upon Mr. De Wet to bring into the account the price of these donkeys. Here, again, we find that these donkeys are omitted from the account, and independently of them, the result is arrived at which shows, according to Louw's statement, that the sum only of £466 16s. was paid. We have, therefore, a pretty fair statement of an account which supports Louw's evidence as to the amount of money paid by him to the defendant, and, on the defendant's side, we have no account. Now, it seems to me that the whole of the defendant's evidence was based upon an impression he had that he had settled the account in some form with Louw. On this occasion he could not have been aware of the exact sum that was paid, and when he was asked by Mr. Moolman to prove the payment by producing the receipt, he told Mr. Moolman that he was not in the habit of showing his receipts to anyone. Well, that was a most extraordinary answer for a debtor to give to a creditor, and if that was said, we must come to the conclusion that he had in his possession some proof in a documentary shape which he could have produced. When the defendant meets Mr. Stoffberg, he takes up the same position that he had in his possession proof, and that he would put it before the Court when the time arrived. He was very naturally pressed afterwards to produce the evidence, or the case would proceed. Then we find De Wet saying he never had any documents at all, and later, when his attorney comes upon the scene, the attorney gets information from the defendant which was conveyed to the plaintiff, and amounts to this: that he had had documents in his pos-

session in reference to this transaction, but that he destroyed them. Under all the circumstances, I think, considering that the burden of proving this payment lay on the defendant, his evidence has not been of such a clear and satisfactory description, that we can accept it as proof of payment, without what is generally regarded as the best evidence—the production of receipts. In the absence of such receipts, we think that Mr. De Wet has failed in discharging the onus of proving that he made these payments, and consequently there still remains due to the plaintiff the sum of £57 10s., for which judgment must be given. There is a further claim for interest due upon certain moneys which were owing from the defendant to the plaintiff, upon an acknowledgment of debt. On the face of that acknowledgment, no date is fixed for the payment. The plaintiff has said that some promise was given that the payment would be made within three or five days after the acknowledgment was given, but, upon the whole, we think that there is no clear proof of any such promise having been made, and that there was some indefinite offer on the part of Mr. De Wet to pay at such time as he should be able. Under the circumstances, there being no fixed date from which any interest may run, and no agreement that interest should be paid, that part of the claim must be disallowed. Judgment will therefore be entered for the plaintiff for the sum of £57 10s. with costs.

Kotzé, J., concurred.

[Plaintiff's Attorneys: Michau and De Villiers. Defendant's Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

FIRST DIVISION.

LYONS V. CUSHING. { 1903. Aug. 26th.

Sir H. Juta, K.C., said that he appeared for the plaintiff in this case, and the defendant was in default. The plaintiff sued the defendant for the transfer of certain shares held by him in a certain syndicate. Some time ago an interdict was granted, restraining the transfer of these shares pending an action to be brought. He was instructed that all the affidavits were now in Court, showing that there had been proper service, but no plea had been filed. The demand was a liquidated demand for certain shares. He asked for an order for the transfer of the shares.

Order granted accordingly.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZÉ.]

BARR V. BARR. { 1903. Aug. 26th.

This was an action brought by Annie Barr against her husband for divorce, on the ground of his adultery.

The declaration set out that the parties were married at Durban in December, 1895. There were two children of the marriage. Between March and July, 1902, the defendant had committed adultery with divers persons.

Mr. Upington for plaintiff; defendant in default.

Annie Barr, plaintiff, said that in 1897 she and her husband came to Port Elizabeth, and subsequently the defendant went to Aliwal North. In 1898 the defendant got two years for forgery, and in 1900 he joined the Cape Town Volunteers, and was sent to Tulbagh. She would, if their lordships granted the decree, send the children home to her parents in Scotland.

Arnold Dempers, member of the District Mounted Police, said that during the war he was stationed at Tulbagh. He knew Corporal Barr, who was also stationed there. In February, 1902, he went into a fort occupied by the defendant, and found him on intimate terms with a coloured girl.

Decree granted, plaintiff to have custody of the children.

FICK V. FICK.

This was an action brought by Stephanus Daniel Fick, against his wife, Susanna

Fick (born Knox), for restitution of conjugal rights, custody of the children of the marriage, and forfeiture of all benefits accruing therefrom.

The declaration set out that the parties were married at Hermanuspetrusfontein in December, 1897. There were three children of the marriage. In January, 1903, the defendant wrongfully, unlawfully, and maliciously deserted the plaintiff, and refused to return to him. Plaintiff prayed for restitution of conjugal rights, custody of the children, and forfeiture of the benefits of the marriage.

Mr. C. W. De Villiers for plaintiff; defendant in default.

Stephanus Daniel Fick, plaintiff, said that after living on a farm for five years, he went to Hermanuspetrusfontein, because his wife did not like farm life. In September and October last he was away, and on his return he heard certain rumours about his wife to which he paid no attention. Later, the rumours were repeated, and he noticed that his wife became quarrelsome. When taxed with intimacy with a man named Deacon, she denied it but the servants corroborated the charge. Subsequently, the defendant went to her mother at Caledon on a three week's visit, and had not since returned. Witness had visited Caledon, but the defendant refused to return.

Rule granted, the defendant to return to the plaintiff by the 30th September, and to show cause by the first day of next term why a decree of divorce should not be granted, the plaintiff to have custody of the children.

ISAACSON V. WALSH AND WALSH. { 1903. Aug. 26th. Sept. 2nd. Oct. 19th.

Breach of Contract—Damages.

This was an action for damages, brought by Albert Isaacson, of Cape Town, against Messrs. Walsh and Walsh, of Caledon, for breach of contract.

The declaration set forth that on the 2nd December, 1901, an agreement was entered into between the plaintiff and the defendants, whereby the former agreed to give his services as masseur for a period of three years in consideration of a payment of £45 a month, and an equal division of the earnings after they reached £700. About July, 1902, the defendants broke the said contract, and by reason of the breach plaintiff had lost his salary, and claimed damages in the sum of £3,154, together with interest *a tempore morae* and costs of suit.

The plea admitted the formal allegations in the declaration and set out that the company took over the liabilities and obligations of the defendants, and the plaintiff had full knowledge thereof, and in June it was agreed that the plaintiff should transfer his services to the company. The plaintiff, in August, 1902, wrongfully and unlawfully refused to carry out his duties, or to continue in his employment.

Mr. Wilkinson for the plaintiff. Mr. Upington (with him Mr. J. E. R. De Villiers) for the defendant.

Albert Isaacson, plaintiff, said that he had been a masseur for a considerable number of years. Previous to 1901 he had been employed at the Caledon Baths. On the 2nd December a contract, which he signed, was presented to him by Messrs. Walsh. On the 8th December another masseur arrived, and witness had an interview with the defendants, on the 28th December, with reference to a division of the work. The defendants said that Mrs. Halls would distribute the work, and witness pointed out that it was agreed that witness was to be the head of the massage department, and that he was to divide the work. Nearly all the new patients were sent to the other masseur, and witness could not possibly come up to the £700. He continued his services up to the 7th July, 1902, when he got his holidays. The company took over in July, and in answer to plaintiff's attorney the company's attorney wrote that the contract would be carried out as if the defendants were the sole owners, but, at the same time, they did not see what claim plaintiff had against the defendants. After a deal of correspondence, when witness was on his holidays, he was finally told to remove his furniture. He estimated his loss at between £400 and £500.

Cross-examined by Mr. Upington: He had three previous contracts with the defendants. He had received notice from the defendants at the expiration of a previous contract, and Mr. G. Walsh asked him to remain. In the previous contract he had £600 a year, and profits after a certain figure was reached. He had heard that the place

was going to be floated. He denied that Mr. John Walsh told him that he was going to float the company. Witness consented to give his services to the company on the same conditions. The agreement as to the distribution of work, in the contracts he submitted to the company. Before the other masseur was dismissed he was prepared to transfer his services to the company on the same conditions; but he would have insisted on an agreement as to distribution of the work. He was given a holiday in July for one month, but he did not return at the expiration of that time to the baths. On the 2nd September he had an interview with the directors, and the result was that he should submit certain proposals in writing. He made it clear that the conditions would be different with the company since the other masseur had been dismissed. He never said anything about continuing on the same salary if another man was engaged. He started on his own account in Muizenberg in November, and at present he was carrying on business in Cape Town. It might be that the company had made more than Walsh and Walsh, but while he admitted that he would have made more profit, it was necessary to have specific conditions since the other masseur was dismissed. There was an agreement between the defendants and himself with regard to the distribution of the work, and he believed he mentioned the stipulation to the directors.

Re-examined by Mr. Wilkinson: During the latter part of his services with Walsh he did not get half the work, and that was what he wanted from the company. He really wanted the distribution of the work defined in the contract.

By Maasdorp, J.: When he left Muizenberg, he had no more patients; he had finished them.

[Maasdorp, J.: Do you mean you had cured them, or——?]

Ellen Isaacson, wife of the plaintiff, said that she helped her husband in his business. Since the plaintiff left the Caledon Baths, he had spent some £400 over what he had earned.

Cross-examined by Mr. De Villiers: She could not say how much money was spent.

Mr. Wilkinson closed his case.

Mr. Upington called the defendant

John George Walsh, one of the partners in the former ownership of the Caledon Baths, who said that when the plaintiff's previous agreement was terminated, he asked to be retained, and a new contract was entered into. It was agreed that the earnings by both masseurs over the specified amount should be lumped together and divided. When the company was being formed, the plaintiff had no objection to go over when witness agreed to the provision of accommodation at the baths, and that no other masseur should be engaged so long as his wife was able to do the work. There was never any question as to the distribution of that work. It was arranged that the contract should be taken over by the company, and they were prepared to continue the plaintiff in exactly the same position as before, and the real hitch occurred through the plaintiff wanting a great increase of salary. The company were in a bad fix when the plaintiff did not return, and they were most anxious to retain him upon the old terms.

Cross-examined by Mr. Wilkinson: The plaintiff would have made more money under the company, as they were unlikely to engage any other masseur. Many more patients went to the other masseur than to the plaintiff, notwithstanding the efforts of witness. Witness thought the plaintiff should have one-half the commission of the earnings. The plaintiff consented entirely to the transfer of the contract. The first intimation that witness had that the plaintiff was dissatisfied was on the receipt of the lawyer's letter. He felt that he should have had the plaintiff's consent to the contract before the flotation was launched.

Wm. J. Walsh, partner in the defendant firm, said that the letter which was lost from the plaintiff set out that he was willing to continue his services with the company, and specified that Mrs. Isaacson would look after the remainder of the massage work, and that no one else would be engaged.

Cross-examined by Mr. Wilkinson: He could only remember the general purport of the letter, and he could not say how many conditions were contained in the letter.

Francis le Sueur, acting secretary of the Caledon Baths in September last, said he remembered the plaintiff meeting the directors in that month. He

did not remember the plaintiff making any mention of the condition as to the half-profits. The plaintiff was asked to send in definite conditions.

Cross-examined by Mr. Wilkinson: He did not remember everything that took place at the meeting.

John Greenstay, resident secretary of the Caledon Baths, stated that in August the baths were much in need of a masseur. It would have been to the advantage of the company to have the plaintiff and his wife during August and September at the same terms as those under the defendants.

Vilhelm Clegg, a director of the Caledon Baths, said that he was present when the plaintiff met the directors. There was no mention as to the distribution of work, and he did not remember the plaintiff stipulating that if a second masseur were engaged his profits should be reckoned on half the earnings. The directors were prepared to carry on the contract the plaintiff had with the defendant. There would have been no difficulty in erecting a house for the plaintiff. The plaintiff put different terms before the meeting, which were not entertained.

Mr. Upington closed his case.

Postea (October 19th).

Counsel argued on the facts of the case.

Maasdorp, J.: The plaintiff alleges in his declaration that on the 2nd of December, 1901, he entered into a written contract with the defendants, whereby he and his wife agreed to give their services as masseurs at the Caledon Mineral Baths Sanatorium for the term of three years from the 1st day of December, 1901, to the 30th day of November, 1904, at a monthly payment of the sum of £45. The contract contains other terms and conditions, which it is unnecessary to specify here. The plaintiff and his wife entered upon their duties and did their work under the agreement until the end of July, 1902, when, it is stated in the declaration, the defendants broke their contract with the plaintiffs and refused to retain him and his wife in their service for the remainder of the term. The plaintiff states that he suffered damages in consequence in the sum of £3,154, for which he prays judgment. The defendants plead that the plaintiff in June, 1902, agreed that in case the defendants transferred their business to an incorporated company, the formation of which was then contemplated, he and his wife would transfer their services to the company upon the same terms and conditions upon which they had served the defendants, and release the defendants from their obligations under the contract. They say a company called the Caledon Baths, Limited, was thereafter formed, which took over the business on the first day of August, 1902, and offered to retain the services of the plaintiff and his wife in terms of the written contract, but the plaintiff refused to carry out his duties and obligations thereunder. The Court has to decide in the first place whether the agreement set forth in the plea was concluded between the parties. The plaintiff says he had a conversation with J. G. Walsh, in which he was asked to consent to the contract being taken over by the company, and he told Walsh he was willing to give his services to the company upon certain conditions, which were not contained in the contract. Nothing was then definitely decided, and Mr. Walsh requested the plaintiff to give his consent in writing. J. Walsh admits that in May or June, 1902, he got a letter from the plaintiff, saying that he was prepared to sign any deed required by the defendants, but he put in a condition requiring the two points mentioned to be clearly stated. Those points were the conditions proposed by plaintiff, which did not appear in the contract. It is clear, therefore, that the consent given by the plaintiff was conditional. Mr. Walsh never communicated to the plaintiff his acceptance of the conditions, and in consequence no agreement was concluded, whereby the plaintiff was bound to release the defendants, and transfer his services to the company. Although Mr. Walsh admits that the consent given by the plaintiff was conditional, the defendants insist in their plea, and in their correspondence through their attorneys that the plaintiff shall enter into the service of the company under the original agreement of the 2nd of December, 1901. Upon this issue between the parties, I came to the conclusion that the defendants must fail. The defendants having disposed of their business to the company in August, 1902, were not in a position to retain the services of the plaintiff

and his wife under their agreement, and the result is that they have broken their contract, and are liable to the plaintiff for any damages he can prove he has sustained in consequence. The plaintiff was not bound to go over into the service of the company, but it is quite clear that the company was prepared and offered to retain his services on the same conditions as he served the defendants. It also appears that there was nothing in the proposed relationship between the plaintiff and the company which was personally objectionable to the plaintiff, because he was prepared to continue the work with them upon more advantageous conditions. The question therefore arises whether, under these circumstances, the plaintiff has shown that any actual damage was suffered by him through breach of contract on the part of the defendants. Upon the point of damages, the case of *Brace* v. *Calder* (2 Q.B.D., 1895, p. 253) was cited at the bar. It appeared that in that case the plaintiff had entered under agreement into the service of four partners of a firm. Before the expiration of the term of his service, two of the partners retired from the firm, but the remaining two were willing to retain his services. He, however, brought an action for damages for breach of contract. The Court, by a majority, held that the breach of contract had been proved, and Lopes, L.J., said: "In estimating the damages it must be taken into consideration that the continuing partners were willing to keep him on in their service till the end of the year, at the same salary as before; but he declined to serve them, and therefore it was his own fault that he suffered any loss. Consequently the damages resulting from the breach of contract would be nominal." Lord Esher said: "Assuming that there was such a breach of contract, I think it is obvious that in estimating the damages for it, the possibility of the plaintiff's getting other employment equally good for the remainder of the two years must be taken into account. In this case it appears that he could have got such employment, and therefore the damages are only nominal." In my opinion, these very sound principles are entirely applicable to the present case. I come to the conclusion that the plaintiff succeeded in proving the breach of contract, but that he is entitled to only nominal damages. Judgment will be given for the plaintiff for £5, with costs.

Kotzé, J., said he was of the same opinion. It seemed to him that the plaintiff's contention that a breach of contract has taken place on the part of the defendant was a correct one. As to the question of damages, seeing that the company agreed to take over the plaintiff's services on the like terms, it followed that he had not sustained substantial damages. Consequently, he agreed that, so far as damages were concerned, the plaintiff was only entitled to £5 by way of nominal damages, with costs.

Plaintiff's attorneys: C. W. Slaughter.

Defendant's attorneys: Van Zyl and Buissinne.

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice KOTZE.]

ADMISSIONS. { 1903. Aug. 27th.

Mr. Schreiner, K.C., moved for the admission of Daniel Rudolph de Wet as an attorney. Counsel said that applicant was an attorney, notary, and translator of the High Court of Pretoria.

The application was granted, oath to be taken before the R.M. of Philip's Town.

Mr. Schreiner, K.C., moved for the admission of Ross Ashton Dold as an attorney.

Application granted, and oath administered.

PROVISIONAL ROLL.

EASTERN PROVINCE GUARDIAN LOAN AND INVESTMENT CO. V. ORANGE RIVER IRRIGATION CO.

Mr. Struben moved for provisional sentence on a mortgage bond for £3,500, dated August 8, 1902, with interest at 7

per cent., and for the property hypothecated to be declared executable.

Order granted.

JAGGER AND CO. V. HOWARD AND LOW.

Mr. J. E. R. de Villiers moved for provisional sentence on a promissory note for £85 11s. 3d., and interest from the 1st June.

Order granted.

JAGGER AND CO. V. HOWARD.

Mr. J. E. R. de Villiers moved for provisional sentence on a promissory note for £55 9s. 9d., and interest from the 1st June.

Order granted.

BOARD OF EXECUTORS V. HADIEN.

Mr. Russell moved for provisional sentence on a mortgage bond for £3,000, with interest at 6 per cent., and costs, property specially hypothecated to be declared executable, the bond having become due by reason of the non-payment of interest.

Order granted.

CHIAPPINI BROS. V. HENDRICKS AND ANOTHER.

Mr. De Waal moved for provisional sentence on a mortgage bond for £400, due by reason of the non-payment of interest, and also for interest at the rate of 6 per cent. from the 18th May last. for the property specially hypothecated to be declared executable, and costs of suit.

Order granted.

LE SUEUR V. JACKSON.

Mr. Russell moved for provisional sentence on a mortgage bond for £4,300, due by non-payment of half-yearly interest, also for interest at 6 per cent. from the 1st January, 1903, and costs of suit, and for the property specially hypothecated to be declared executable.

Order granted.

BECK V. SAYDIEN.

Mr. Russell moved for provisional sentence for £550 on a mortgage bond, dated 17th February, 1902, with interest at 6 per cent. from the 1st January last, due by reason of non-payment of interest, also for the property specially hypothecated to be declared executable, and costs of suit.

Defendant said he had got behind with his payments, because he had been ill.

Order granted.

GOTTSCHALK BROS. V. DU TOIT.

Mr. Close moved for provisional sentence on two promissory notes of £262 10s., and £205 respectively. A sum of £130 had been paid on account of the former.

Order granted.

ILLIQUID ROLL.

ADENDORFF V. DEANE. { 1903. Aug. 27th.

Mr. Buchanan moved for judgment under Rule 319, in default of plea, for £49 13s. 1d., balance due for goods sold and delivered to the defendant.

Order granted.

GOLDSTEIN AND CO. V. FINNEY AND CO.

Mr. Benjamin moved for judgment, under Rule 329d, for £44 8s. 3d., goods sold and delivered.

Order granted.

GIBBS, JUNIOR V. BESTER.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £300, money paid by the plaintiff to the defendant as part purchase price of a certain hotel business purchased by the plaintiff from the defendant, the said sale having been subsequently cancelled.

Order granted.

ANDERSON AND CO. V. GEISSLER.

Mr. Struben moved for judgment, under Rule 329d, for £50 3s. 3d., and costs.

Order granted.

WENSE AND CO. V. SANDERS AND CO.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £27, goods sold and delivered, interest and costs.

Order granted.

MELLISH V. TITMAS.

Mr. Buchanan moved for judgment, under Rule 329d, for £49 15s., balance of account for hire of certain houses let by plaintiff to defendant, and also for interest *a tempore morae* and costs of suit.

Order granted.

ROSS AND CO. V. MELLETT.

Mr. Alexander moved for judgment, under Rule 329d, for £129 4s. 11d., goods sold and delivered, interest *a tempore morae*, and costs of suit.

Order granted.

PARTRIDGE V. STEPHAN.

Mr. Upington moved for judgment, under Rule 329d, for £500, balance of purchase price of certain property, plaintiff tendering transfer, also interest on £500 from the 1st July, 1903, and costs of suit.

Order granted.

SCHIETEKAT V. KIRSTEN.

Mr. Russell moved for judgment for £1,050, purchase price of certain property, with interest from the 1st May, 1903. Counsel added that there was an alternative prayer in the summons for cancellation and damages, but he did not ask for judgment under that head.

Order granted.

REHABILITATIONS.

Mr. M. Bisset moved for the rehabilitation of Henry Madder Ingram, whose estate was sequestrated 19 years ago.

Application granted.

Mr. Close moved for the rehabilitation of Michael James Power, whose estate was sequestrated in 1889.

Application granted.

TRIAL CAUSES.

SAUNDERS V. SAUNDERS. { 1903. Aug. 27th.

This was an action brought by Helen Lucy Margaret Saunders, of Johannesburg, against her husband, for restitution of conjugal rights, failing which, a decree of divorce. Mr. Benjamin appeared for the applicant, and the defendant was in default.

Chas. W. H. Smith, clerk in charge of marriage records, Colonial Office, produced a copy of the certificate of marriage.

The plaintiff, Helen Lucy Margaret Saunders, said she was married to the defendant at Kalk Bay on the 1st March, 1888. She was born at Queen's Town, and was brought up by her grandfather, partly there and partly at Graham's Town. Her father was then living at Kimberley, but subsequently he went to Barberton, where she joined him about 1887. She met her husband at Barberton, but her father said he did not care about her marrying, and sent her to Cape Town. She came down here, and stayed with Captain Jackson. Saunders followed her, and they were married at Kalk Bay by special licence. Her father consented, on the understanding that he would have nothing more to do with her. They had thought of living in the Colony. Defendant's father was General Saunders. Defendant was living on remittances, but the remittances ceased after the marriage. Defendant had no other means. They went to Johannesburg. Defendant did not work, and they had no money. He was about five years at Johannesburg. Defendant went to Rhodesia for about nine months, and had employment for a time as manager of the Native Depot, under Dr. Jameson. Defendant then came to Cape Town, where witness had been living, and he took her with him to Kimberley, where he got employment for about two months. Witness was taken ill, and ordered to have a sea voyage. She went to England, but defendant did not send her any money, and when she asked him for remittances, he said he had no money at all. Subsequently defendant came over to England, while witness was in Canada. While in Canada, she had a letter from him saying that he had no money, but he hoped to make some money. She saw him in London on returning from Canada. The defendant told her that he had no home and no money. There were three children of the marriage.

By the Court: She did not know the defendant's whereabouts. She had been working for the past five years.

She was emloyed as a typist during the war, and was now keeping a boarding-house in Johannesburg. She carried on tea-rooms in Canada. Her husband had been in this country for about twenty-five years.

A decree of restitution was granted, the defendant to return to or receive the plaintiff on or before the 15th January, 1904, failing which, a rule *nisi* calling on him to show cause on the 1st February why a decree of divorce should not be granted; personal service to be effected if possible, failing which, publication in the same manner as before.

GENERAL MOTIONS.

MENDELSOHN V. MOSES. { 1903. Aug. 27th.

Mr. Alexander moved for the rule *nisi* to be made absolute. Further assets, said counsel, had been found at Kimberley, and he applied for a rule that these assets should be similarly attached. The amount sued for was £30 16s. 7d. and costs.

Replying to the Chief Justice,

Mr. Alexander said that he had no information as to the amount already attached except that it was insufficient to cover the principal and the costs.

De Villiers, C.J. said that the rule would be made absolute as asked, but the other part of the application must stand over pending fuller information. It would be open for counsel to apply further to a judge in chambers.

REWN V. REWN.

This was an application in respect of a suit for the return of certain cattle in the defendant's possession, the property of his brother, the plaintiff. It appeared, however, that the plaintiff had since been killed in a railway accident, and the matter would, therefore, have to be hung up until an executor was appointed, and for that reason Mr. Buchanan (for plaintiff's estate), applied for the case to stand over *sine die*.

Mr. Alexander, for the defendant, asked what was the direction of the Court with regard to costs.

The Chief Justice said he did not think they could decide the question of costs at the present stage.

VAN DER HORST V. COLONIAL GOVERNMENT.

Mr. Van Zyl applied for a date to be fixed for the trial by jury of an action brought by the plaintiff against the Colonial Government for £5,000, damages alleged to have been sustained by him in a railway accident.

Mr. Schreiner (with him Mr. Howel Jones) said he appeared for the Government. The matter arose out of an explosion of dynamite at some place beyond Tulbagh through a passenger having dropped the dynamite. The plaintiff alleged that the explosion was due to the negligence of the Government.

The case was set down for trial on the 4th November, costs to be costs in the cause.

Ex parte MARTIN.

Mr. M. Bisset moved for an order authorising the cancellation of certain mortgage bonds. It appeared that the bonds had been duly discharged.

Order granted.

Ex parte VAN DER BYL.

Mr. M. de Villiers moved for an attachment *ad fundandam jurisdictionem* in respect of certain two pieces of quit-rent land situated in the division of Hay, which had been specially hypothecated to the applicant for £800 sterling. Counsel said that no interest had been paid by the respondent (J. Boisson), who, it was stated, left the Colony shortly before the war, and was now residing in German West Africa.

Order granted, petitioner being given leave to sue by edictal citation, returnable on the first day of next term, personal service to be effected, if possible, failing which one publication in "Ons Land."

GRAHAM V. GRAHAM.

Mr. Benjamin moved on behalf of the petitioner for leave to sue her husband by edictal citation for restitution of conjugal rigths, failing which a decree of divorce. The petition stated that the parties were married at Knysna, and had resided together there until some time ago, when the defendant lost his appointment, and went

away with the intention of seeking employment. Petitioner had had no communication from the defendant since the 15th June, 1902, and although she had made diligent inquiries she had been unable to ascertain his present whereabouts. She had become entitled to a legacy from the estate of her paternal grandparents. She applied for leave to sue by edictal citation, and for an order authorising the Master to pay £150 from the money standing to her credit to enable her to defray the costs of the action and maintain herself and children until the same was tried.

Leave to sue granted, rule to be returnable on the last day of next term, personal service to be effected if possible, failing which one publication in each of the Cape Town daily newspapers. An order was also granted authorising the Master to pay £150 to the applicant.

Ex parte JANSEN.

Mr. Benjamin moved for an order authorising the registration of the transfer of a property at the corner of Castle and Burg-streets, occupied by W. A. Richards and Sons. The petitioner held the power of attorney of George Pauling, who was the late owner. The property was formerly purchased for £12,000, and had now been sold for £32,000. The Registrar of Deeds objected to pass transfer on the ground that the power of attorney did not sufficiently describe the property. The purchase price had actually been paid to Mr. Pauling.

Order granted as prayed.

Ex parte BRINK AND ANOTHER.

Mr. M. Bisset moved for leave to sell certain property at Oudtshoorn, in an estate of which petitioners were executors testamentary, to the Colonial Government for £1,000. It appeared that a minor was interested in the estate.

The Master's report was as follows:—

"It seems to me that it would be in the interests of the minor if the proposed sale were allowed to go through. I therefore beg to recommend that your lordships may be pleased to grant an order confirming the sale of the property on either of the following conditions:—

(*a*) That the balance of the said purchase money, after the deduction of the costs of this application, be deposited with one of the Local Trust Companies to credit of the said minor subject to the life usufruct of the first-named petitioner. Or,

(*b*) That the petitioners be empowered to apply the balance of the said purchase money, after deduction of the costs of this application, to the purchase of other property, and the erection of buildings thereon, and to deposit the balance, if any, with one of the Local Trust Companies to credit of the said minor, subject to the life usufruct of the first-named petitioner.

Order granted in terms of clause (*b*) of the Master's Report.

Ex parte BENJAMIN WHEELER AND FRANK WHEELER.

This was an application for leave to sell certain movable property by public auction under the following circumstances.

Messrs. Wheeler were sued by Mr. Sass for damages for the performance by the Nance O'Neil Company, of which Mr. McKee Rankin was manager, of the play "Magda," in respect to which Mr. Sass claimed the sole right to produce in the Colony. Mr. Rankin guaranteed Messrs. Wheeler against all costs and expenses in connection with the action. While the action was pending, Mr. Rankin was about to leave the jurisdiction of the Court, and Messrs. Wheeler applied to have him arrested until he gave security. The Court then ordered that Messrs. Wheeler might retain the sum of £200, which they had in their possession belonging to Mr. Rankin. Subsequently, Mr. Rankin interviewed the applicants, and deposited with them certain jewellery as security for payment of that amount of money. The action had now been settled between the Wheelers and Sass, and it was for the purpose of paying to Sass the sum agreed upon (£75) and their (Messrs. Wheeler's) costs in the matter that the applicant wished to realise this jewellery. Attached to the petition was a letter, dated February 27, 1902, from Mr. Rankin to Messrs. Van Zyl and Buissinne, the applicants' attorneys, in which he stated: "I hand over to you jewellery valued by Mr. Myers, jeweller, at £240, which I authorise you to hold as security for payment. If I

fail to pay this amount to you by December 31, 1902, this will be your authority to realise the diamonds enclosed, and to pay the proceeds into court in accordance with the order given. I need hardly add that if this Sass matter is settled, and the Wheelers, and I come to an amicable arrangement, there will be no necessity to sell the jewellery." Mr. Rankin was liable altogether for £160. Counsel mentioned that Mr. Rankin's daughter, who was in South Africa, was anxious to purchase this jewellery.

[De Villiers, C.J.: It is desirable that the applicant's daughter should have the jewellery. Has she made any offer?]

Mr. Upington (for the applicant) said she had not to his knowledge.

The case was ordered to stand over for information on this point.

Later in the day Mr. Upington said Mr. Rankin's daughter had offered to pay the amount of the claim if the jewellery were handed over to her. She had, however, left for England.

The case was ordered to stand over.

Ex parte MARAIS.

Mr. Benjamin moved for leave to transfer certain property bought by petitioner, the executor in the estate of the late Wilhelm Jacobus Marais, at public auction. It was deposed on affidavit that the sale was well attended, and that the price was a good one.

Granted.

Ex parte ACKERMAN.

Mr. C. W. de Villiers moved for an order authorising the cancellation of a certain mortgage bond.

Granted.

BUFFALO SUPPLY AND COLD STORAGE COMPANY V. TETLEY AND FLEMING.

Mr. Benjamin applied on behalf of the Buffalo Company, the defendants in the action, for removal of bar, leave to plead, and postponement of trial.

Mr. Schreiner, K.C., appeared for the respondents.

It appeared that there was a sum of £20,800 claimed by Tetley and Fleming. Of this £20,000 was admitted to be due, but the £800 was in dispute.

Mr. Schreiner consented to the removal of bar, providing judgment were given for £20,000. The defendants could then defend the claim for the balance.

Mr. Benjamin said that the company was in liquidation, but was quite solvent. It had been absorbed by another company, and it was expected that the amount, which would be paid by this other company, would be about £167,000. At present, however, there was no money in the hands of the liquidators, and he (Mr. Benjamin) would therefore apply for a stay of execution if judgment were given for the £20,093, admitted to be due.

De Villiers, C.J.: The Court will order that the bar be removed, and the defendant allowed to plead, and the trial be postponed, on condition that judgment be entered for plaintiffs for £20,093 7s. 3d., with costs, without prejudice to the plaintiffs' right to recover the balance of the amount claimed by them. As to a stay of execution, I think that that matter should be left to the plaintiffs. I should think it would be desirable in their own interests for plaintiffs to stay execution, but by staying execution the Court would be depriving them of judgment. Costs will stand over.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

JAGGER AND CO. AND WHITE AND CO. V. HERMAN BLOMSON.

Mr. Upington, for the applicants, moved that the defendant's estate be finally adjudicated as insolvent.

Order granted.

STERNER V. MOROM. { 1903. Aug. 27th. Sept. 3rd.

Builder's right of retention—Spoliation.

Applicant having been clandestinely deprived of possession of a house in which he, as builder, has performed certain work, and which he claimed the right to retain until he was paid his costs and charges. The Court ordered the owner

to restore possession, pending proceedings by him to recover possession.

This was an application by Jacob Sterner, contractor, Wynberg, against James Allan Morom, also of Wynberg, for an interdict with respect to certain premises known as Broomsgrove House, Main-road, Wynberg.

The applicant seeks the recovery of a right of lien. The applicant made certain repairs and renovations to the property, under a contract with one Dr. Gillanders, who subsequently became insolvent. At the meeting of creditors, it was resolved that the property should be restored to the present respondent, who had sold it to Dr. Gillanders for £400. Acting upon that, Morom obtained entrance to this house. The applicant's contention was that the respondent had got possession contrary to law of a property on which he (Sterner) had a lien.

The affidavit of Alphonse de Beer stated that he held the applicant's power of attorney, Sterner being away in Europe. In November, 1902, the applicant performed services as a builder, and supplied certain material at the said premises. On the 22nd May, 1903, the estate of Gillanders was sequestrated as insolvent, and the deponent filed a proof of debt for £208, as balance of account for work and labour done, and building materials supplied. The key was in the hands of Sterner, who claimed to have a preferent lien. Subsequently correspondence took place between deponent and the secretary of the Board of Executors, who was trustee in the estate of Gillanders. Morom demanded that deponent should hand over the key of the premises, but deponent declined, and he subsequently found that respondent or his representatives had effected entrance, and declared an intention to hold the premises against all-comers.

The affidavits of the respondent and others stated that on the 12th August it was found that a window-pane had been broken, and respondent sent in one Wallworth, who got through the window and opened the door. Respondent went in, and placed a representative of his on the premises, and on the same day his daughter, Mrs. Vincent, removed into the building, and was still living there. Respondent said that the applicant's claim was not against him, but against the insolvent estate of Gillanders. Respondent's daughter had seen a man named Eastman on the premises. She accused him of having broken into the premises, but he denied that.

The replying affidavits of De Beer and Eastman stated that the respondent demanded the key on the 8th August from De Beer, who, however, declined to give up the key unless the claims of Sterner were satisfied. Respondent then informed him that one of the windows had been broken. De Beer sent Eastman to repair the window. Eastman went at 8 a.m., entered by the front door, and took measurements, but on returning at 11 a.m., he found that the front door had been barred. On going to the back door, he found several pieces of broken glass and a fractured window. He effected the repairs and left the house. He denied that he broke any pane of glass for the purpose of entering the premises.

Mr. Close (for applicant): We clearly had a lien on this property. See Act 5 of 1861, section 8. We were in quiet possession.

Mr. Upington (for respondent): Your lordships suggested that I should look for some authorities on the question of the right to cancel a contract on the ground of non-payment. I have not succeeded in finding any cases on this question, but there are authorities referring to *læsio enormis*. On this, see *Pothier on Contracts* (Cushing's Translation), p. 236, Sec. 372). My contention is, that the recission of a contract of sale on the ground of non-payment by the purchaser stands on the same footing as *læsio enormis*. If anything, the case for recission for non-payment is stronger. The fact that recognition of *læsio enormis* has been abolished by statute does not cut away the ground from the analogy I base thereon. If a purchaser has not paid the purchase price, he is allowed to pay it and take the property.

[Maasdorp, J.: But if the purchaser has not paid, has not the vendor the *jus retentionis*?]

The purchaser can still get necessary and useful expenses, but the purchaser cannot transfer his right of lien to a third person.

[Maasdorp, J.: But in this case have they not given up their pledge?]

Our contention is, that the heir had a *jus in rem* over the property. According to Pothier, the vendor re-enters on the estate discharged from all obligations.

[Kotzé, J.: Even a *mala fide* possessor can set up a claim for improvements.]

No doubt such *mala fide* possessor is entitled to be recompensed for his improvements, but he must show that the improvements have resulted in some benefit to the applicants. He has not shown that he has improved the property to the value of one single halfpenny. He does not say he has improved it, nor does he base his case on having done so. Whether we consider Stenting as a *mala fide* possessor, or as having a lien on the property as against Dr. Gillanders, he must show how he has improved the property.

[Kotzé, J.: What right had you to take possession of the house?]

It is true we went in by a back window, but a man may go into his own house in any way he pleases. We entered the house *bona fide*, and there is no question of spoliation here. The basis of my case is, that the applicant comes into Court claiming a real right to the property, as against Dr. Gillanders, in virtue of his lien. He does not claim a lien as a possessor, whether *bona fide* or *mala fide*, but as a builder; but to this he has no right unless he is prepared to show that Gillanders acted as his agent. A builder cannot claim both against the person with whom he has contracted and also against the owner, for improvements. He has elected to proceed against Gillander's estate, and hence he cannot now shift his ground and come against us. I submit that applicant's lien as a builder is inoperative against us.

Postea (September 3).

Maasdorp, J.: It appears that the respondent in this matter sold the house in question to a Mr. Gillanders, and after the sale, he gave possession to the purchaser, but no transfer of the property took place. When Mr. Gillanders obtained possession, he employed the applicant to effect certain repairs and alterations in the house. The work was undertaken by the applicant, and a considerable amount of work was done, in the shape of repairs and alterations, and also improvements, and there is now due to the applicant for the work done by him the sum of £280 6s. While the work was proceeding, the estate of Gillanders was surrendered, and the trustee came to some arrangement with the respondent for the cancellation of the sale of this property. The applicant at that time was still in possession of the house, and still retained the key. He had been put in possession, and the key had been handed to him by the purchaser, and he was expected to retain possession and keep the key until he had finished the work he had undertaken to do. After the sequestration of the estate, the respondent requested the applicant to give up possession of the property, but he failed to do so. Thereupon, he declares that the respondent clandestinely obtained possession of the property by getting through the window at the back of the house, and succeeding in obtaining possession of certain keys inside the house, he opened the house, and put someone in charge of it for himself. Now, at that time a claim had been set up by the builder to a right to retain possession of the property until he should have been paid for his work. That was a *bona fide* claim, and under all the circumstances, there is some *prima facie* grounds for his claim, perhaps not to the full extent to which it is here stated, but, in all probability, to some portion of the expense to which he was put, in so far as he may have benefited the owner himself. It may be that the applicant is in law entitled to a retention of this property until the full payment for all work done by him, and the charges to which he was put. It may be that he is only entitled to retain the property until he is paid by the owner for such improvements as were necessary and useful to the owner himself. Now, these are questions which will have to be decided hereafter, and we do not now undertake to decide them. We only now come to the conclusion that there was a *bona fide* claim set up by the applicant for the retention of this property, and that there is *prima facie* ground for his claim. Under these circumstances, being in quiet possession at the time, he was entitled to retain such possession until he was legally ejected. The law upon the subject was referred to, as it appears upon our Statute. Where

it is provided in Act 5 of 1861, section 8, sub-section 5, that builders shall lose right of tacit hypothecation, but it is provided that nothing in this Act contained shall be construed to deprive any person of any right he may now by law possess to retain any property whatsoever which shall be in his actual possession until his costs and charges incurred thereon shall have been paid. Here there is a right of retention reserved to the builder of the property for his costs and charges. Now it is quite possible that it may be held that, under the circumstances, he is not entitled to all the costs and charges as against the owner, and we do not decide that question now. But he occupies a far stronger position when he proves to the Court he has been at considerable expense to perform work in that house much of which may ultimately appear to have been useful and necessary. Under all the circumstances, the Court will hold that, being in quiet possession, and having been disturbed in his possession clandestinely by the respondent in this case, that the respondent shall restore possession to him, pending proceedings by the respondent to recover possession. The application will therefore be granted in that form, with costs.

Kotzé, J., concurred.

[Applicant's Attorneys: Syfret, Godlonton and Low; Respondent's Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.]

WEPENER V. WEPENER AND RENSBURG. 1903. Aug. 28th

This was an action for divorce brought by Jacob Erasmus Wepener, of the district of Aliwal North, against his wife, Esther Petronella Wepener, on the gound of hr adultery with one Johannes van Rensburg, residing in the district of Elliot, against whom damages and costs of suit were claimed. Mr. J. E. R. de Villiers appeared for the plaintiff, and the suit was undefended.

Chas. W. H. Smith, clerk in charge of marriage registers, produced the register of the marriage.

The evidence of the petitioner, taken on commission, stated that in 1895 he left his home to visit some friends, and his wife went to another portion of the same farm to reside with her father. On his return he went for her, but she declined to accompany him. For some time past she had been living with the co-defendant, and was still living with him in adultery. Recently his father-in-law had had him arrested on a false charge of attempting suicide, which had cost him £35 to defend, and his wife had also contracted debts against him to the amount of £20.

An affidavit by the co-defendant admitted that he was living with the first-named defendant, that they had been cohabiting for the past five years, and that she had given birth to four children, of whom he was the father, three being still alive.

Decree of divorce granted, with judgment for £100 damages against the second-named defendant, who was also ordered to pay the costs of suit.

SAMPSON V. SAMPSON.

This was an action for divorce, brought by Nicholas Sampson, a coloured man, of Wynberg, against his wife Caroline Sampson (born Bailey), for divorce on the ground of adultery with one John Cloete.

Mr. Close apeared for the plaintiff, and the suit was undefended.

Charles W. H. Smith, clerk in charge of the marriage registers, Colonial Office, produced copy of the certificate of the marriage.

Nicholas Sampson, the plaintiff, said he was married to the defendant, Caroline Bailey, in December, 1886, at Port Elizabeth, and he lived there till 1899. They then removed to Wynberg until 1901, when they were visited by a man named John Cloete, who taught his daughter to play the harmonium. Witness had quarrels with his wife about her going out late in the evening with Cloete. He left her, and came to Cape Town. Cloete went to live with his wife in the same house, and she had given birth to a child, of whom witness was not father.

James Arthur Burgess said he knew the parties when they lived together at

Wynberg. John Cloete was now living with the defendant, and they occupied one room. The defendant had given birth to a child, of whom she said John Cloete was the father. Witness was boarding at the house.

Decree of divorce granted.

VENTER V. VENTER AND ANOTHER.

This was a suit instituted by Daniel Nicholas Venter, labourer, district of Prince Albert, against his wife, for divorce, on the ground of her adultery with one Du Plessis. Mr. Wilkinson was for the plaintiff, and the suit was undefended.

Chas. W. H. Smith, clerk in charge of the marriage registers at the Colonial Office, produced a copy of the certificate of marriage.

The plaintiff said he was married to the defendant at Prince Albert on the 16th December, 1895. They first lived in the district of Prince Albert. About three or four months before the war witness went to Bloemfontein to take a situation in the Locomotive Department, leaving his wife with her mother at Oudtshoorn. When the war broke out he was called out on commando; he was a year on commando, and was made a prisoner of war, and kept for 22 months. He afterwards went to Holland to undergo an operation. He returned to the Colony in November last. He did not see his wife from the time he left her before the war until he found her at Worcester in July last. She was living with Du Plessis, the co-defendant. She had a child about three months old. She told witness that it was Du Plessis's child. He had received a letter from her, in which she expresed her regret for what had occurred, and pointed out that he must think over it, and remember how long he was absent from her before the war broke out, and that she received no report as to where he was. He should remember that if he had been with her this would not have happened. He could have her summoned for divorce, and she was willing to pay half the costs. She would be his sister, and always stand by and help him. Witness (continuing his evidence) said he wrote to his wife while in the Free State, and sent her money. There were two children of the marriage, and witness asked for custody of both.

Decree of divorce granted, the plaintiff to have custody of the children of the marriage, and the second defendant to pay the costs.

CARSON V. CARSON.

This was an action brought by Helen Carson, of Sea Point, against her husband, now residing in Kimberley, for restitution of conjugal rights, on the ground of malicious desertion, failing which a decree of divorce. Mr. Upington was for the petitioner. The defendant was unrepresented.

The plaintiff Helen Carson, said she was married to the defendant in 1887 at the Roman Catholic Chapel, Berkeley-road, Dublin. They remained in Ireland until 1894, when they came out to this colony, with the intention of settling here. They stayed together in Cape Town for ten months, when the defendant left her, in order to go to Mafeking. He subsequently proceeded to Kimberley. Since 1895 he had not contributed towards her support, and she had had no communications from him. She had supported herself, first, by taking situations in business houses, and afterwards by carrying on a boarding-house. Counsel read a letter received by plaintiff's attorneys from the defendant, in which he said he had no intention of returning to his wife, or providing her with a home. Witness added that defendant was employed at De Beers, in Kimberley, as a guard.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 30th September, failing which, to show cause on the first day of next term why a decree of divorce should not be granted.

Postea (October 15): The rule was made absolute.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

COLEY V. DE VILLIERS. { 1903. Aug. 28th.

Prospective lease—Abandonment—Cession of rights by lessee.

On November 3rd, 1900, defendant entered into an agreement

with one M., whereby he gave to M. the sole right of prospecting on certain land for certain minerals and precious stones for a term of three years, M. to have the power of ceding his rights on certain conditions. In April, 1901, M. ceded his rights to the plaintiff, but the stipulated conditions were not fulfilled till June, 1903, or thereafter. Defendant thereupon refused to recognize M.'s right of cession or to acknowledge plaintiff as the concessionary, alleging that M. had abandoned his rights previous to June, 1903. In the absence of evidence of abandonment by M. or of acceptance of such abandonment by defendant or of any neglect on M.'s part to perform all his duties under the contract, save as to the payment of rent. The Court held that by such neglect he had not abandoned his rights as a concessionary, that defendant was not justified in refusing to recognise the cession to plaintiff and to allow him to prospect, and that consequently plaintiff was entitled to a declaration of rights and to an extension of five months beyond the time allowed by the original contract.

This was an action brought by Osborne Richard Coley, of Cape Town, against J. N. de Villiers, of Stellenbosch, for a declaration of rights, in respect of the defendant's farm, which had been ceded to the plaintiff by the original lessee on the 20th April, 1901.

The declaration set forth that in November, 1900, the defendant and one Arthur H. Charles Musters entered into an agreement, by which the defendant, as the registered owner of the property, gave Musters the sole right for a period of three years to prospect for iron, copper, tin, other mineral materials, and precious stones on his farm. It was provided that the owner should have the use of his homestead and a certain area ,and a preferent right as to water. The concessionaire had the right to purchase the property within the said period for the sum of £8,000, and in consideration, he had to pay the rental of £1, £2, and £3 per month during the three years. The three years expire in November, 1903. It was lawful for the concessionaire to terminate the contract within fifteen months, provided he intimated his intention, and reinstated all the disturbances of soil. Subject to certain conditions, the owner could not transfer his land during the three years. On April 20, 1901, A. H. C. Musters transferred all his rights to the plaintiff, and on June 15, 1903, the plaintiff tendered to pay the defendant the rent, £72, being the amount stipulated in the said agreement. On June 19, 1903, the defendant refused to recognise the rights of the plaintiff, and refused to allow Mr. Bennett, an engineer, whom he had deputed to look over the property, to come on the farm. Plaintiff claimed an order compelling the defendant to declare the agreement not only during the period of three years, but also during such extended period as the Court might decree the plaintiff entitled to, by reason of the defendant wrongfully and unlawfully cancelling the agreement, and also to restrain him from interfering with the plaintiff's servant.

The plea admitted the agreement between Musters and the defendant, but the defendant had no knowledge of the concession to the plaintiff. The tender of £72, by way of rent, was considered unsatisfactory in terms of the agreement, and the refusal to allow Bennet on the farm was not wrongful and unlawful. Prior to the 15th June, 1903, neither Musters nor the plaintiff had been to the farm, nor was any rent paid. No intimation of the said transfer was given to the defendant. Prior to the 15th June, 1903, the plaintiff had abandoned his rights, and allowed the agreement to lapse. Acting under the belief that the contract had lapsed, the defendant in May sold the farm to a third party, but the transfer had not yet been given, and the defendant would be seriously prejudiced if the sale were not carried into effect.

The replication was general.

Mr. Schreiner, K.C. (with him Mr. J. de Villiers) for plaintiff; Mr. Burton (with him Mr. Van Zyl) for defendant.

Osborne Richard Coley said he held a cession from Mr. Musters of his right under the agreement. The cession was verbally made on the 20th April, 1901. The cession was subsequently confirmed in writing, and witness made financial advances to develop the property, and he had never abandoned his claim. Musters, as far as he knew, paid no rent, and neither did witness. The farm was close to Saxonberg, where tin had been discovered, and although witness first prospected for coal, he resorted to tin in June last, when he tendered the rent of £72. It was understood that if he succeeded in getting anything out of the property, one-half should go to witness, and the other to Muster's wife and child. In June, 1903, he wanted Mr. Bennett, an engineer, to inspect the property, and consequent on the defendant's refusal, he had lost that opportunity, and he was able to do nothing since June last.

Cross-examined by Mr. Burton: Musters told him he had paid no rent, but he did not say that he had never been to the place, although he clearly understood he had done no work. He got the cession in April, 1901, and he made no intimation to the owner for two years. He had endeavoured to raise capital, although he had never been there, nor had he sent anyone. He had, however, heard there was a likelihood of coal being discovered there. He never attempted to finance the owner with his rent. He knew nothing of De Villiers having sold his property to the Frank Cushing Syndicate in June. He did not notice that the prospectus covered that particular property. He had read in June that there was a likelihood of tin being discovered. It was not after the sale to the Cushing Syndicate that he wrote the letter. Musters neither had the time nor the inclination to work the property; but at the same time, he was in pecuniary difficulties towards the end of 1901.

Re-examined by Mr. Schreiner: Before he wrote the letter, he had consulted his attorneys, and as soon as he heard of the sale, he got the interdict on the transfer.

Mr. Schreiner closed his case.

Jan Nicholas de Villiers said that on the 4th November, 1900, he drew up the agreement with Musters. Beyond £3, he never got any rent. Musters never came near the place, nor did he send anyone to prospect. In September, 1901, he saw Musters at Kenilworth races, and he said on account of the war he did not succeed in his intentions. He never saw Musters again, and he did not know the plaintiff at all; in fact, he thought the whole thing was dead. Musters never said a word about having consigned his rights to anyone else. The Frank Cushing Syndicate bought the property on the 27th May, 1903, and on the 15th June he first heard of the plaintiff.

Cross-examined by Mr. Schreiner: He never went to Walker's office for the rent, and he had never made any demand on any person. When he met Musters at the races, witness said, "What about the company?" He entered into a written contract with the Cushing Syndicate where it was detained in the office, and he thought he could manage to get the document. Cushing himself asked him to sell the farm, and witness signed the contract before the interdict was granted.

Harry Thomas Standen, defendant's attorney, said that the first he knew of the sale was in May, when the defendant and one of the directors of the Frank Cushing Syndicate called at his office, and on the 27th May, at a meeting, the preliminaries were arranged.

By Mr. Schreiner: He never saw the document drawn up by Mr. Cushing and the defendant.

Mr. Schreiner, K.C. (for the plaintiff): The case of *Thomas* v. *Carr* (13 C.T.R., 526) shows that the mere neglect to pay rent is not sufficient to terminate a lease. This lease is a specific contract, and does not give the defendant the right to object arbitrarily to a cessionary if the cessionary undertook to pay the arrears of rent and to fulfil all obligations under the lease. All we have to do is to prove the cession. Mostert simply says that owing to the war he had not succeeded in floating a company, but that there was no abandonment of his right as to the time to which he was entitled by way of extension. See *De Beers Mines* v. *McCarthy* (17 S.C.R., 439).

Mr. Burton (for defendant): If the Court is against me on the main ques-

tion I cannot object to a reasonable extension of time. If, however, we look to the pleadings, I would point out that after the lease to Mostert in November, 1900, we hear nothing from him till June 15, 1903. By that time the defendant had sold the property to a third person. Up to that time there was no contractural relationship between Mostert and the defendant. Until paragraph 5 of the lease applied there could be no such relationship between the plaintiff and the defendant. That could only arise after notice had been given in terms of paragraph 5. The defendant was led by Mostert's conduct to believe that he had abandoned all his rights. Clause 3 give the concessionaire the right to terminate the lease should he fail to find minerals within 15 months. No doubt Coley may have had rights against Mostert in respect of the cession, but he had none against the defendant, because he had not notified the defendant of his intention to fulfil his obligations under the lease.

[Maasdorp, J.: Both parties must consent to the abandonment of a contract.]

A person may abandon by his conduct. Here Mostert did not use his rights and did not pay his rent; but I do not wish to build on this point. The defendant treated the contract as dead. He asked for no rent, and clearly showed that he regarded the contract as abandoned. Briefly, my points are: (1) That up to June, 1903, there was no contractual relation between plaintiff and defendant, and (2) that Mostert, by his own conduct, had abandoned his rights.

Mr. Schreiner was not called upon in reply.

Maasdorp, J.: It appears that on the 3rd November, 1900, an agreement was entered into between the defendant and one Musters, in which the defendant granted to Musters the sole right to prospect for iron and lead and also for precious stones, upon certain land for three consecutive years. In the ordinary course, therefore, this agreement would have expired on the 3rd November of this year. Under this agreement the option is given to Musters, upon his giving notice before the expiry of three years, to purchase the sole right of digging for these minerals for an in definite period. Under clause 5 there is provision made for the cession of the rights under this contract. It is there provided that "the owner shall not be bound to recognise the validity of any assignment or cession on the part of the concessionaire of his rights under these presents, until there shall have been lodged with him an undertaking in writing signed by the assignee or cessionary binding and obliging himself to henceforth fulfil towards him all the obligations theretofore incumbent on the assignor or cedent, and until all rent due to him up to the date of the intimation of such assignment or cession shall have been paid." The plaintiff alleged that he entered into an agreement with Musters on the 20th April, 1901, by which the rights of Musters under the contract were ceded to him, and this agreement which they then entered into was reduced to writing on the 25th July, 1901. However, no intimation was given to the defendant that this cession had taken place until the 15th June, 1903, and De Villiers, upon receiving intimation, repudiated the right under the cession and refused to recognise the plaintiff as the concessionary. It is alleged in the declaration, and admitted by the defendant now, although it was rather questioned in the plea, that all the requirements which it rested upon the concessionary to perform under section 5 of the contract have been performed, that he has lodged an undertaking whereby he takes upon himself all the obligations of the contract, and has tendered to pay all the rent. If, therefore, nothing else is proved, the concessionary would now be entitled to all the rights under the contract and to judgment in this case. But it is alleged by the defendant that this contract was abandoned by the plaintiff before June 15, 1903, and that, consequently, after such abandonment, he cannot now insist upon the contract being performed. The evidence, as put before the Court, upon which this abandonment is averred, is of a very meagre description. As to what passed between the parties, which could convey any intention in this respect on the part of Musters, we have only evidence of a casual conversation which took place between Musters and the defendant at the racecourse. There the defendant, in the year 1901, was evidently under the impression that Musters was still entitled to carry out the condition of this agreement, and he asked him how it was that nothing had yet been done by him.

Musters then told him he had not succeeded in his intentions. His intentions were, under the rights he had under this contract, to float a company, but up to that time he had not succeeded. Well, clearly, nothing was said then from which the Court can infer that Musters had abandoned the contract, and that that abandonment had been accepted by De Villiers; because clearly the abandonment must be mutual, that is, one party abandons, and the other must in some way give his assent to the abandonment. Up to that time nothing had been done which amounted to an abandonment in the eyes of the defendant himself. As a matter of fact, when that conversation took place, there had been already a contract for the cession to Coley, but of course that contract could not be binding upon the defendant until the conditions of section 5 had been performed. That took place only in June. The abandonment, according to the plea, is said to be an abandonment, not by Musters, but by Coley. We have therefore now to consider whether anything was done or said by Coley which amounted to an abandonment of his rights under the contract, and whether such abandonment was accepted by the defendant. Now, it has not been shown that it was the duty of the plaintiff to perform certain work as prospector, the neglect of which would indicate abandonment, or that it was the duty of the plaintiff to perform certain conditions of the contract at certain periods, the neglect of which might have amounted to an abandonment. The only neglect on his part materially affecting the defendant was his neglect to pay rent. Now, that matter has been so fully considered lately in its bearing on the matter of the termination of a contract that it is not necessary to go into it now, but it has been clearly established that neglect to pay rent for any long period does not of itself operate as a forfeiture of the rights of the lessee, where he subsequently tenders payment of the rent. I come to the conclusion that such neglect also does not operate as proof of an abandonment of the rights of the parties under the agreement. There is one other clause in the contract which I should like to refer to as bearing upon this case, and that is the third clause, which provides: "It shall be lawful for the said concessionaire to terminate these presents at any time prior to the expiry of the first fifteen months of the said term of three years in case, after a fair endeavour on his part to find payable minerals, the same have not been found, provided (1) he notifies such intention to terminate, in writing, (2) reinstates all disturbances of the soil. (3) pays his rental up to date of termination, and also pays to the said owner the sum of five pounds sterling." Here we have a clear intention on the part of the defendant under the contract that he would hold Musters bound to this contract unless he gave him notice within a certain time that he desired to terminate the contract. There was no indication of any such intention on the part of Musters himself to terminate this contract. I therefore think it was the duty of the defendant, before he under took to deal with this property, to have ascertained clearly what actually was the intention of Musters or anyone who held a cession, and, having failed to do so, and having dealt with the property without having so ascertained the wishes of the other party to the contract, he has been guilty of breach of this contract. It appears that the defendant, after repudiating the cession, refused to allow the plaintiff to go upon the property under the contract in June, and that consequently from that time plaintiff has been prevented from prospecting. Mr. Burton admits that, if it is now found that the plaintiff's rights under the contract did not terminate until the 3rd November of this year, the plaintiff, having been prevented from prospecting from this period, should now be granted an extension of time equivalent to the period during which he was prevented from carrying on his work upon the property. Under the circumstances, I think the plaintiff is entitled to a declaration of rights in terms of clause "A" of his prayer, and that he is further entitled to an extension of time under the contract to the 1st January next.

Kotzé, J.: I am of the same opinion. I do not find any evidence in this case of abandonment. It is quite true that the Court could presume abandonment from the act of one or other of the parties, but it cannot be said that Coley has really abandoned his rights, and that is really the sole defence.

The Court entered judgment for the plaintiff in terms of prayer "A," the de

fendant to pay costs, including the costs in respect of the interdict.

[Plaintiff's Attorney: A. W. Steer; Defendant's Attorneys: Sauer and Standen.]

KNOESEN v. THERON. { 1903. Aug. 28th.

Slander—Defamatory words.

Where words may have an innocent or a defamatory meaning, the Magistrate was wrong in allowing an exception that the words were not defamatory. He should try the case on its merits and determine whether under the circumstances the words were defamatory.

This was an appeal against a decision of the Resident Magistrate of Kokstad, in which an exception to an action for slander was upheld.

The exception was taken that the words used were not defamatory, and were incapable of any injurious meaning, and the Magistrate upheld that exception. The plaintiff, Maria Johanna Knoesen, instituted an action for £500 damages for slander. In July, 1901, the defendant, while riding to the town of Kokstad, said of the plaintiff to one Zietsman that she was really a married woman, and that he was in the church when she was married to a man named Matthews, and that one Jimmy Knoesen was a son of the marriage, which had been in force for seventeen years. The plaintiff had suffered damages to the extent of £500. The defendant contended that the plaintiff was a duly married woman, and that no exception could be taken to the words.

The Magistrate's reasons for judgment were that the words were not defamatory, and in no way exposed the plaintiff to hatred, ridicule, or contempt.

Mr. Buchanan (for the appellant): I submit (1) that a man who repeats defamatory words cannot shelter himself under the plea that he has only repeated what he has heard. (2) That in this case we must take for granted that the appellant is a spinster. Then if the words complained of are untrue they are slanderous. In *Rudd* v. *De Vos* (2 Sheil, 383) it was held that certain words were not actionable. In that case it was held that the words used did not bear out the innuendo: but in this case the words taken in their plain English meaning are slanderous, and the appellant should not stand or fall by the innuendo. The Magistrate says that the words used would not bring the plaintiff into ridicule or contempt, but he should have gone further if the words were calculated to injure her in her good name. The Magistrate argues that marriage is an honourable state, but so is spinsterhood. She had given out that she was a spinster, and to have it said that she was a married woman and a mother was certainly injurious. The words amount to an accusation of not having told the truth about herself. They may have injured her prospects of marriage, and so have caused her damage: they may also have injured her in social intercourse. Again, it was said that she had been separated from her husband (one Matthews) for 17 years. The fact that Matthews had sent her money would seem to have implied that the separation was her fault, and to imply that was certainly injurious.

Mr. Benjamin (for respondent): The test applied by the Magistrate was quite correct. Were the words used capable of bringing the appellant into hatred, disrepute, or contempt?

[Maasdorp, J.: On the pleadings she is said to be unmarried. Is it not slanderous to say of any unmarried woman that she has had a child?]

Yes, but we must take either the original words or the innuendo: neither imply defamation. It is not defamatory to say that a woman is married.

[Maasdorp, J.: If a woman passes herself off as single, and you say she is married, is not that defamatory?]

I submit not. There is no innuendo that she has been guilty of unchastity: it is only said that she is a married woman and the mother of a child.

[Maasdorp, J.: Suppose a man says "I saw that woman, who professes to be unmarried, married in church," would not that be defamatory if it were untrue?]

No, such a statement would not expose her to hatred, ridicule, or contempt. She was not accused of having led an improper life. A false statement about a person is not necessarily defamatory.

It might have been defamatory to have said that certain persons had called the lady "Miss Knoesen," instead of "Mrs. Matthews."

[Mr. Buchanan: It is injurious to charge a man with paternity.]

[Maasdorp, J.: But here it is said that she was married.]

Mr. Benjamin cited *Odgers on Libel and Slander* (p. 119, 3rd Edit.) as to innuendo.

[Kotzé, J.: According to our law, if the words used are not slanderous in themselves, and no innuendo is laid, there can be no action for defamation.]

[Maasdorp, J.: The innuendo is that the respondent said the appellant was a married woman, whereas she is a spinster.]

The innuendo is so vaguely set forth that we really do not know of what slander we are accused.

[Kotzé, J.: Is not the meaning of the innuendo this: "That she being a spinster and holding herself out as one, was the mother of a child?]

No. If immorality was said to be alleged against her, why was not that clearly set out in the innuendo?

Mr. Buchanan (in reply): Counsel for the respondent has argued as if the bystanders did not know that Miss Knoesen was a spinster. It would be very anomalous if a person could bring his action for slander to title in order to defend his property, and yet could not bring an action to defend his (or her) character.

Maasdorp, J.: The plaintiff, who describes herself as a spinster, fully aged 21 years, sues the defendant in an action for slander, alleging that he said of her that he was astonished that they designated her as Miss Knoesen, when she was really a married woman, and had married a man named Matthews, that he was in the church when the marriage took place, that Matthews, up to some years ago, had sent her money, that it was 17 years since Matthews last met her, and that Jimmy Knoesen was born of the marriage. Then it is said by innuendo that the general meaning of these words is that the plaintiff is the mother of Jimmy Knoesen, and that the words were understood in that sense by those who heard them, whereas the plaintiff is a spinster, and not the mother of the said Jimmy Knoesen. Exception was taken to this summons, on the ground that the words used were not defamatory or actionable, and also that they would not bear the construction put upon them in the innuendo. The Magistrate, in deciding that exception, said that in no sense are the words defamatory, as they in no way exposed the plaintiff to hatred, ridicule, or contempt. Now, it seems to me that the Magistrate was wrong in simply taking the words as they stand without the surrounding circumstances, as alleged in the summons, because the effect of the surrounding circumstances when the words were used would materially affect the meaning that must be attached to the words. Of course, there is nothing injurious in merely stating about a lady that she is married and has children. Of course, that is an honourable position for a lady to occupy, if it is true; but words that may have an apparently innocent meaning, may, under certain circumstances, be very injurious and defamatory. Now, as it is alleged in the summons that this lady is a spinster, and from the very words that are used by the defendant, I cannot but come to the conclusion that he intended to convey at the time that she held herself out as an unmarried lady, and while she was holding herself out as an unmarried lady, she, so far from being a virgin, was the mother of a child. I think no more injurious or scandalous words could be used in reference to an unmarried woman, than that she is the mother of a child; but the other words which were used at the time, in which he stated that she was a married woman, may ultimately show that he was acting honestly, and that he did not intend maliciously and falsely to injure her. What the Magistrate will have to decide when he tries the case upon its merits is, whether these very words were used in such a way, and so understood by the bystanders, as to convey the meaning that the plaintiff was a married woman, or that she had been guilty of immorality. Under all the circumstances, though the words might have an innocent meaning, they might have a very injurious meaning. The exception will be dismissed, and the matter will be referred back to the Magistrate to try the case upon its

merits, the respondent to pay the costs of the appeal.

Kotzé, J., concurred.

[Plaintiff's Attorneys: Findlay and Tait; Defendant's Attorneys: Faure and Zietsman.]

NDUBE V. HOLMES. { 1903. Aug. 28th.

Action against messenger of the Magistrate's Court — Interpleader suit.

Where property seized in execution is claimed by a third party, and no steps are taken to have the claim determined by way of interpleader suit, the claimant may sue the messenger for the recovery of the property.

This was an appeal against a decision of the R.M. of Nqamakwe, in which the appellant sued the respondent unsuccessfully for the return of a certain mare.

The plaintiff sued the defendant as messenger of the Court for the return of the mare, or its value. The mare was seized in execution of a judgment in another case, and plaintiff alleged that he had purchased that mare, which since had three foals, and claimed a return thereof. The messenger's agent found the previous owner of the horse had deserted his residence, and from information he received, he proceeded to the kraal of John Ndube, and duly attached the mare. He then proceeded to other kraals, and attached the young horses. Plaintiff sued for the return of the horse, or its value, and after evidence had been given judgment was given for the defendant, with costs. The Magistrate, in his reasons, said there was no evidence against the defendant to show he did not act in a *bona fide* manner. The manner in which the plaintiff and his witnesses gave their evidence led the Court to believe there was no sale of the horse to the plaintiff.

Mr. Gardiner for appellant. Mr. Benjamin for respondent.

Counsel, having been heard in argument on the facts,

Maasdorp, J.: It appeared an action was brought by one Govu against Gecelo for the delivery of a horse, said to be bought by Qovu from Gecelo, or its value the sum of £50 damages. The Magistrate, in trying the case, found that the horse had been sold by Gecelo to Govu, and consequently gave judgment for the plaintiff in that case, not for the delivery of the horse, but for the payment of the sum of £50. A writ of execution was then issued to obtain satisfaction of this judgment against the property of Gecelo, and the deputy-messenger, acting for the the present defendant, seized the mare now in dispute as the property of Gecelo. The mare was seized by him at the kraal of a man named John Ndube, and it is now claimed by the plaintiff in the present suit as his property. The plaintiff based his claim to the horse upon a sale of the horse by this man Gecelo to himself. It appears from the evidence given by the witnesses for the plaintiff that the mare was really the property of a man called Manzini, who was the father of Gecelo. During the absence of Manzini, Gecelo seems to have acted for his father, having been sent by his father to fetch the whole of his family to where the father was. There was amongst other properties this mare, which Gecelo sold on behalf of Manzini to Josiah Ndube. Now, there is abundance of evidence that this really took place. The evidence which was given by the witnesses for the plaintiff in the case is corroborated in the main point by one witness for the defence. If the statements of these witnesses are believed, then it is clearly proved that Gecelo, acting for his father, sold this horse to the plaintiff. But the Magistrate says that the circumstances of the case and the manner in which the plaintiff and his witnesses gave evidence led the Court to believe that there was no sale of the horse to the plaintiff. The question, therefore, arises, whether there is any evidence to rebut the evidence given by the plaintiff's witnesses. Mr. Benjamin has been unable to point out a statement made by a single witness for the defence, or for the plaintiff, which throws any doubt upon the evidence of the witnesses for the plaintiff. The evidence is therefore all one way in support of the alleged sale, and there is none at all against the sale. Now, it seems to me, the magistrate considered that when he found in the first suit that this horse had

been sold by Gecelo to Govu, in the face of that finding it was impossible for him to come to the conclusion that that horse was also sold to Josiah Ndube. But I think he was wrong there. He may have been perfectly right in finding that there had been a sale by Gecelo to Govu, but that is not inconsistent with the sale of the horse by Gecelo to another person, who purchased it *bona fide*. If Josiah, without knowledge of the sale by Gecelo to Govu, had purchased this horse, and accepted delivery, the property would vest in him, and, therefore, it would not be inconsistent that there was also a sale to Josiah upon which the plaintiff is entitled to claim this property. When the Magistrate makes a finding upon a question of fact, the Court would hesitate before it would interfere with such a finding, and it is generally on the ground that the Magistrate, having the witnesses before him, would be able to judge of their credibility; but I don't think the question of credibility arises here. The point was raised that the proper course to be adopted in this case would have been to proceed by means of an inter-pleader, in which case the property would have remained in the hands of the Messenger, while the parties contested the claim. But in this case an inter-pleader suit was not instituted. The Messenger retained this property in spite of a demand for its delivery, and I think, upon the authority which has been cited by Mr. Gardiner, the Messenger has now to justify his position by showing that in the execution of the writ he seized the property of the defendant in the suit in which the writ was executed. It seems to me that, under all the circumstances of the case, the plaintiff has proved that the property belongs to him, and he is entitled to recover it. The appeal must therefore be allowed, and judgment will be given for the appellant for the delivery of this horse or the payment of £20 and costs in this Court and the Court below.

Kotzé, J., concurred.

[Plaintiff's Attorneys: Walker and Jacobsohn. Defendant's Attorneys: Syfret, Godlonton and Low.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ADMISSIONS. { 1903. Aug. 31st.

Mr. Schreiner, K.C., moved for the admission of Louis Bertie Jacobson as an attorney and notary.

Application granted and oath administered.

Mr. Benjamin moved for the admission of George Greyham Palmer as an attorney and notary.

Application granted, oath to be taken before the Registrar of the Eastern Districts' Court at Graham's Town.

PROVISIONAL ROLL.

WOOLF V. RUDNICK.

Mr. Russell moved for a decree of civil imprisonment on an unsatisfied judgment of this Court for £225 15s. 6d. and taxed costs, £25 15s. 10d.

Mr. Alexander, for the defendant, read the latter's affidavit, which was to the effect that he lived in Longmarket-street, was a foreman carpenter, and earned £5 a week. He had to support a wife and seven children, and practically all his earnings were absorbed by the maintenance of himself and family. He offered to pay £2 a month.

Mr. Russell: I am instructed not to consent to that, because it would take ten years to pay off the debt.

The defendant was called, and he stated that he had no other source of income than his wages, that he paid £5 10s. a month rent, and that £2 a month was the utmost he could afford to pay.

Cross-examined by Mr. Russell: He had sold a house at Woodstock, but he only made about £50 profit.

By the Court: That money had gone in bringing out three of his children from Europe. There was a bond on the property.

Decree of civil imprisonment granted, to be suspended on payment of £4 a month, first payment to be made on the 15th September, with leave to the

plaintiff to apply for an increased contribution.

WIENER AND CO. V. DAVIDSON AND COHEN.

Mr. Nightingale moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

LUNTZ V. SCHOEMAN.

Mr. Benjamin moved for provisional sentence on a good-for for £37 10s., and a promissory note for £375.

Order granted.

HARDY V. WILKES.

Mr. Russell moved for provisional sentence on a bill of exchange for £150.

Defendant's agent said he had filed affidavits, but he had not employed counsel, as he had no funds left.

An affidavit by the defendant's attorney, J. A. Robertson, stated that the defendant was not indebted to the plaintiff in the sum of £150, or any part thereof, and that the plaintiff had admitted to deponent that defendant was not indebted to him. He added that Wilkes was abroad, and he believed would return to this colony in January or February next.

An affidavit by the plaintiff stated that he was induced by the defendant to give up a good business connection at Claremont, to take up some billet under the Cold Storage. He had given Wilkes £60. He denied several of the allegations in the affidavit of Robertson.

Robertson's replying affidavit stated that certain agreements were entered into between the plaintiff and defendant for the importation of cattle from the Argentine, but that, through the Proclamation issued by the Government on the outbreak of disease, it was impossible to carry out the agreement. He contended that plaintiff had wrongfully discounted the bill of exchange sued upon. Proceedings had previously been commenced by the plaintiff against the defendant. The summons, it appeared, was allowed to lapse.

[De Villiers, C.J.: What is the consideration for this bill of exchange?]

Mr. Russell: As far as I can make out, it was an advance of £60 by the plaintiff to the defendant, and for inducing him to leave his employment.

Defendant's agent said it was their desire to pay the £60, though they did not admit the legality of it. If the contract had been carried out the plaintiff would have been entitled to £500 for his £60. The sum of £60 had nothing to do with the bill of exchange, but it was arranged that it should be sent to England to be discounted in case the first shipment of cattle did not realise sufficient.

De Villiers, C.J.: The application for provisional sentence will be refused, and plaintiff must go into the principal case, costs to be costs in the cause. The plaintiff may have a claim for £60 against the defendant, but plaintiff had no right to present the bill of exchange, and, besides, the defendant is not here. The former summons was withdrawn while he was here, but as soon as he left there was a fresh summons issued. He has no property here. I have no doubt the parties will be able to come to some terms, as the defendant's agent holds three bills signed by the defendant.

CUNNINGHAM AND ANOTHER V. JACKSON. 1902. Aug. 31st.

Mr. Russell moved for the provisional order for the sequestration of the defendant's estate to be made final.

Order granted.

ESTATE MARSH V. KOHNE.

Mr. Russell moved for provisional sentence on three mortage bonds as follow: £1,000, with interest from the 1st July, 1901; £800, with interest from the 1st October, 1901; and £1,800, less £800 paid on account, with interest on the sum of £1,800 from the 25th July, 1902, to the 25th January, 1903, and on £1,000 from the 26th January, 1903. Plaintiff also asked for provisional sentence for 12s. premium of insurance, and for the property specially hypothecated to be declared executable.

Order granted.

ESTATE SILBERBAUER V. WILDSCHUT.

Mr. Van Zyl moved for provisional sentence for two sums of £36 11s. and £1,150, with interest and costs of suit.

Order granted.

MEYER V. DU TOIT.

Mr. Russell moved for provisional sentence upon a certain acknowledgment of debt for £15, and also for judgment under Rule 329d for £15 15s. rent.

Order granted.

ILLIQUID ROLL.

DITCHFIELD V. STERNER. { 1903. Aug. 31st.

Mr. J. E. R. de Villiers moved for judgment under Rule 329d for £22 10s. for sanitary fixtures provided and fixed by the plaintiff at defendant's instance and request, with interest *a tempore morae* and costs.

Order granted.

POTGIETER V. BATTESON.

Mr. Burton moved for judgment under Rule 319 in terms of plaintiff's declaration for transfer of a certain farm to the plaintiff from the defendant, plaintiff tendering to take over the mortgage bond thereon.

Order granted.

SMITH V. IBERTSON.

Mr. Nightingale moved for pudgment under Rule 329d for £220, purchase price of certain land, with interest and costs, transfer being tendered on the summons.

Order granted.

MCCRINDLE V. MORRIS.

Mr. Nightingale moved for judgment under Rule 329d for £155, balance of purchase price of certain land, with interest at 6 per cent. from the 1st June, transfer being tendered on the summons.

Order granted.

NYMAN V. RABIE.

Mr. Buchanan moved for judgment under Rule 329d for £72 rent due by the defendant to the plaintiff.

Order granted.

SPILHAUS V. TAPPE BROS.

Mr. C. W. de Villiers moved for judgment under Rule 329d for £132 11s. 3d., goods sold and delivered, less £25 paid on account, with interest *a tempore morae*, and costs of suit.

Order granted.

ROBERTSON V. MOSS.

Mr. Burton moved for judgment in terms of the report of the referee (Mr. Maynard Nash). The matter, said counsel, was referred to Mr. Maynard Nash to ascertain the state of affairs in connection with the partnership, and Mr. Nash had now handed in his report, which showed that, after deducting £1.000 which he was instructed to deduct, there was due to the plaintiff a sum of £387 13s. 7d. He applied for judgment for this amount, for costs of the action, costs of an application for the appointment of an interim receiver (which had been ordered to stand over pending the result of the action), and for costs of the present motion.

Sir H. Juta (with him Mr. Alexander), who appeared for the defendant, said that with regard to the application for the appointment of an interim receiver, the Court refused the application, and the costs were ordered to stand over. He could not see any reason which appeared from the action why the plaintiff should be allowed these costs, because there was no allegation that the defendant was doing away with the assets, so as to require the appointment of a receiver.

De Villiers, C.J., said that as a partnership had been established between the parties, judgment must be given for the plaintiff for £387 13s. 7d., with costs of this action and the previous motion.

FRANK V. BLACK.

Mr. M. Bisset moved for judgment, under Rule 329d, for £59 12s., goods sold and delivered.

Order granted.

REHABILITATION.

Mr. Buchanan moved for the rehabilitation of Jacobus Johannes Hooper.

The matter was ordered to stand over, in order that a balance-sheet might be filed.

GENERAL MOTIONS.

REYNOLDS V. NEW CAPE CENTRAL RAILWAY, LTD. 1903. Aug. 31st.

Mr. Benjamin applied on behalf of the New Cape Central Railway, Ltd., defendants in the action, for the appointment of a commission to take the evidence of a certain witness—one John Coburn.

Mr. Schreiner, K.C., appeared to oppose.

It was stated on affidavit that on the 22nd August application was made to the Court for the appointment of a commissioner. No order was made, but the Court mentioned that the application might be renewed if it were found impossible for Coburn to be present at the trial, which was set down for the 8th September. Coburn was a divisional engineer in the employ of the Central South African Railways, and resided at Thaba 'Nchu, Orange River Colony. It was stated that if he came to Cape Town, it would involve a week's absence from the work over which he had control. The Government were anxious to have this work completed, and Coburn's absence for a week would cause delay in various ways.

After hearing counsel in argument,

De Villiers, C.J.: The defendant could, of course, subpœna his witness, and the Court could enforce the attendance of the witness, but this seems to be a case in which there are real difficulties in the way of this witness coming here, and I think it would be for the convenience of both parties that this commission should issue. The Court will, therefore, authorise the examination of this witness before a commissioner, and will appoint the Resident Magistrate of Thaba 'Nchu as commissioner to take the evidence. This order will apparently necessitate the postponement of the case. The next term will be earlier than usual, and there will be no very great delay in setting it down for next term.

Costs were ordered to stand over.

HERBERT V. HERBERT.

Mr. C. de Villiers moved for a decree of divorce, the defendant having failed to comply with an order of Court to make restitution of conjugal rights.

Granted.

Ex parte BOUSFIELD.

Mr. Gardiner moved to make absolute a rule *nisi* under the Derelict Lands Act.

Granted.

Ex parte AYRES.

Mr. De Waal moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

Granted.

ESTATE ANTHONISSEN V. NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA.

Mr. Gardiner moved to make absolute an order calling upon defendants to show cause why they should not be compelled to pay the proceeds of a certain policy of insurance.

Granted.

Ex parte HULLEY AND OTHERS.

Mr. Close moved for leave to pass transfer of certain property in which certain minor beneficiaries were interested. The Master recommended that the prayer of the petition be granted.

Leave was granted as prayed.

Ex parte McDANIELL.

Mr. Bisset moved for leave to transfer certain property, under circumstances, the nature of which sufficiently appears from the Master's report. The report reads as follows:

"The petitioner, in her capacity as executrix testamentary of the above-mentioned estate, has sold to her son, J. S. McDaniell, for the sum of £1,650, farm No. 342, situate in the division of East London, which forms part of the assets of the joint estate of herself and her deceased husband, and now prays that she may be authorised to pass transfer thereof to her said son. She further proposes to divide the whole of such purchase price between her eight children now living and the issue of one of her daughters, who died since her late husband's death. The price seems to be a fair one, and so far as the sale itself is concerned, should, I think, be confirmed. In view of the terms of the will, however, and more especially in regard to

the following clause which appears therein, viz.:

"'And at the demise of the survivor of us, then the said joint estate shall be divided equally amongst our aforesaid children which may then be living and the lawful issue and other descendants which may then be living of such of our said children as shall happen to die in our or either of our lifetime; such issue or other descendants to take, nevertheless, only the same share or portion as his or her respective father or mother or other ancestor would have been entitled to if living; and the said joint estate shall thereupon be delivered and paid over to our said children and their issue aforesaid, subject to the payment of the just debts of the said estate.'

"I feel doubtful—the survivor having adiated—as to whether such proposed distribution could now be made, or whether such distribution is only to take place at the death of the petitioner.

"1. Should your Lordships hold that the distribution may now be carried into effect, then I beg to recommend the following:

"That the sale be confirmed, and that the petitioner be authorised to pass transfer of the said farm to her son, James McDaniell, and that the purchase price be distributed on the basis set forth in the petition: the portions accruing to the minors to be paid into the Guardians' Fund.

"2. In the event of your lordships holding that the distribution is only to be made at the death of the petitioner, then I beg to recommend:

"That the sale be confirmed, and that the petitioner be authorised to pass transfer of the said farm to her son, James McDaniell, and that the purchase money be deposited with one of the local trust companies, subject to the life usufruct of the petitioner, and the conditions of the will."

An order was granted in terms of the alternative recommendation of the Master, the proceeds of sale to be deposited with a Trust Company, to be approved of by the Master.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZÉ.]

TRIAL CAUSES.

ASHMAN v. ASHMAN. { 1903. Aug. 31st.

This was an action for restitution of conjugal rights, brought by Sophia Margaret Ashman against her husband.

The declaration set forth that the parties were married in community of property in May, 1892. There were four minor children of the marriage. On the 19th April, 1903, the defendant maliciously deserted the plaintiff, who now claimed an order for restitution of conjugal rights, and failing compliance therewith, a decree of divorce, division of the joint estate, custody of the children, and a reasonable sum for maintenance, with costs of suit.

In an alternative claim, the plaintiff expressed her willingness to accept payment of the sum of £500, cession of her life policy of £500, and certain household furniture.

[Mr. Buchanan for plaintiff; defendant in default.]

Rule granted, the defendant to return to or receive plaintiff on or before the 30th September, or show cause on the first day of next term why a decree of divorce should not be granted, custody of the minor children to the defendant, division of the property, payment of £2 per month as maintenance for each of the children until they attained the age of sixteen years, with costs of suit, or judgment in terms of the alternate claim.

WRIGHT AND DONALD v. WESSELS. { 1903. Aug. 31st Sept. 3rd.

This was an action for the recovery of the sum of £56 15s. 11d., being the balance of an account for work and labour done and goods sold and delivered.

The declaration set out that the plaintiffs were engineers in Cape Town, and the defendant a brickmaker, residing at D'Urban-road. The defendant was justly indebted to the plaintiffs in the sum of £56 15s. 11d. for work and labour done, material supplied, and moneys

disbursed during February and March, 1903. The defendant refused to pay the said sum or any portion of it.

The plea admitted the formal allegations, but set out that in January last the plaintiffs were employed to superintend and carry out the erection of certain machinery, for the purpose of brickmaking, and a certain fan on the Fairfield Estate, and give the services of such workmen as might be necessary to carry out the work in a proper and skilful manner. The plaintiffs accepted the said employment, but they had failed to carry out the work in a workman-like manner, and in consequence of the manner the plaintiffs carried out the work, the defendant was forced to have the work undone and reconstructed. The value of plaintiffs' work did not exceed the sum of £50, which had been paid by the defendant.

For a claim in reconvention, the plaintiff stated that he was prevented from carrying on a profitable business, and sustained damages to the extent of £500.

The replication denied that the plaintiffs undertook to superintend the erection of the machinery in a good and workman-like manner, or that they were in any way liable.

[Mr. Upington for plaintiffs; Mr. M. de Villiers for defendant.]

Walter Wm. Wright, engineer, partner in the plaintiff firm, said that in January, 1903, he entered into an arrangement with the defendant as regarded the labour, but there was nothing arranged with regard to the erection of the machinery. Plaintiff agreed to supply a skilled mechanic and a helper, and the defendant asked him to tender for the erection of certain machinery. Witness had not got control of the mechanic and helper. After Mr. Little had been working for three weeks, he was stopped, and witness had an interview with the defendant, who asked him to send in a tender for the balance of the work. A tender was sent in, but witness heard nothing further about it. Certain work was done at the shop, with a view to the tender. After accounts had been forwarded, the defendant wrote on the 12th April that the account contained some abnormal charges, and witness went and saw the defendant next day. He paid £25 on account, and seemed satisfied. There had been no complaint about the work until the defendant was threatened with proceedings to recover the money. Witness did not in any way supervise the erection of the fan which was complained of, and the material was of the best quality. The labour and material was supplied as they appeared on the account.

Cross-examined by Mr. De Villiers: He had put up brickmaking machinery before. The defendant did not explain anything about machinery. The defendant did not lay particular stress on the erection of the fan, but it was possible witness said that he understood all about the fan. The defendant, witness believed, stopped Little proceeding with the work.

By Kotzé, J.: He could not say why Little was stopped working by the defendant.

Trevor Little, fitter in the C.G.R., at Salt River, said that he was a mechanical engineer, and that in February and March last he was with the plaintiff firm. On January 28 he went out to the defendant's place, and remained there until February 20. The fan was unpacked and in sections, when he arrived. He superintended the removal of the fan to the spot where it was to be erected. He did not bolt the fan together, but, temporarily, he connected the fan to see if all the parts were there. He left before it was taken to pieces again. The defendant gave him to understand that he would not be required again.

Cross-examined by Mr. De Villiers: The defendant, he believed, told him to put the fan up temporarily. He could not possibly believe that the defendant thought that the fan was permanently erected, and proceeded to erect a house over it. It was unnecessary to tell anyone that the fan was only temporarily erected. The foundations were not constructed at witness's instructions.

Re-examined by Mr. Upington: He took no more responsibility than merely seeing the parts put together.

George Halliwell, mechanical engineer in the plaintiff's firm, said that in March he went down to the defendant's place. The defendant asked him if he had come down to put the fan up, and showed witness the sections lying about. The fan had been removed from the siding. The

brick and mud foundations had been erected for the fan. Witness bolted together the various parts of the fan, and noticed in a day or so that the foundations had sunk under the weight. The defendant, with six or seven boys, worked on the fan. When witness left there was about a month's work on the fan, and when he (defendant) stopped him from working he said he would build a wall round it, and send for witness again. The defendant himself erected the fan.

Cross-examined by Mr. De Villiers: Any engineer would know that the fan had only been temporarily fixed up. Witness placed the iron bars underneath to raise the fan up. He intended running in the water in like manner. When the shaft was placed in a wrong position it was on Wessel's instructions.

Re-examined by Mr. Upington: When he left, the work was incomplete.

Mr. Upington closed his case.

Petrus Johannes D. Wessels, the defendant, said he was a brickmaker, and had imported brickmaking machinery. Witness went to Messrs. Wright and Donald, and asked for a price to put up the machinery, mentioning the fan particularly, as it was a new thing, and very important. Witness did not know much about machinery. Witness asked Wright for an estimate, and the latter suggested that they should go to the place and see the machinery. They did so, and afterwards Wright said he could not quote a lump sum, but would charge witness for material, and for labour at a daily rate. It was not understood that witness should direct the work. Little and another man subsequently came out. Witness supplied the material, and the unskilled labour, employing sometimes eight men. Witness had no control over the work. He told his men to take instructions from Little. Witness was not satisfied with the work, and went and complained to Wright, who told him that Little was going away, and that he would send up another man. The foundations had then been made. Wright then said something about quoting a lump sum for the rest of the work. Another man came in place of Little, and inserted certain pieces of iron under the work. Witness did not understand that this was only temporarily. Witness understood that Little was sent there to give witness skilled advice and assistance. The fan was put up while Little's successor was there. Witness built a house over the fan. Witness got Mr. Webster to come and see the work. Afterwards he wrote to England for advice, and got information as to how the work should really have been done. He subsequently saw Mr. Merryfield, and became absolutely satisfied as to the defects in the construction of both the pan and the fan. The work had to be undone and the whole gone over again in a proper way. Little was there when the foundations of the pan were finished, and directed how the work was to be done. He was not there when the foundations for the fan were completed. It had cost £65 to do the whole work properly. Witness had paid more than plaintiff's work was worth to him. Witness had a large business, and the loss owing to being deprived of the use of the machinery was very heavy; it was about £2,000. His assessment of £500 was very modest. Witness was charged with three poles at £5 each; he could have bought the lot for £1. This item appeared in one of the accounts, but was not now in the case. When witness wrote in May, saying he was prepared to pay if a proper account were submitted, he was not aware of the full deficiencies in the work. The defect in the fan was due to it being placed according to the instructions of the skilled expert, Mr. Little.

Cross-examined: There was work to be done on the fan when Halliwell left. The agreement with Wright and Donald was that they were to erect the pan, the fan, and other machinery. Witness had never seen a fan like his in this country. He had not had any machinery erected before, except an engine and boiler. Witness did not ask Wright and Donald to finish the work, because he thought they were not doing it properly. When witness paid a sum on account in April he said nothing about the work being wrong; he did not then know it was wrong. Witness only intended to pay £25, but Wright asked for more, representing that he had a court case coming on.

Re-examined: The work was not completed yet. £65 had already been spent. The difficulty was that there was no connection between the fan and the kiln.

By the Court: Halliwell gave witness to understand that the work on the pan was finished, excepting to make a connection, which would only take a day.

Harry Barnes said he was instructed by Mr. Little to do the brickwork for the foundations of the pan and the fan. He received no instructions from Mr. Wessels, who told him to work according to Mr. Little's instructions. Mr. Wright gave him certain instructions with regard to the fan.

Cross-examined by Mr. Upington: He was told that he could build anything on the outside, but he must build with brick and cement in the middle to carry the weight. In his opinion the foundations had not sunk. Mr. Little told him to leave seven-eighths of an inch for packing in order to lift the pan up to the old shaft. Mr. Wessels told him to take his instructions from Donald and Wright or any of their representatives. That was after Mr. Little had gone. It was not true that he was instructed to make the foundations of brick and stone right through.

Robert Henry Merryfield, mechanical engineer, said he had inspected the pan for Mr. Wessels at Fairfield. He found that the pan had been put together wrongly. The pan had been so erected as to defeat the maker's object. If the pan had been worked as it had been erected it would have been dangerous not only to the machinery, but also to the men who were managing it. The fan was also improperly erected, in fact, built "inside out." The whole fan had to be shifted about twelve feet. All the work was practically of no use at all, and the structures had to be re-built.

Cross examined by Mr. Upington: He had had considerable experience of brickmaking machinery in England. This machinery had been re-erected on his instructions. He was confident that the fan would work now. The pieces of iron that he found in the machinery were not, he believed, intended to be temporary packing. Those pieces of iron were placed between planed surfaces, which ought to have been working together.

Abraham Webster said that in April last he went to see the fan at the request of Wessels. He tested it, and found it defective. The machinery of the pan was also placed wrongly. Witness undertook to put the pan right for £15.

Mr. De Villiers closed his case.

Postea (September 3).

Mr. Upington (for plaintiffs), said he thought the first point to be decided was whether the mechanical engineer who was to supervise the work must be looked upon as the servant of the plaintiff or of the defendant. He submitted that all the plaintiffs were to do was to supply a mechanic of ordinary skill, not an expert in brickmaking machinery or the novel form of fan that was erected for the defendant. All that the plaintiffs undertook was to supply labour, a skilled mechanic, and a helper at so much per day. Assuming that he was negligent, counsel contended that he was not the servant of the plaintiffs, but of the defendant, who paid the man, though, of course, not directly. The defendant had the power of dismissing the man and indicating the work to which he was to address himself.

Mr. M. de Villiers (for defendant) contended that the defendant's agreement had been fully proved. The plaintiffs were supplying expert advice and assistance to Mr. Wessels to have this machinery properly erected. He urged that the *onus probandi* rested upon the plaintiffs to show to what extent their work had benefited the defendant. He contended that the defendant was entitled to damages for failure to properly erect the machinery.

Maasdorp, J.: The plaintiffs in this case claim from the defendant the sum of £56 15s. 11d., as the balance on an account for work and labour done, material supplied, and goods sold and delivered, and also moneys disbursed. It appears that the whole of the account amounted to £106 15s. 11d., but payments were made upon account, which reduced this account to £56 15s. 11d. The items under this account consist of work which was rendered by the plaintiffs through their servants in the erection of certain machinery upon the ground of the defendant and of items which represent material supplied out of the shop and articles manufactured there at the request of the defendant by the plaintiffs. Now, it seems to me that it has been proved that the work was done upon the ground under an agreement between the plaintiffs and the defendant, by which the plaintiffs were to supply the defendant with the services of a skilled mechanic and an assistant, for whose services they would be entitled to charge at a certain rate per hour. The mechanics proceeded to the defendant's place and set about erecting certain machinery, which was to

be used in the brick kiln. This machinery consisted of what is called a pan and a fan. The plaintiffs' workmen were busy at this work for some considerable time, and at the time they left it appears the pan had been fixed upon its foundation, and instructions had been given to the plaintiffs' servants as to the foundations that were to be put up and the manner in which the fan was to be constructed. At that stage of the proceedings the defendant dispensed with the services of these mechanics. By the agreement, I am of opinion that the work was to be done, not by the job as a complete work, but was to be done from day to day as the defendant required the services of these men. Consequently, we must take it that when he dispensed with their services they were only responsible for the work up to the stage at which it had then arrived. Up to that stage they should be paid for their services if their services were of any use to the defendant, but for any work that was to be effected beyond that the plaintiffs would not be responsible. When the plaintiffs contracted to supply skilled labour—the skilled labour of a mechanic and his assistant—I think they guaranteed that the services which they themselves were going to charge for would be the services of skilled men, who would properly construct the machinery they took in hand. It seems to me that the mechanics failed to effect that purpose. When they left the works I am satisfied that both the fan and the pan had been improperly constructed. The pan had been wrongly adjusted, and the result of the mistakes made by the plaintiffs' servants was that the work had to be undone again, and virtually done from the very commencement. The foundation that was left upon which the pan was replaced was really the foundation built by the defendant himself. It was found that the manner in which the fan had been constructed under the direction of the plaintiffs' servants was such that it was wholly useless for the purpose for which it was intended, and there also the work had to be entirely undone, and defendant was put to great expense to reconstruct it. Now, it seems to me that when the plaintiffs' claim for services rendered by these men in the construction of this work, they must prove that the work was properly done, and if it appears that the work was wholly useless to the defendant, they would not be entitled to claim, I come to the conclusion that upon the result of the evidence it would seem that the work was really useless, and that the machinery had to be reconstructed, and the foundation, as far as the fan was concerned, had to be rebuilt, and upon that ground the plaintiffs are not entitled to claim for these services. The defendant, however, contends that because in the reconstruction of this work he had expended more than the £50 claimed in respect of it, he is entitled now to the excess; but he has put in no claim in reconvention for moneys expended by him, and consequently such a claim cannot now be made. If he had set up a claim in reconvention, that claim would have been considered, but at present it cannot be considered, because it has not been made. The conclusion, therefore, that I come to is this—that, as far as the £56 is concerned which is claimed for work done in the shops and other material supplied, upon the evidence the plaintiffs are entitled to recover that sum. It is entirely a separate claim from that for work done in respect to the brick-kilns upon the ground. The plaintiff is therefore entitled under his account to the £56 for materials supplied from his shop, and the work done in his shop. But we find that in respect to that claim a sum that may be appropriated to the payment of that claim, amounting to £50, has already been paid, and consequently there remains a balance due to the plaintiffs of £6 15s. 11d. There is a claim made in reconvention by the defendant, in which he claims £500 for damages suffered by him through loss of the profits which he might have derived from brick-making if the brick-kilns had been completed by the plaintiff's servants. Now, I may mention that I do not find that there was any contract between the parties that the brick-kilns should actually be completed by the plaintiff's servants: consequently there is no contract by the plaintiff that he would hand over the completed brick-kiln to the defendant at a certain time, after which time he might be regarded in default; but, besides that, I may generally state that damages of that character are altogether too remote to be claimed in a case of this description. Judgment will therefore be given

for the plaintiff for £6 15s. 11d. on the claim in convention, with costs, and judgment will be given for the defendant in reconvention on the claim in reconvention.

Mr. Justice Kotzé concurred.

[Plaintiffs' Attorneys: F. W. Greenwood. Defendant's Attorneys, Michau and De Villiers.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D) and the Hon. Mr. Justice KOTZÉ.]

GENERAL MOTIONS.

HERBERT v. CLAREMONT MUNICIPALITY. { 1903. Sept. 1st.

Municipal regulations—Municipal engineer — Building regulations.

On motion for an order compelling the engineer of M. Municipality to issue a certificate of completion of the applicant's building, it appeared that his architect had submitted certain plans to the Municipality, shewing the floor line to be 12 inches above the level of L. road, and that the plans had been approved of, but that the floor line of the house, as built, was on a level with L. road.

Held, *in the absence of any proof of approval of the divergence, the applicant was not entitled to succeed.*

This was an application upon notice of motion brought by John Alexander Wm. Herbert, as owner of property at Claremont, against the Claremont Municipality, for an order to compel the respondents to issue a certificate of completion in respect of a certain building in the vicinity of Lansdowne-road.

The applicant's affidavit stated that in August, 1902, he submitted plans, sections, schedules, and specifications for a building comprising a shop and dwelling-house, to be erected within the Municipality of Claremont, which said plans, sections, and so forth were passed. The schedule set forth that the floor levels must be 12 inches above the centre of the nearest street, but the nearest street to the said building was a certain unnamed street. Applicant subsequently wanted to alter the situation of the proposed building by erecting it nearer to the said street. The Municipal Engineer's attention was called to the matter. The Engineer said this could not be done, as the street in question was a recognised road, and that petitioner was to work from it. On the 9th February, 1903, notice was given to the Municipal Clerk that the foundations of the building were completed, and an inspection by the Municipal Engineer was asked for. The engineer inspected the foundations, and had no fault to find, and deponent heard nothing further until the roof was nearly completed, when objection was made by the Municipality on the ground that the floor levels were not twelve inches above the crown of Lansdowne-road. Applicant said that the level of the floors was about 22 inches above the centre of the unnamed street, and in his view this street should form the basis for the levels of the property.

There were supporting affidavits by applicant's father, Wm. John Herbert, builder, and of a mason employed on the building.

The answering affidavits of the clerk, engineer, and other officers of the Claremont Council were to the effect that the Council's position was that the floors of applicant's property were about level with Lansdowne-road, that Lansdowne-road, and not the unnamed street, was the standard road shown on the schedule, and that the plans provided that the floor levels should be 12 inches above the crown of Lansdowne-road, in compliance with regula-

tion ii., cap. 9, of the Muncipal Bye-laws. The clerk had been unable to find in the records at the Council's office any notice from Mr. Herbert inviting inspection of the foundations. The Council declined to allow a certificate of completion to be issued until the buildings had been erected in accordance with the plans submitted to them, as for drainage and other purposes it was of importance that the level should be adhered to. The applicant had no excuse for proceeding with the erection of the buildings in contravention of the plans and schedules passed by the Council. The engineer denied that he had told the applicant to take the unnamed street as the basis for the floor levels.

The replying affidavits of applicant and his father, Wm. John Herbert, stated that had it not been for the repair of Lansdowne-road, and the raising of the crown of the said road, the floor levels would have been nine inches higher than the crown. It was also stated that in order to comply with the notice received from the Council it would have been necessary to take out the doors and window frames, take off the roof, and raise the walls.

Mr. Benjamin (for the applicant): Apparently the applicant went on building in ignorance of the fact that his plans had been returned to the architect.

Mr. McGregor (for the respondent): We will sanction the building if the floors are raised to 12 inches above the road level.

Mr. Benjamin: I do not know whether the floors can be raised. As the doors and windows are already in, it would be very inconvenient to raise them. The building schedule of the Municipality does not agree with the regulations. The one says that the floors must be one foot above the *nearest* street; the other simply says one foot above *the* street. The side street in this case is the nearest street, and the question is whether the regulations or the building schedule should prevail.

[De Villiers, C.J.: Is there any real conflict between them?]

The architect was misled by the engineer, who told him to work from the side road.

[De Villiers, C. J.: No, he was particularly told to work not from that road, but from the road.]

[Kotzé, J.: The regulations say that you must work from the level of the main road.]

I admit that we have not complied with the regulations, but we acted in good faith and without contumacy. The floors are two feet above the level of the circumjacent land, though they are only two inches above the crown of the Lansdowne-road. The building is perfectly healthy, and the Municipality would not be prejudiced by sanctioning it. See *Dada v. Municipality of Mafeking* (12, C.T.R., 373). The respondents' engineer misled the applicant, and the respondents are thereby estopped from going back on their own decision.

Mr. McGregor (for the respondents) was not called upon.

De Villiers, C. J., put it to respondent's counsel whether if the floors were raised the Council would take a liberal view in the application of their bye-laws as to the height of the rooms?

Mr. McGregor, after a pause, said that he had consulted with his attorneys, and they were prepared to give an undertaking that if petitioner would raise the floor 12 inches, respondents would not insist upon the rest of the main building being raised.

Mr. Benjamin said he was unable to obtain any definite guidance on the point from his attorneys. He did not know whether there would be any architectural difficulties in the way of raising the floors. Proceeding, he said that the applicant was led to believe by the engineer that the unnamed street was a recognised road, and that he must work from it. The applicant had made a *bona fide* mistake, and it was due to conversations that he had had with the Municipal Engineer. There seemed to be very little prejudice to the Municipality in allowing this building to be occupied as it was, because, although the floor levels might not be above the Lansdowne-road, they were 24 inches above the circumjacent land.

[De Villiers, C. J.: This is an application for an order compelling the Claremont Municipality to instruct its Municipal Engineer to issue a certificate of completion of a certain building. Such an order cannot be made unless the Court is satisfied that the certificate has been improperly or illegally withheld by the engineer, and in the present case there is really no evidence to show

that the engineer acted improperly or illegally. The building regulations provide that all plans submitted to the Council for approval shall show the line and width of the road (if any) which it is proposed to face, and the line of any adjoining property, and the heights of foundations above the centre of the said road. The road which this property was to face was the Lansdowne-road. The architect employed by the applicant himself showed that the floor line of the house was to be twelve inches above the Lansdowne-road. Clearly, therefore, the applicant is bound to have the floor line of his house 12 inches above the Lansdowne-road. He relies, however, upon the schedules in which the level is given "above the nearest road." Well, in one sense, the other road, that unnamed road, may be nearer, because at one point it is slightly nearer than the Lansdowne-road, but at another point it is much farther, and if you take the average distance, then Lansdowne-road is the nearest road, so that, even taking the schedules, it is not clear that the applicant is right. But taking the regulations, which I think we ought to take, with the plan, then it is undoubted that Lansdowne-road is the nearest road, and that there was an undertaking on behalf of the applicant to have his floor-line 12 inches above the Lansdowne-road. But then, it is said, that on one occasion there was some application to come nearer to the unnamed road, and that then the applicant was told that he should work from that unnamed road. Well, it does not follow from that conversation that there was any authorisation to place the floor line 12 inches above that road, seeing that, according to the regulations and according to the plans, this floor-line was to be 12 inches above Lansdowne-road. It is possible that if the whole question is tried by action, the plaintiff may succeed, but upon the affidavits, I do not think he is entitled to succeed; but at the same time I would suggest to the respondent Council to consider whether now, under all the circumstances, they might not allow this building to stand. It seems to me that it would be somewhat hard for the applicant if he were compelled to raise all his doors, all his windows, even if it is not necessary to raise the roof. It would put the applicant to much inconvenience, and certainly great expense, and it would be well for the Council to consider whether now, having asserted their rights, they might not be justified in overlooking the applicant having his floor-line below where it should be put, and allowing matters to stand where they are. If that suggestion is adopted, then we may hear nothing more about the case, and the applicant then will not have any need to bring an action. Upon the affidavits now before the Court, I am of opinion that the application should be refused, with costs.

Mr. Justice Kotzé concurred.

[Applicant's Attorneys: Findlay and Tait; Respondent's Attorneys: Tredgold, McIntyre and Bisset.]

DR. WILLIAMS' MEDICINE CO. v. TOTHILL. { 1903. Sept. 1st.

Trade mark Registration—Imitation.

In 1893, the applicant registered a trade-mark for pills in the following terms: "Dr. Williams' pink pills for pale people," and no application was afterwards made to expunge the mark from the register. In 1903, the respondent sold pills, in wrappers and boxes, of a different colour from applicant's, but with the label "Dr. Wilson's pink pills for anæmic people."

Held, *that as the similarity was calculated to deceive intending purchasers of the applicant's pills, he was entitled to an interdict restraining the sale.*

This was an application for an interdict restraining the respondent from selling or exposing for sale certain pills sold in boxes bearing the words, "Dr. Wilson's pink pills for anæmic people," on the ground that there was an infringement of the registered trade mark of the applicant's in respect to the pills registered as "Dr. Williams' pink pills for pale people."

In an affidavit filed by the plaintiff company's South African manager, points of similarity between the two packages were referred to. The pills were made up in boxes of similar size and shape.

The respondent denied that there was any infringement. The pills, in respect of which complaint was made, were sent to respondent by Messrs. Lorimer and Co., wholesale and export druggists, of London. The pills appeared in the catalogue of that firm.

Mr. Schreiner, K.C. (for the applicant): Our trade-mark was registered in 1893, and therefore arguments drawn from Act 12 of 1895 to show that the word "pink" is not registerable cannot apply. Our Act No. 23 of 1877 followed the English Act of 1873, and our Act No. 12 of 1895 follows the English Act of 1888. We complain that the respondent advertises "pink pills," which is the name by which our medicine is known. It is a case of colourable imitation. See *Lever Bros.* v. *Nannucci* (10 C.T.R., 660).

[De Villiers, C.J.: But in that case the designs were very smiliar.]

Yes, but here they use our trade-mark duly registered under Act 22 of 1877, and to that trade-mark we have an exclusive right as long as it remains on the register. See *Lever Bros.* v. *Nannucci* (10 C.T.R., 660).

Mr. Wilkinson (for the respondent): The question is whether in this case any deception has been practised on the public. As to the word "pink," nobody can have a monopoly in that.

[De Villiers, C.J.: Then what is the essential part of the trade-mark?]

We must take the whole trade-mark together. It is impossible to say that one part is more essential than another.

[De Villiers, C.J.: The description of the goods and also the names "Williams" and "Wilson" are very similar.]

It is not as though the respondent in advertising had made extensive use of the colour of pink. No doubt the names "Williams" and "Wilson" are very similar, but that is not Wilson's fault. We must take a trade-mark as a whole, and here the whole get up of the pills is different. As to Williams' trade-mark having been registered under Act 22 of 1877, the whole question is: Does section 6 of that Act make these words "pink" and "pills" registerable. In previous trade-mark cases, as in the *Sunlight Soap* case, the labels used were very similar. If the resemblance in the get up of the goods is not close enough to deceive a customer, how can there be any deception? Here the get up of the two articles is quite different and the applicant's pills are not known simply as "pink pills," but as "Dr. Williams' pink pills." We must look to the whole design, or the respondent might be forbidden to use even the words "pills" and "doctor."

Mr. Schreiner (in reply): The respondent's case has been argued as though disclaimer were recognised under the Act of 1877, but that Act does not make any provision for disclaimers. We do not say that Wilson may not sell pills, but that he may not sell "pink pills for anæmic people." Williams, and not Wilson, thought out the collocation of these words. As to colour, that in itself has nothing to do with a trade-mark. See *Kerly on Trade-marks* (p. 379).

De Villiers, C.J.: In 1893 the applicant registered his trade-mark in due form in this colony in the following terms, "Dr. Williams' pink pills for pale people," "great blood builder, nerve tonic," and so on. The registration took place under the Trade Marks Registrations Acts of 1877 and 1891, and no proceeding has ever been taken to expunge the mark from the register. It is certainly not a mark which could be registered as such under the Act of 1895, and the question is not now raised whether it could properly be registered under the previous Acts. The Court must therefore assume that it was properly registered. The respondent is a chemist in Cape Town, and has been selling pills with the mark "Dr. Wilson's pink pills for anæmic people." The colour of the wrappers is different, but the colour of the pills is the same. The appellant now seeks to restrain the respondent from continuing the sale, and the question to be determined is whether the similarity in name is calculated to deceive intending purchasers of the applicant's pills. The names of the two doctors are not identical, but there is just sufficient similarity to impose upon persons who, having heard of the virtues of Dr. Williams' "pink pills," are thus led into purchasing Dr. Wilson's "pink pills." It is true that the former pills are recommended for "pale people," while the latter are said to be "for

anæmic people," but this slight difference would not be sufficient to remove the wrong impression caused by the similarity in other respects. Dr. Wilson is entitled to use his own name on his pill boxes, but he had so many other descriptive adjectives to select from that there was really no necessity for calling his pills "pink pills," being the name already registered as the applicant's trade-mark. The application must be granted, with costs.

Kotzé, J., concurred.

[Applicants' Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorneys. Syfret, Godlonton and Low.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and a Jury.]

BARNARD V. MOOLMAN. { 1903. Sept. 1st. " 2nd.

Slander.

This was an action brought by Cornelius Barnard, a Field-cornet, of Carnarvon, against Willem Moolman, of the same district, to recover £1,000 damages for slander.

The declaration set out that on the 11th March, 1903, at Vaalputs, in the district of Carnarvon, the defendant, at a public auction, and in the hearing of a large number of people, said of the plaintiff: "Friends and all people present here, I would advise you to have as little as possible to do with Mr. Frank Barnard (meaning the plaintiff), as he is a d—— scoundrel. He has fraudulently brought up horses belonging to me in his own name before the Commission (meaning thereby that the plaintiff had fraudulently claimed compensation in his own name before a certain Commission appointed to inquire into war losses for horses belonging to defendant), and if it were not for his parents and parents-in-law, for whom I have so much respect, I would have had him thrown into gaol. To show you what I think of him: the man who bought this place (meaning Joseph Fourie) asked me to become surety for him together with him (meaning the plaintiff), but I refused, as I won't have anything to do with such a d—— scoundrel. He is not satisfied with swindling the public, but he swindles the Government, because he is going to bring a big claim before the Commission, and I can prove that he did not lose a hundred sheep (meaning thereby the plaintiff was going to make a fraudulent claim before the aforesaid Commission for more sheep than he had actually lost)." And the defendant further, at the same place and in the hearing of the said people, wrongfully, unlawfully, and with intent to injure, said of the plaintiff: "Yes, you will now go to court with your lot of d—— Hottentots, who will swear just as you wish them to, since no decent man will ever be a witness in a case of yours," the defendant meaning thereby that the plaintiff would proceed to law with the suborned testimony of a lot of Hottentots, and that the persons who had given evidence in a recent case in the Supreme Court between the parties were Hottentots, whose testimony had been suborned by the plaintiff, who had committed perjury at the request of the plaintiff, who had also committed perjury. By reason of the premises, the plaintiff had suffered in his good name and reputation, and had otherwise suffered loss and damage to the extent of £1,000, which the plaintiff claimed as damages.

The defendant, in his plea, admitted that he spoke the following words to the plaintiff: "Now you cannot prove that I am a rogue, and I now say you are a rogue, and I will prove it to you. In the first place, we purchased the sheep on joint speculation, and you sold them as agreed, and you informed me that we made nothing on them, and that it was, as you stated, a 'dead loss,' but now I discovered from Mr. James de Witt, the purchaser of the sheep, that I should have got about £130. After I have trapped you, you are willing to pay. Then I discovered that you claim some horses, my own *bona fide* property, in your claim and on your name before the War Losses Compensation Commission. Your own father told me, who asked me to keep the matter quiet. To make your claims large, you do such things. And had it not been for the respect I have for your parents and parents-in-law, I should have had you lodged in gaol. The Boers did not slaughter more than 100 of your sheep at Kleinvlei. You not only cheat the public, but also the

Government. Just now a man who had purchased a farm came to me and asked me to stand security for him along with another man. I then asked him who that other man was, and he said Barnard, and I at once refused, and the reason why I refused I shall now state—it was because I did not trust you." The defendant said that the words were used under the influence of great anger, caused by the provocation of the plaintiff, who first approached the defendant and slandered him, and that he used the words without malice. By reason of the following words, used by the plaintiff, "You are a rogue. I shall prove in a court of law the thefts you have committed," the defendant claimed in reconvention £1,000 damages, and £93 4s. in respect of the balance of a certain joint transaction in a sheep speculation.

Mr. Upington (with him Mr. J. E. R. de Villiers) for plaintiff. Mr. Burton (with him Mr. van Zyl) for the defendant.

Mr. Upington then called the plaintiff,

Cornelius Barnard, Field-cornet for the district of Carnarvon, who stated that for some time he had carried on speculations in sheep. In October, 1901, he entered into an agreement with the defendant, and in September, 1902, he had a settlement with his partner. On the 11th March this year he was present at a sale at Vaalputs, in the district of Carnarvon. In the morning he saw the defendant, who was claiming a wagon from the estate. In consequence of a conversation with one Fourie earlier in the morning, he went up to the defendant and asked him what he (defendant) had against him. The defendant got greatly excited, and accused witness of several dishonest transactions. The defendant said that witness had claimed for two of his horses before the War Losses Commission. Witness said, "If I am so dishonest, why don't you bring me up?" and the defendant said that only for his parents he would have put him in gaol. The people then congregated, and the defendant, addressing them as "Gentlemen and friends," advised them to have as little as possible to do with the plaintiff, as he was a d—— rascal, and that he was not satisfied with robbing the public, but that he was also robbing the Government. The defendant further said that, to show those present what he (the defendant) thought of him, he refused to stand surety for him, and that he would have nothing to do with such a rogue. Witness replied that he would make him prove it in a court of law, and the defendant then said to the people that witness would bring a lot of d—— Hottentots to the court, and make them swear as he liked. Witness had suffered severe damages on account of these malicious statements, and people had said that, unless he would prove otherwise, they would sever their connection with him. In October, 1901, he entered into a sheep transaction with the defendant, who was to supply half the purchase money and take half the profits. Witness entirely financed the transaction, and bought some 2,300 sheep, of which the witness himself purchased 1,100, and the remainder was in a joint transaction. The sheep were for Mr. Haupt, but the military would not give a pass to take the sheep to the station, and they remained on his farm until December. He was removing his sheep to another farm when a Boer arrested him, and kept him six days. Subsequently, when Moolman and witness were about dividing the sheep, a Boer patrol came up and told the defendant that De la Rey had crossed the Orange River, and everything would be confiscated. Witness agreed with the defendant to remove the sheep to another farm, and on counting the sheep there, it was found that there were only 2,258 or 2,260. Witness moved to another farm, and agreed with the owner, Mr. De Witt, that the latter should pick the best of the sheep and sell them in the market for a sovereign each. Boer commandoes were all over the place, and witness got Mr. De Witt to dispose of the remainder of the sheep for £894 14s. When he bought the sheep, the average price paid was 18s. In September, 1902, he saw the defendant, and they came to a settlement. Witness told the defendant there was a loss, which was occasioned by the expenses. The price of sheep had gone down on account of the restrictions by martial law. On the afternoon of the 11th of March he did not provoke Moolman in any way. The claims for sheep and horses of the Government were made in perfect good faith.

Cross-examined by Mr. Burton: It was agreed with the defendant that he should come into the partnership in a previous transaction. He could not get Van Rooyen's sheep, because he was a Jingo, and he got Moolman's influence to purchase these and other sheep. He had previously purchased Lyall's sheep, and it was agreed that the defendant should make them a joint transaction. Moolman gave him power of attorney to borrow £600, but he could not produce any documents, as the Boers had destroyed everything. Witness wanted De Witt to take the whole of the sheep, but the latter would only take the good sheep. The flock bought from Lyall was every bit as good as the twelve hundred bought in the joint transaction, and De Witt bought most of the former. On the morning of the 11th March, the defendant laughed, when witness said: "I have a bone to pick with you." They had a drink, and the picking of the bone was shelved until the afternoon. When the sale was over the defendant said that witness had cheated him in the sheep transaction, but witness did not say that he would pay him back. Witness did not call the defendant a "schelm" first. When the reference was made about Hottentot witnesses, the case of White and Barnard was heard at the Supreme Court. He would give Haupt as one man who had threatened to sever his connection if witness did not disprove the allegations of the defendant.

Re-examined by Mr. Upington: The White case was the only one that he had ever had before the Supreme Court. The defendant had never withdrawn his allegations.

Carl Johannes van Zyl, attorney-at-law, notary public, and justice of the peace at Carnarvon, said that he knew both plaintiff and the defendant. Witness issued a pass to the plaintiff to purchase sheep, and in October an order was issued cancelling all passes to deal in sheep, except with the Cold Storage. Witness was auctioneer at the sale on the 1st March at Carnarvon, and remembered the defendant claiming a wagon from the estate. When the sale was over he noticed the plaintiff and the defendant approaching a group of people, and then heard the defendant in a loud voice open the conversation by some reference to the horses before the War Losses Commission. Witness then corroborated the plaintiff as to the remarks that were passed by the defendant, and added that he was almost demanding an explanation himself about the reference to the Hottentot witnesses, as he was the attorney in the case.

Cross-examined by Mr. Burton: He had given a faultless repetition of the declaration, and he was the plaintiff's attorney.

James de Witt, speculator, residing at Victoria West, said he was present at the auction sale, and remembered the defendant having a quarrel about a wagon. At another time he remembered the defendant asking him about the sheep. The defendant said that Barnard had only paid him fifteen shillings for the sheep, and witness said, "Then Frank Barnard has swindled you." The defendant, in the afternoon, told the plaintiff that he had fraudulently given up his (defendant's) horses to the military, and on being questioned by the plaintiff the defendant replied that only for his parents he would have put him in gaol. The defendant then warned the people against the plaintiff, and when the latter said that he would make him prove the allegations, the defendant replied, "You can take your Hottentots and make them swear just as you wish. No decent fellow will have anything to do with your case." He remembered Barnard coming to his farm with one flock in January, 1902. Witness purchased 1,225 of them, and gave the plaintiff a sovereign each for them. Of the whole number nearly half were Bastard sheep. Witness also sold the balance of the sheep for £894 18s. in April.

Cross-examined by Mr. Burton: Of the 1,225 sheep he bought from the plaintiff half were Bastard sheep, and he had taken all the fat sheep. At the quarrel witness only came up after it had been in progress some time. The defendant was in a great rage, and shouted loudly.

Berthold Nussbaun, partner in the firm of Haupt and Co., of Carnarvon, said that in 1901 the firm were purchasing sheep on a large scale, and were paying direct to the farmers and speculators at from seventeen to twenty shillings each. Barnard got an order to buy 2,000 sheep, but, owing to an order from the military, the order was never fulfilled. After that regulation sheep fell in value. Witness was present at the sale at Vaalputs on the 11th March, and heard the defend-

ant accuse the plaintiff of dishonesty in connection with a sheep transaction. The defendant further said that only for the plaintiff's parents he would have had him put in gaol, and then proceeded to make the accusation about the horses, and warn the people against him. Witness understood from the remark about Hottentot witnesses that the plaintiff had bribed his witnesses to commit perjury. The firm could not do business with Barnard if the allegations were true.

Cross-examined by Mr. Burton: He told the plaintiff afterwards in his office that he would have to clear himself of the charges. He thought it a great pity that the plaintiff and the defendant, who were both his friends, should bring the quarrel to court.

Willem Minnaar, contractor, said he was present at the auction sale, and corroborated the evidence as to some of the words made use of by the defendant to the plaintiff.

Albert van Rossik said he remembered the defendant making the charges against the plaintiff, and at the time he identified the statements which the plaintiff's attorney had in the letter of demand.

Cross-examined by Mr. Burton: He remembered the plaintiff saying, "It's not me that's a 'schelm'; it's you."

Johannes van Heerden said he recollected the plaintiff arriving at his farm in January, 1902, with two lots of sheep. The price of sheep fell in March.

Peter Smeer said that when Barnard proved the claim before the Commission, the Commissioner said that the plaintiff had said that the horses were the defendant's.

Peter Jacobus de Wet, of Carnarvon, gave further corroborative evidence as to the nature of the remarks passed by the defendant to the plaintiff.

Plaintiff (recalled) said he had two herds, which he supplied from October until the beginning of January. Witness spent close on to £100 on herding. This included forage, veld hire, charges on exchange, and so on. The detailed statement produced was as accurate as possible.

Mr. Upington then closed his case.

Mr. Burton called

Wilhelm Petrus Jacobus Moolman, the defendant, who said that in 1901 he entered into a transaction to buy sheep from plaintiff. Barnard came to him and told him there was a good chance of making money on sheep. Witness went with Barnard and bought the sheep belonging to his (witness's) brother. Barnard took the sheep, saying he would look after them on his farm. Subsequently they bought other lots of sheep, witness giving promissory notes. The sheep arrived at witness's place. There were 1,040 sheep. Witness sent them to Barnard's place, where the 165 first purchased already were. Witness knew of no transaction between Lyon and Barnard. Witness had nothing to do with the 700 sheep bought from Lyon. Witness confined his dealings to the sheep with condition to be sold in eight days. The 1,205 sheep cost £951 odd. The sheep were grazing on witness's place from November, Barnard's shepherd looking after them. Witness knew nothing of the sheep bought from Lyon being on his farm. Witness sent Barnard to his (witness's) uncle for money. Barnard returned, and said witness's uncle only had £300, but that he had borrowed a further £200. Witness sent word to the sellers that the money was there for them. All were paid excepting two, who were owed £234. This amount was paid by witness afterwards. Barnard came to witness and suggested that there was a good chance of selling the sheep at Carnarvon. Witness agreed to their being taken away. Witness saw some of Lyon's sheep being taken, and questioned Barnard about it, but the latter said he was only taking these sheep to the village. In September witness saw Barnard at Van Wyk's Vlei, and asked him what had become of the sheep. Barnard said it was a matter of loss; that no profit had been made. Witness took his word. In the same month they had a reckoning up, Barnard giving witness a cheque. The settlement was on the basis that no profit had been made on the sheep. In December witness saw De Wet, and found out that the sheep had been sold at £1 per head. Barnard never gave witness an account for expenses in connection with the sheep. The witness gave evidence as to what occurred at the auction sale. There had been a dispute as to the price of a wagon, after which witness got on his cart with Visser, preparatory to leaving. Barnard made some observation, and wit-

ness got off the cart. There was a conversation, in the course of which witness used the words stated in the plea. Witness was very much enraged. Witness would have said nothing had Barnard not called him from his cart.

Cross-examined by Mr. Upington: Witness did not know what Barnard referred to when he asked: "What have you and your wife got against me?" Witness did not take a particular interest in the case of White and Barnard. Witness did not know whether his wife had spoken to any of the witnesses in that case, and was working against Barnard. Witness refused to stand security for him. Barnard and witness had been friends. Witness did not know that Bernard had done him any good turns during martial law; he did not know that Barnard had saved him from being arrested. Witness considered now that Barnard had not acted fairly towards him in respect to the sheep. He thought Barnard had no right to claim for the horses before the Commission. Witness did not use the words set out in the declaration. He was very angry at the time, and could not remember exactly what he said in his anger. Witness intended to convey in the words he used that Barnard had no right to bring up the horse in his claim. He did not say Barnard was a d—— scoundrel, or that he was swindling the public and Government.

Mr. Upington: I want to put this to you, Mr. Moolman; are you now charging Mr. Barnard with fraud?

Witness: As far as I know, I don't think he acted fairly with me.

In further cross-examination, witness said he received a cheque from the plaintiff on the 7th September for £27 10s., but he did not receive one for £55 then.

By the Court: The cheque for £55 was paid to him for a wagon; he remembered that now.

Witness, replying further to Mr. Upington, said Barnard, sen., told him at the door of the Commission that the horses were being brought up in his son's name.

Re-examined by Mr. Burton: Barnard had not withdrawn what he had said about witness.

Jacobus Nicholas Moolman, farmer, residing in the Carnarvon district, said that he remembered the plaintiff coming in October or November, 1901, to the defendant's farm to purchase sheep. The plaintiff said there was a good chance of making some money, but that he had not sufficient money. The plaintiff and the defendant entered into an agreement to share the profits, and they then bought 165 Cape sheep from witness. The plaintiff drove the sheep over to his own farm. Next morning plaintiff and defendant went out to purchase sheep, and returned a few days later with a good marketable flock of sheep. Witness counted over 1,000 sheep. He was present at the sale at Vaalputs on the 11th March, and was driving on with the defendant when Barnard came after them and called his brother from the cart. Barnard asked the defendant what he and his wife had against him, and the latter replied that he had found out from James de Witt that the sheep had been sold at a profit. The plaintiff called the defendant a rogue, and the latter then said, "You call me a rogue, and I will now call you a rogue." When Barnard threatened the court, the defendant said, "All right, but don't bring your Hottentot witnesses with you."

Cross-examined by Mr. Upington: The plaintiff came up to his brother and dragged him by the jacket. The defendant and plaintiff walked away some distance from the crowd. His brother did not address the people standing round. He did not hear the conversation as given by the witnesses for the plaintiff.

Jan Bulman said the sheep were in two lots at Humansdorp, and he took charge of one lot. The lot under his charge were in good condition. Subsequently they were put into one lot, and he judged by the appearance of the sheep that De Witt had taken a number of Barnard's. The poor sheep remained behind in the kraal.

Cross-examined by Mr. Upington: He told his master that the sheep had been mixed up.

Daniel Visser said he was present at the sale at Vaalputs, and remembered the plaintiff call the defendant from his cart. He heard the plaintiff say to the defendant, "You are a schelm."

Cross-examined by Mr. Upington: He did not hear the defendant address the

people. The plaintiff did not catch the defendant by the coat.

Andries Petrus Voss said the first thing he heard was Barnard calling Moolman a "schelm." Moolman then said, "I cali you a schelm, because you did me out of the profits on the sheep." When the question of the court came up, the defendant said the plaintiff could bring his clump of Hottentots with him.

Cross-examined by Mr. Upington: He heard the plaintiff say, "There are witnesses here," and then the defendant called the plaintiff a d—— scoundrel, and advised the people to have as little as possible to do with him. After charging him with dishonesty over the sheep and horse claims, the defendant added that only for his people he would have had the plaintiff thrown into gaol. He did not address the people, and it must have been the plaintiff he advised to have nothing to do with Mr. Barnard.

Counsel having been heard in argument on the facts, his Lordship summed up, and the jury returned after a short consultation with a verdict for the plaintiff for £200 damages with costs. Judgment was entered accordingly.

[Plaintiff's Attorneys: Van Zyl and Buissinné; Defendant's Attorneys, Michau and De Villiers.]

SUPREME COURT

SECOND DIVISION.

[Before the Hon. Mr. Justice KOTZE.]

MUNRO V. COLONIAL GOVERNMENT. { 1903. Sept. 2nd.

This was an action for damages arising out of a railway collision at Elsie's River Halt, on the 11th October, 1902, brought by James Henry Munro, commercial traveller, Cape Town, against the Colonial Government, from whom £1,000 was claimed. Sir H. Juta, K.C. (with him Mr. Upington), was for the plaintiff, and the defendants were represented by Mr. Schreiner, K.C. (with him Mr. Howel Jones). The case had been set down for trial before a jury.

Sir H. Juta said that a settlement had been arrived at between the parties, and, in order that it should appear that it was a jury trial, they asked his lordship to allow judgment to be entered now. The parties had agreed upon judgment for the plaintiff for £350 and costs.

Mr. Schreiner said he consented to judgment being entered without empanelling a jury.

Kotze, J. (to Sir H. Juta): When you say £350 damages and costs, how about the expenses of the jury?

Sir H. Juta: That is all included.

Kotze, J.: Now comes this difficulty: How are we to know which nine of the jury are to be paid? I thought counsel might suggest a way out of the difficulty. I think perhaps we had better go through the form of calling nine jurymen.

The necessary nine were accordingly called in order that the matter of expenses should be determined, and were then discharged.

Judgment was entered for the plaintiff for £350 and costs.

IN CHAMBERS.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.].

Ex parte JENKYNS.

Mr. Alexander moved for an order for the arrest of George A. Parker, pending the production of security for an action to be instituted by the petitioner for the recovery of £200 on a promissory note. The petitioner had reason to believe that he would shortly be leaving Cape Town to proceed to England.

Order granted as prayed, the respondent to be set at liberty on giving security to the amount of £250, action to be brought by petitioner forthwith.

Ex parte MULLER AND OTHERS.

Mr. McGregor moved for an order confirming the sale of certain property. It appeared that the petitioners were interested in the estate of the late Cornelius Johannes Andries Muller, who had left a piece of perpetual quitrent land called Buffelsfontein, in

the division of Mossel Bay. The land consisted of about 330 morgen, and for Divisional Council purposes was valued at £400. There were a considerable number of heirs interested, and, in view of the cost of giving transfer to the various beneficiaries and the small extent of the ground, it had been thought best that the ground should be sold by public auction and the proceeds distributed to the parties. The land had been offered by public auction, and had been sold, subject to the confirmation of the Court, for £507. Petitioners now prayed for an order authorising the executor dative to pass transfer to the purchasers and administer the proceeds of the sale and distribute the same to the heirs.

Order granted as prayed.

Ex parte MOODIE.

Mr. McGregor moved for leave to sell certain property in the estate of the late Cornelius Johannes Andries Muller. It appeared that the petitioner was the executor dative of the estate mentioned in the previous application, and that it had been found that the estate also comprised a fourth share in the remainder of the land Buffelsfontein, about 38 morgen. The application was made on the ground of the very large expense which would be involved in transferring a small piece of land to a very large number of heirs.

Order granted as prayed, subject to the consent of the heirs being obtained.

STRYDOM V. THE MASTER.

Mr. Gardiner moved for an order directing the Master to issue a certificate in terms of section 1 of Act 12 of 1856. The petition stated that he was the surviving spouse, and that he was married in community. There were surviving three major children and one minor. In June last petitioner, having arranged to contract a second marriage, proceeded to Oudtshoorn, but on the day before the marriage was to take place he was informed by telegraph by his agent that the Master refused to grant a certificate until the landed property of the joint estate bequeathed to the minor children had been secured against wrongful alienation. As a consequence, the marriage had been postponed from time to time, and could not yet take place. Several objections had been raised by the Registrar with regard to the deeds in the estate.

The Acting Master presented the following report: "In view of the facts set forth in the application, I beg to submit that your lordships may be pleased to grant an order authorising the Master to issue the certificate applied for, provided the applicant has a record made in the Deeds Office of the minors' vested interests in the landed property, specially bequeathed; such record to be completed forthwith in regard to the landed property already transferred to him, the said applicant in the meantime to give an undertaking to have such record made on the three title deeds by the Surveyor-General, and also in regard to such landed property which has still to be transferred to him."

[De Villiers, C.J.: It seems very hard on the man that he should be delayed in this fashion.]

The Acting Master said that he had not caused the delay; the matter lay rather with the Registrar.

[De Villiers, C.J.: However, it seems that between the Master and the Registrar, he cannot get married.]

Order granted in terms of the Master's report.

Ex parte STUART.

Mr. McGregor moved for an order removing one Francis Gerhard Myburgh from executorship of the estate of the late Gerhard Myburgh and his spouse, Atella Myburgh. The petitioner stated that the said Francis Gerhard Myburgh left Cape Town in July, 1902, for the Orange River Colony, and that some little time afterwards, a letter was received from him in Natal, in which he said that he contemplated going into the territory known as Zululand, and that his movements were uncertain, but that he would telegraph when he was returning. Since then, nothing had been heard of or from the said Francis Gerhard Myburgh. The estate of which he was executor consisted of property of considerable value, farms in the Orange River Colony and landed property requiring constant attention. The estates were threatened with an action at law in respect to boundaries, and there was no one to represent the said estates. Petitioner prayed for an order for the removal of the said Francis Gerhard Myburgh from the post of executor, and to authorise the Master to appoint Freder-

ick St. Martin Myburgh and Lewis Arthur Myburgh, together with the South African Association of Cape Town, as executors of the estate, or otherwise grant an order directing the Master of the Court to call a meeting of next-of-kin, and of the creditors, at which an executor could be appointed. Petitioner also applied for the removal of the name of Francis Gerhard Myburgh as trustee, under a notarial deed, and the substitution of others.

Order granted, removing Francis Gerhard Myburgh from the post of executor testamentary, and directing the Master to call a meeting for the appointment of an executor dative, Gerhard Myburgh to be appointed trustee in the room of Francis Gerhard Myburgh.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

REX v. CERTAIN NATIVES. { 1903. Sept. 3rd.

Vagrancy Act, 1879—Native location.

Squatters trespassing upon land set apart as a native location cannot be convicted of a contravention of the 9th section of the Vagrancy Act of 1879, until after, having been directed by order of the Resident Magistrate, to remove from the land, they have disobeyed such order.

De Villiers, C.J.: A case came before me in which certain natives were charged before the Special Justice of the Peace at Vosburg with residing in the Municipal Location without the necessary permission of the Municipal authorities. I requested the Special Justice to mention this Municipal regulation, and the exact terms, and the answer is, "I erroneously stated the Municipal regulations. It should have been Vagrancy, section 9, Act 23 of 1879," and referring to that section, I find that it provides that all squatters trespassing upon native locations may be directed to remove therefrom, and that it is only in case they disobey such order that they can be dealt with and punished under the Act. In the present case they were never directed to remove from the land, but only because they lived there, they are charged under the section. The Special Justice of the Peace was therefore clearly wrong. There ought, first, to have been an order for their removal, and upon their disobeying that order, they could have been charged. The conviction must therefore be quashed.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

ADMISSION. { 1903. Sept. 4th.

Mr. Schreiner, K.C., moved for the admission of Jonathan Calf le Roux as an attorney.

Application granted and oath administered.

APPEALS.

HENDERSON AND ANOTHER v. HANEKOM. { 1903. Sept. 4th. „ 11th

Assignment of lease — Mineral lease—Agricultural lease.

The defendant, being the owner of a farm, entered into a contract with L., giving him the sole and exclusive right to prospect for and win minerals and precious stones for a

period of five years, with a right of renewing the contract for eighteen further periods of five years. L. assigned all his right, title and interest in the contract to the plaintiffs, who gave notice of such assignment to the defendant.

Held, *on appeal from the High Court of Griqualand, that L. could legally transfer his rights to the plaintiffs, so as to give them a right of action against the defendant.*

De Vries *v.* Alexander *(Foord's Rep. 43) distinguished.*

This was an appeal from a judgment given by the High Court of Griqualand in an action brought by John Crosbie Aitken Henderson and the G.K. Syndicate, Ltd., against Jurgens Johannes Hanekom, for a declaration of rights in a certain contract entered into between the defendant and one John Joseph O'Leary, who had ceded his rights to the plaintiffs. The plaintiffs to the action prayed for: (1) A declaration that the said contract has been duly transferred to, and is now vested in them, and that they are entitled thereto, and to exercise all the rights, powers, and privileges thereby granted, but subject as in condition 2 thereby provided; (2) an order that the defendant do duly abide by and carry out such contract; (3) general relief; (4) costs. On the trial coming on before the Judge-President of the High Court of Griqualand (Mr. Justice Laurence), an exception was taken that the declaration disclosed no good cause of action against the defendant, and that the plaintiffs were not the proper persons to sue in this action as appeared from the contract annexed. The exception was allowed with costs, the Judge-President stating that, "in view of the nature and terms of the contract, in the absence of any allegation of the defendant's consent to the alleged cession, the declaration fails to disclose a good cause of action."

The declaration was in the following terms;

1. The first plaintiff is a director of companies living in London. The remaining plaintiffs are a company with limited liability duly registered in the Transvaal Colony and having its head office at Johannesburg.

The defendant is a farmer living at the farm Stilverlaat in the district of Hay in this colony.

2. On or about the 23rd day of October, 1896, the defendant, who was the then registered owner of the said farm, entered into a contract (hereinafter called "the said contract") with one John Joseph O'Leary.

3. By the said contract it is (*inter alia*) provided that the said John Joseph O'Leary should have the right for five years from the 23rd October, 1896, to prospect, dig, quarry, and explore for, work, win, take out, and carry away, and for his own account to sell or dispose of, all minerals, metals, and precious stones of whatsoever kind or nature in or under the said farm upon the conditions therein contained.

The plaintiffs refer particularly to condition numbered 2 in the said contract, which is as follows:

"2. That after the expiration of the said period of five years, the said John Joseph O'Leary shall have the right to renew this contract for eighteen further periods of five years, each upon the same terms and conditions and subject to the same rentals as are herein contained, upon giving notice to the said Jurgens Johannes Hanekom, his heirs, executors, or assigns, of his intention so to renew this lease at any time before the expiration of the then current period of five years."

4. On or about the 30th day of October, 1896, the said John Joseph O'Leary, as he was entitled to do, by an instrument in writing duly ceded, assigned, transferred, and made over to the first plaintiff, and one Leopold Kessler all his—the said John Joseph O'Leary's—right, title, interest, property, claim and demand in and under the said contract.

5. On or about the 20th day of August, 1898, the said Leopold Kessler, as he was entitled to do, duly ceded to the remaining plaintiffs, other than the first, viz., to the said G.K. Syndicate, Ltd., all his right, title, and interest in, to, and under the said contract.

6. Notice that the said contract had been duly assigned to and vested in the plaintiffs was duly given to the defendant.

7. Prior to the expiration on the 22nd day of October, 1901, of the first quinquennial period under the said contract, the plaintiffs, as they were entitled to do under the said second condition thereof, gave notice to the defendant of their intention to renew the same for a second period of five years.

8. At the date of such notice, the defendant still was, and to the present time has continued to be, the duly registered owner of the said farm.

9. The said second period of five years under the said contract is still current, all rent due under the said contract has been duly tendered or paid in terms thereof, and the same is still in full force and effect, and has been duly transferred to the plaintiffs in the manner hereinbefore set forth, and they are the proper parties to sue in this action.

10. The defendant, though frequently requested by the plaintiffs to allow them to exercise the rights granted by him under the said contract, refuses to carry out the said contract and allow them to do so, and alleges that the same was not transferable, and that the plaintiffs are not entitled thereto.

Mr. Schreiner, K.C. (with him Mr. Benjamin), was for the appellants; and Sir H. Juta, K.C. (with him Mr. Buchanan), was for the respondent.

Mr. Schreiner, in opening, stated that this action raised a point which had never been specifically decided in this court, and that was as to whether the contract in dispute was a right *in personam* or a right *in rem*.

Mr. Schreiner, K.C. (for the appellants): in the case of *Wright and Co.* v *Colonial Government* (8, Juta, 267), there was a large number of concessionaires, but that case is not exactly in point. The question here is, would O'Leary's executors have a right to come in in case he did not attain the age of 96? I submit that if this contract is held to be a lease, the common law has been modified by certain Placaats. *Sande on Restraints* (chap. 9), in which he treats of what actions may be ceded, and what may not, shows that the tendency of legislation is to change rights *in rem* into rights *in personam*. If O'Leary's rights were not purely personal, they would devolve on his successor. Ever since 1880 we have admitted this Placaat of 1580 (see *Groot Placaat Book*, p. 2,550). The point has been raised, what is the exact nature of a mining lease? We may assume that this lease in question is an ordinary lease of land. But can a lease of minerals be regarded as a lease of land? I should say it cannot. The case of *De Vries* v. *Alexander* (Foord. 43) is clearly distinguishable from this case. The placaat was not dealing with mining leases, but with farm leases. The case of *De Vries* v. *Alexander* has never been extended. The case of *Green* v. *Griffiths* (4, Juta, 346) does not apply to the present case. See also *Parkin* v. *Lippert and Parkin* (12, S.C.R., 179). Were it not for the placaat urban and rural tenements would stand on exactly the same footing, as they do in common law, and hence should the Court hold that these mining leases are *sui generis*, it will put them on a common law footing.

[Maasdorp, J.: But may not O'Leary's liability have come to an end?]

No; the creditors could come on the executors, and might even go so far as to attach the lease, which is very valuable. O'Leary was a man of means, but it does not follow that he could put a man of straw in his place. See *Van der Byl and Co.* v. *Findlay and Another* (9, Juta, 178). The Court below relies very strongly on *Coronel and Others* v. *Ward and Wessels* (1, Sheil, 159), and *Imroth* v. *Ward* (8, Juta, 257). There there was a question of a prospecting licence, but that is not our case; our lease is not a prospecting lease, but a mining lease. His lordship in the Court below seems to have confused a sub-lease with an assignment. On the lease of mines see *Hunter's Scots' Law* (Vol. 1, p. 247; 4th Edit.).

[De Villiers, C.J.: The question is whether the rights which might apply to a prospecting licence would also apply to a mining licence.]

The whole contract as to erecting machinery, etc., shows that *delectus personae* has nothing to do with this case, because so many persons are interested: See *Rankin on delectus* (p. 172; Library Edition). Our law very closely resembles the Scots' law, and according to that, if a right be granted for 19 or 21 years, there is nothing to show that it cannot be assigned. See also the recent Transvaal case of *Liebenberg* (Tr., Rep., 1902, p. 65). In England such a case would be regarded as a question of licence. *Bainbridge on Mines*

(p 280), and *Campbell* v. *Wardlaw* (8, Ap. C., 641). Also, as to mineral leases, *McSwinney's Law of Mines* (p. 183), and *Green's Roman Law* (p. 143). This mining right is a right *in rem*, and if I wish to debar a man from assigning his rights I must express that in my contract with him.

Sir H. Juta, K.C. (for respondent): If there ever was a case in which *delectus personæ* came in, surely this is one. Here is a farmer carrying on his operations, and allowing a man to come on his land and prospect; there would have been constant friction between these men unless there had been *delectus personæ*. In most contracts *delectus personæ* occurs to a greater or less extent; for instance, in a building contract, for that is a personal contract.

[De Villiers, C.J.: If the work is done what does it matter who does it?] There is as much difference between one builder and another as between one gardener and another. Then, how can a contract be assignable which gives sole and exclusive rights? See *Imroth* v. *Ward* (8, Juta, 257). In that case the Court attached a certain meaning to the words "sole and exclusive right." Now, if a *persona grata* obtains certain rights and then hands them over to a company what becomes of the *delectus personae*. Then, again, whenever they speak of Hanikom they speak of "his heirs, executors, and assigns," showing that the arrangement entered into with him was intended to be lasting and permanent.

[Kotzé, J.: What about the executors?]

I would say that under this contract the executors have no rights. Then under section 14 the right to water refers the question as to how much water may be necessary to the personal opinion of O'Leary. Section 16 gives him a personal servitude, viz., to graze horses on the farm. Section 17 gives him another personal servitude of right of way. This case is not so much a question of law as of the terms of the written contract of lease. On that we take our stand, and it is not necessary to go beyond it. Surely the language of a written contract must mean something. In the Transvaal it has been held that a mining licence is not a lease; but, if this is a lease, it cannot be assigned, since, being a place for urban purposes, it is a lease of an urban tenement. *Swarts* v. *Landmark* (2, Juta, 5). This right is either a lease or a personal right. There is no question of any praedial servitude, so I do not see what the placaaten have to do with the matter.

Mr. Schreiner (in reply): As to the assignment of contracts, see *Leake on Contracts* (p. 998, 3rd Edit.). We are not considering a question of obligations, but of rights. As to the assignment of rights, see *Uitenhage Municipality* v. *Colonial Government* (9, Juta, 375). Common law gives us the right to assign, and there is nothing to show that this right has been in any way restricted. As to the water, there is nothing to show that, provided Hanikom got as much as he wanted, he cared who got the rest.

Cur. Adv. Vult.

Postea (September 11th).

De Villiers, C. J.: This is an appeal against a decision of the High Court of Griqualand to the effect that the plaintiffs, to whom one O'Leary ceded his rights under a certain contract between him and the defendant, had acquired no right of action by virtue of such cession. The contract provided that O'Leary should have the sole and exclusive right, during a period of five years, to prospect, dig, quarry, and explore for, work, win, take out, and carry away and dispose of all minerals, metals, and precious stones found in or under the farm Stilverlaat, the property of the defendant. The consideration for the rights thus granted was the payment by O'Leary to the defendant, his heirs, executors, or assigns, of £75 per annum, payable in advance. A right was given to O'Leary, after the expiration of the period of five years, to renew the contract for 18 further periods of five years "upon the same terms and subject to the same rentals," as are stated in the contract, upon giving notion of O'Leary's intention, "so to renew this lease." A right was further given to O'Leary to erect buildings and machinery, and to use water not required for farming purposes, but the defendant, his heirs, and executors, and assigns were to retain in their entirety the surface and agricultural rights of the farm.

The general rule of our law undoubtedly is that rights under a contract can be validly ceded, and the only question to be determined is whether a contract such as the one now under

consideration forms an exception to the general rule. The position taken on behalf of the defendant is that the contract is one of *locatio-conductio*, but that the lease is of such a nature that the lessee could neither sublet nor assign his rights thereunder. Under the Roman law there would have been no doubt whatever as to his right to sublet what he had himself hired from the defendant. The rule stated in the Code (4, 65, 6) that, in the absence of any special agreement, no one is prohibited from letting to another a thing which he has himself hired, has always been accepted as an authoritative statement of the law on the point. Groenewegen, in his note in the passage, merely refers the reader to Grotius (3, 19, 10), who adopts the rule as part of the law of the Netherlands, but adds that it does not hold good with respect to the letting of work, and labour, nor in regard to houses in municipalities whose bye-laws prohibit such sub-letting without the consent of tht owner. In the case of *De Vries* v. *Alexander* (Foord's Rep., p. 43), this Court had occasion fully to consider the question whether a further exception had been introduced into the Dutch law in the case of agricultural leases, and the question was answered in the affirmative on the authority of Voet and other writers. Two further exceptions are mentioned by Voet (19, 2, 5), namely, where the condition in life of the proposed sub-lessee was such as to justify a reasonable apprehension that he would injure the thing let by applying it to different purposes from those to which the original lessee would have applied it, and where, in the case of buildings, the lessor is prepared, on receiving notice of the intended sub-lease, to retain the thing and pay the same rent as the sub-lessee had undertaken to pay. In regard to the first of these exceptions it does not appear to be in any way unreasonable, but the point does not arise for decision in the present case, because there is no allegation in the pleadings that the plaintiffs are in any way likely to prove undesirable tenants. In regard to the second of these exceptions the right claimed by the lessor bore some analogy to the right of retraction enjoyed by a debtor, in case of the cession of the debt, to discharge himself by paying to the cessionary the amount which the latter had himself paid for it. This right has been held in the case of *Seavill* v. *Colley* (9 Juta, 39) no longer to exist in this colony, and the reasons for holding that the one rule had been abrogated, would be equally potent in favour of the abrogation of the other. However anxious the Court may be to maintain the Roman-Dutch law in all its integrity, there must, in the ordinary course, be a progressive development of the law keeping pace with modern requirements. In no department of law has this development been more marked than in the practice relating to leases, especially of mineral rights. Whilst under the Dutch practice assignments were almost unknown, such assignments are now more usual than sub-leases, especially where the leases are taken over by joint stock companies. It would be impossible to apply in all their strictness the ancient rules regulating the sub-letting of property to modern assignments of leases, and it would certainly be a startling doctrine to hold at the present day that, where a lessee under an assignable lease transfers his rights to a company against which no valid objection exists the lessor might claim that the assignment shall be made to himself instead. The Court has been referred to an able and interesting judgment of Wessels, J., in the case of *Rolfes* v. *Zwcigenhaft* (Transvaal Supreme Court), in support of the view that there was a tendency in the Dutch law against the sub-letting of either *praedia rustica* or *praedia urbana*, unless the owner approved of the sub-lessee. This view, however, seems to be somewhat inconsistent with the judgment of the former High Court of the Transvaal, which held that the tendency was in favour of sub-letting, and decided that, even in the case of *praedia rustica*, there was a right to sub-let or assign (*Eckard* v. *Nolte*). The only authorities relied upon in support of the alleged tendency against subletting are passages in which it is stated that the owner could take over the lease himself if he did not approve of the sub-lessee, but an exception of this nature, even if it were generally admitted, hardly seems to establish such a tendency as would now justify the Court in holding that a lease other than an agricultural lease cannot be assigned without the consent of the lessor. The question, moreover, in the recent Trans-

vaal case was not whether the lessee could assign, but whether, having assigned, he remained liable for the rent to the lessor. This question was decided in the affirmative, and it is impossible to ignore the cogency of the reasoning in favour of the decision. I am not sure, however, that the judgment attached sufficient weight to the change in form of modern leases from those which were in use under the Dutch law, or to the difference between ancient sub-leases and modern assignments. The judgment appears to confine the doctrine that a lessee's obligations cannot be assigned without the consent of the lessor to the case of short leases, but if the reasoning is correct, it ought equally, if not *a fortiori*, to apply to long leases. As pointed out by Voet (19, 2, 1), the juridical nature of the right created by the contract cannot depend upon the length of time during which the right is to subsist. It is true that in the case of long leases registration is required, but this requirement was introduced for the protection of the lessor's creditors and of intending purchasers of the land, and not on account of any inherent difference between long and short leases. In the case of *Parkin* v. *Lippert* (12 Juta, 179), this Court considered the question whether the insolvency of a lessee terminates the lease, if before the date of sequestration there had been a complete assignment of the lease; but my remarks on the point were merely *dicta*, seeing that it was found that the lessee had sublet the land, and not assigned the lease. The *dicta* in that case, as well as in *De Pass* v. *Colonial Government* (4 Juta, 383), certainly went very far in upholding the complete alienability of leasehold property, whether the lease be of long or of short duration, but it is an entire mistake to suppose that, in the opinion of the Court, a lessee might escape liability for the rent by transferring his rights to a pauper. There is nothing in either judgment to support the view that the lessor is bound to accept an assignee to whom reasonable objections exist. It is only in case of his raising no valid objection to the proposed assignee that he could, in any case, be held bound by a transfer of the lessee's obligations to the assignee. In my humble judgment, however, the length of the lease can have no bearing on the question whether or not a complete delegation has been effected.

In the present case the lease is for five years, but the lessee has the right of renewing the contract for eighteen further periods of five years. At the option, therefore, of the lessee, the lease might continue for ninety-five years. This circumstance certainly affords an argument in favour of the view that the benefit of the lease was not intended to be confined to O'Leary personally. On the other hand, the mention of the heirs, executors, and assigns of the lessor, and not of the lessee, affords an argument in favour of the opposite view. These arguments certainly counterbalance each other, and the case must be decided without reference to them. The decisions of the learned judge in the Court below was mainly founded upon a judgment of this Court in *Coronel* v. *Ward and Wessels* (1 Sheil, 157), where it was held that the cessionary of certain prospecting rights leased to a prospector and his assigns acquired a right of action against the lessor. The fact that assigns were mentioned was regarded as conclusive in favour of the assignability of the contract, and it was, therefore, unnecessary to inquire what the rights of the cessionary would have been if the contract had been silent as to assigns. It is to be regretted that the judgment was so brief or that it was too briefly reported, for, as it stands, it is somewhat misleading. A careful reading of it, however, satisfies me that it was not intended to decide that if assigns had not been mentioned the contract would not have been assignable. The second case relied upon by the learned judge is that of *Imroth* v. *Ward* (8 S.C., 257), where a remark was made by myself during the argument that it would make a material difference to the lessor whether one person only prospected or whether a large number of sub-concessionaries came upon the ground. The rights of the lessor, however, were not in question, and the remark was made in reference to counsel's argument that the owner could not complain of their coming on the ground. The lessee in that case had ceded a fourth of his rights to the plaintiff on condition that he (the lessee) should develop and work the mine at his own expense, and it was held that the plaintiff, who derived all his rights from the lessee, had

no authority, in the face of the condition, to go upon the farm and prospect for himself. The rights of the owner were left untouched by the decision, and the remark which fell from the bench for the purpose of testing the soundness of counsel's argument, was certainly not intended to decide a question not then before the Court.

For the reasons which I have already stated, I am of opinion that the rights of O'Leary under the contract now in question could be legally ceded to the plaintiffs. The land, it is true, was a *praedium rusticum*, but there was no letting of the land for agricultural or pastoral purposes, and it is not alleged that there exists any reasonable apprehension of the plaintiffs abusing the rights ceded to them. The appeal must, therefore, be allowed, with costs in this Court, and the exception must be overruled, with costs in the Court below.

My brother Maasdorp concurs with this judgment.

Kotzé, J.: The point we are called upon to decide is whether an exception taken in the Court below, that the declaration discloses no cause of action, was rightly upheld. The plaintiffs, as cessionaries of what may be called a mining lease, a species of contract which since the discovery of minerals in South Africa has become one of daily practice, instituted an action for the purpose of having it declared by the High Court at Kimberley that they are entitled to the rights conferred by that contract upon one O'Leary, from whom they have obtained a cession of those rights. The lease was granted by Hanekom, as owner of the farm Stilverlaat, to O'Leary, on 23rd October, 1896, for a period of five years, and after the expiration of the said period of five years O'Leary shall have the right to renew this contract for eighteen further periods of five years each, "upon the same terms and conditions, and subject to the same rentals as are herein contained, upon giving notice to the said Johannes Hanekom, his heirs, executors, and assigns, of his intention so to renew this lease at any time before the expiration of the then current period of five years." The contract gives O'Leary the right to prospect, dig, quarry, work, win, and for his own account sell or dispose of all minerals and precious stones, of whatever kind or nature, found in or under the farm Stilverlaat. The case, therefore, raises an important and interesting question as to the lessee's right to cede or assign such a mining lease. There can be no doubt as to the rule of the Roman-Dutch law on the subject, which is correctly stated by the learned Judge-President in the following words: "Speaking generally, whatever may be the case as to contractual liabilities, under our law contractual rights are capable of assignment or cession, unless there is something either in the nature of the contract, or in the terms of the agreement, excluding or negativing such capability." The only further qualification in the case of a cession of a lease is that mentioned by Voet (19, 2, 5), viz., where it can be shown that the cessionary or the sub-lessee is an undesirable person, or where the subject leased is applied to an improper or unsuitable purpose (cf. Cens. For., 4, 22, 9). But there is nothing of this kind alleged in the present instance.

Now, I agree with Mr. Schreiner's argument that the Placaat of 1658 has no bearing on this case, which is not governed by the decision in *De Vries* v. *Alexander* (Foord's Rep., p. 43). A Statute, dealing with certain local abuses in the provinces of Holland and West Friesland with regard to agricultural rights and holdings, cannot, in my opinion, be extended to a mining lease or contract, such as that now under consideration. As the general rule of our law recognises the lessee's right to assign or cede his contract, it lies on those who dispute that right to show that, from the nature of the contract given to O'Leary, or any of its terms, the conclusion can fairly be drawn that it is a purely personal and non-assignable contract. It certainly is somewhat noticeable that, while the document of lease always speaks of the lessor and owner, "his heirs, executors, and assigns," these words are not employed in connection with the mention of the name of O'Leary. From this, however, it does not follow, as the learned Judge below seems to have thought, that the rights of O'Leary are purely personal. Sir Henry Juta urged with much force that the maxim "*expressio unius est exclusio alterius*" governs here, but that maxim,

it has been well observed, is not of universal application. The mention of one thing does not necessarily exclude another which is not expressed. We are, therefore, brought back to the original position, what does the contract say? Against the circumstance that the words "his heirs, executors, and assigns," are not coupled with the name of O'Leary, we have the fact that the term of the contract is for 95 years in all. Such a lease *in longum tempus* certainly raises at least an equally strong presumption against the view that the contract is a purely personal one, so far as O'Leary is concerned. But, then, it is said that the lessor must be taken to have intended O'Leary only to enjoy the benefits of the contract, for the "sole and exclusive right" is given to him. These words appear to me to have been inserted for the protection and benefit of O'Leary, and do not indicate that the lessor intended to reserve a *delectus personae* to himself. It was contended at the Bar that by our law a person has such a choice or selection in many contracts, and the illustration of a building contract was put, which, it was argued, the builder or contractor cannot make over to another without the consent of the building owner. But this is not so. As usual, we find that the point has not escaped the notice and industry of Voet, who says that the builder may substitute another in his place to perform the work which he had undertaken, except where by the terms of the contract, or from the nature of the case the contrary appears; as, for instance, where one has ordered a painting to be done by a particular artist. Voet adds that, although the builder may so assign his contract, he still continues liable to the building owner for the due and proper performance of work (19, 2, 34,; cf. Cens. For., 4, 22, 9). The question of a *delectus personae* does not arise in the present case.

The Court below relied on two decisions of this Court. The first is that of *Coronel* v. *Ward and Wessels* (1 Sheil, 157), where it was held that because in the particular contract then under consideration, the "assigns" of Ward were mentioned, he was entitled to cede his rights. From this the inference was drawn by the learned Judge-President that the absence of the word "assigns" in the present agreement shows that the contract is not assignable. But as I have already observed, the one does not follow from the other. Coupled with other circumstances, the absence of the word assigns may have a material bearing on the question of assignability or non-assignability. Its mere absence, however, in a written contract does not *per se* amount to much, and is not sufficient to take the case out of the general rule. The other case referred to is that of *Imroth* v. *Ward* (8, S.C., 257), where during the argument the Chief Justice remarked that it would make a very material difference to the lessor whether one person only prospected or whether a large number of sub-concessionaries came upon the land. Now the Chief Justice has himself during the argument in the present instance answered that by observing that an expression of that kind does not form any part of the judgment or decision, and is often merely made for the purpose of testing the soundness of counsel's contention or the view occurring at the moment to the Judge. It is quite true that in *Imroth* v. *Ward* this Court held that under the terms of the agreement Ward alone, and not Imroth, was entitled to do the prospecting, and other work required, but that was because of a special agreement between them to that effect, and Wessels, the lessor, was not before the Court. These decisions, therefore, do not affect the point. It has not been shown to my satisfaction that O'Leary cannot assign this contract, and I may add that mining agreements or leases, of the kind with which we are now dealing, have been held by the former High Court of the Transvaal Republic to be assignable. If O'Leary then can assign his rights, it follows that the right of renewal is not personal, but, likewise, passes to the cessionary. It was so held in *Paterson's Executors* v. *Webster, Steel and Co.* (1, Juta), although the Chief Justice was careful to add that by the cession, the original lessees did not escape responsibility for the performance of the covenants in the lease. In the same way when I say that a contract, like the one under discussion, can be assigned, I do not wish it to be understood that such assignment, where there is no proof of any consent by the lessor to that effect, will relieve the original lessee or *Cedens* from his liabilities under the contract. I do not think it necessary at this stage to decide

the point, for the appeal, upon the soundness, or otherwise, of the exception taken in the High Court at Kimberley, can be readily disposed of without entering upon that. I am of opinion that the declaration does disclose a cause of action, and that the exception is untenable. The appeal should, therefore, be allowed, and the judgment below reversed, with costs.

[Appellant's Attorneys: Syfret, Godlonton and Low; Respondent's Attorney: H. Sonnenberg.]

GENERAL MOTIONS.

Ex parte SELTZER.

Mr. Buchanan asked leave to mention this matter as one of urgency. The petitioner applied on behalf of his minor daughter, Annie Seltzer, for a writ of arrest against the respondent, one J. Kaplan, to found jurisdiction, or in the alternative for the attachment of a certain ring belonging to respondent.

The petition set forth that the petitioner was the father and natural guardian of Annie Seltzer, who was of the age of 19. In the present month respondent made a proposal of marriage to Miss Seltzer, which was accepted. He purchased and handed to her an engagement ring, valued at £32 10s., and caused the engagement to be announced in Cape Town papers. On the 3rd inst., Kaplan, after having publicly announced the engagement to his friends, summarily broke it off, and clandestinely left Cape Town, and was now on his way to the Orange River Colony. The petitioner stated that the act of the respondent had caused himself and his family great grief and sorrow, and had lowered his daughter in the estimation of her friends. Petitioner was anxious to take proceedings to recover £5,000 damages for breach of promise, and made the present application in order to found jurisdiction, Kaplan being domiciled at Jagersfontein-road, in the Orange River Colony. Respondent had left on his way to the North on the previous evening, but petitioner had been informed, and believed, that he had broken his journey, and was now at Paarl or Wellington, whence he intended to proceed by to-night's (Friday's) train to the Orange River Colony. The ring was at present in the hands of the plaintiff's attorney (Mr. David Tennant).

Maasdorp, J., asked why petitioner had not taken the course of applying to the Registrar under the eighth Rule of Court for a writ of arrest.

Mr. Buchanan said the applicant chose the present course, his object being to found jurisdiction.

Maasdorp, J., said an order would be granted in terms of the alternative prayer to attach the ring to found jurisdiction in an action to be instituted for damages for breach of promise of marriage.

STRYDOM V. MARKOTTER.

Spoliation.

This was an application to have a rule *nisi* granted on August 17th made absolute, ordering the respondent to restore to the plaintiff a Colonial mare, alleged to have been wrongfully taken from his possession.

The applicant's affidavit stated that on Thursday, August 6, he went to the town of Uniondale, a distance of about 30 miles, with his cart and two horses, for the purpose of taking his sick child to a doctor for treatment. The horses had been in his lawful possession for a considerable time as his sole property. On his arrival at the town of Uniondale, he obtained permission from a storekeeper—Abraham Pieter Hansen—to place the two horses in his stable reserved for customers. On Saturday, the 8th August, while the petitioner was attending to his sick child, Christoph Carl Markotter, a clerk, in the employ of John Thomas Stone, of Uniondale, proceeded to the stable, and, secretly, and without the applicant's knowledge or consent, removed one of the said horses, a Colonial mare. Markotter took the mare to another stable in the town, and he was still in possession of the animal, and refused to give up the same, although requested to do so. Markotter alleged that he lost a Colonial mare in the Protection Camp during the administration of martial law, resembling the petitioner's mare in colour and in other respects. The petitioner said that the mare was born in November, 1898, and that in or about May, 1901, he handed over the mare to the military authorities, in accordance with instructions, for the purpose of being sent away to the Protection Camp. After the cessation of hostilities and in or about August, 1902, the said animal was re-

turned to him by the military authorities as his own legitimate property, and it had since remained in his quiet and lawful possession up to the month of August, 1903. The said mare was the *bona fide* property of the petitioner, and was taken possession of unlawfully by the respondent, Markotter.

The respondent, in his affidavit, denied the allegations as to the question of the ownership of one of the question of the ownership of one of the horses. In answer to the other allegations, he stated that in or about April, 1901, he handed over to the military authorities of Uniondale the identical mare in question, and that it was subsequently sent by the military authorities to the military Protection Camp; that after the cessation of hostilities the mare was claimed and taken by the petitioner in deponent's absence from the military authorities at Humansdorp as his property; that he was afterwards informed by one Le Roux, a groom in the service of his late stepfather, the Rev. H. Hough, that he had seen the mare in the possession of a man in the employ of the petitioner; that defendant had written a letter to the applicant requesting him to deliver up the said mare, and that, as applicant had taken no notice of that, deponent's agent had demanded delivery of the said mare.

Mr. McGregor for the applicant. Mr. Buchanan for the respondent.

Mr. Buchanan argued that the point to be determined by the Court was really as to the ownership of the horse.

[Kotzé, J.: Under our Roman-Dutch law you cannot take the law into your own hands in that manner. The question of that ownership is not now before the Court; it is simply a question of possession. You have no right to go and forcibly take possession of a horse that is in the possession of another man. You must give back this horse to the man, and then you can bring an action to determine the question of ownership.]

Mr. Buchanan said that his client had not taken possession of the horse in a forcible manner, but had obtained it from the applicant's agent.

[Kotzé, J.: How can a stable-keeper give consent when he has nothing to do with it?]

Mr. Buchanan said he did not seek to justify the taking, but the fact remained that the applicant had received a horse from the military that he had no right to receive.

Kotzé, J., said that the petitioner was *prima facie* in the lawful and peaceable possession of the animal, and how could the respondent go and forcibly dispossess him of it?

Maasdorp, J.: There is no doubt that the respondent in this case committed an act of spoliation in removing the horse from the stable, where it had been placed by the applicant, in the manner in which he did remove it, and the Court will now order the defendant to deliver the horse to the applicant and pay the costs of this application.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZÉ.]

SHAW v. FOCK. { 1903. Sept. 7th.

Counsel—Agent—Reasonable disbursement.

The defendant, being charged with a criminal offence, employed a law agent to instruct Counsel for his defence. The trial lasted three days, and the defendant was acquitted. Counsel's fee for the first day was paid by the defendant. On the second day Counsel demanded a refresher fee, which was also paid by the defendant. On the third day no demand for a refresher fee was made, but the defendant admitted, that if it had been made on that day, he would have paid it. Subsequently Counsel demanded the fee for the third day from the plaintiff, who paid it.

Held, *that the plaintiff was entitled to recover the amount*

from the defendant in the absence of any proof that the fee was unusual or exorbitant.

This was an action brought by William B. Shaw, law agent, Cape Town, against Joseph Fock, valuator and auctioneer, Mowbray, to recover twenty guineas, moneys disbursed to counsel at the special instance and request of the defendant.

The declaration set out that at the Criminal Sessions of this Court in February last, the plaintiff was employed by the defendant to engage counsel to defend him on a charge of forgery, and uttering forged instruments, knowing the same to have been forged, under the Liquor Licensing Act. Plaintiff engaged counsel accordingly for the purposes of the said defence, and the defendant objected to pay the fees for which plaintiff had become responsible to counsel. Plaintiff had paid to counsel his fees in connection with the matter, and the defendant had only paid part of such charges, and there still remained due and owing to the plaintiff £21, which the defendant refused to pay.

The defendant, in his plea, admitted paragraph 1 as to the parties. As to paragraph 2, he admitted that he employed the plaintiff in connection with the defence, but he specially denied that he employed plaintiff to engage counsel, and stated that he himself engaged counsel and paid the fees. He denied that he (plaintiff) became responsible to counsel for the fees in connection with the said defence, or that the defendant undertook to pay the said fees to counsel. As to paragraph 4, he admitted that he was defended by counsel at the hearing, but he denied the other allegations, and said that counsel had been paid his fees in connection with the said defence by him. He knew nothing about the said charge of £21, and he admitted that he refused to pay the said amount, and said that there was nothing further due from him to the plaintiff.

Upon the foregoing pleadings issue was joined.

Mr. Burton for plaintiff. Mr. Upington for defendant.

Sir Henry Hubert Juta, called by Mr. Burton, said that Fock came to his chambers, and said he was going to be tried, and he asked witness whether he would be able to defend him. Witness replied that he thought so, and informed the defendant that he must get an attorney or a law agent. Witness believed that Fock replied that he would, and that Mr. Shaw had acted for him. Witness said: "You must go and get an agent or an attorney to instruct me." Thereupon Mr. Shaw came. He first came alone, and witness took his instructions from him. When he got his brief from Mr. Shaw, he made certain notes. Subsequently he had a consultation with Mr. Shaw and the defendant. Mr. Shaw made notes at the time of the different points that witness wanted in evidence. He told Mr. Shaw what his fee would be for going into court, and that if the case went beyond one day he should want refreshers. His recollection was that when Mr. Shaw came to see him about the brief he came alone. His fee was 100 guineas for the trial. The case ran beyond one day into the Civil Term, and he told Mr. Shaw's clerk that he should want a refresher for the second day, and he received 50 guineas. Then the case went on to a third day, and he informed Mr. Shaw's clerk that he should want a further refresher of 20 guineas. The fee and the first refresher were paid to him by cheque at the time. He sent a memo. to Mr. Shaw on the 20th April in the following terms: "You will oblige me by sending fee (£21) due before next term begins." The fee was paid to him by Mr. Shaw.

Cross-examined by Mr. Upington: He did not remember whether the first cheque was signed by Mr. Fock. He arranged for the refresher of 50 guineas with whomsoever was acting on Mr. Shaw's behalf. He fixed the amount of the second refresher on the third day of trial. He informed Mr. Shaw or the person who was acting for him. The fees were not marked on the brief, he believed; he told Mr. Shaw what the amount was to be.

The plaintiff, William B. Shaw, law agent, Cape Town, said he had frequently instructed counsel in criminal cases. He appeared for Fock in the proceedings in the Magistrate's Court. When they found that defendant was to be indicted by the Attorney-General, witness asked him who was going to defend him. Fock said Sir Henry Juta, and he went to see

Sir Henry, and afterwards came and told witness that counsel would like to see him. Sir Henry Juta said that his terms would be 100 guineas, with the usual refreshers. Witness saw Sir Henry, in company with the defendant. Before the case came on on the first day, witness asked defendant if he would make out a cheque for 100 guineas. Defendant produced a cheque for 100 guineas, and witness handed this over to Sir Henry. The second cheque was handed to Sir Henry Juta on the morning of the second day of trial. On the third day witness told Fock that he would have to pay a second refresher. Fock said he thought Sir Henry Juta had had enough. Witness had his first notification of a further charge of 20 guineas at the end of term. Witness paid the amount.

Cross-examined by Mr. Upington: He did not mention "refreshers" in one of the letters he sent to Fock, although he mentioned that the fee would be 100 guineas. The reason why he did mention "refreshers" was because defendant had been present when the fees were arranged.

Mr. Upington: Was Mr. Fock annoyed when he had to pay a further refresher?

Witness: No.

Was he pleased?—I think he was very pleased when he got off so lightly.

Further cross-examined: He received Sir Henry Juta's bill for the second refresher about the 20th March. Mr. Fock thought Sir Henry ought to forego the second refresher, and asked witness to go and see Sir Henry with regard to the matter. Witness told him that he (Shaw) would do nothing of that kind. Witness sent in his account early in March. He received a cheque from Mr. Fock for £21 for his personal services. There was nothing on witness's account to show that a further amount was due. The £21 did not include his fees in the Magistrate's Court; these had already been paid. Fock had never said that he would not pay the second refresher of 20 guineas.

Mr. Burton closed his case.

The defendant, Joseph Fock, said that in January he was charged with certain criminal offences. The case was reached on the last day of January, and it ended on February 3. When the indictment was left at the office of Mr. Shaw, the latter saw him, and told him that the indictment had been received. Witness saw Sir Henry Juta, who told him that he should get a lawyer. Mr. Shaw afterwards saw him, and asked him whether he would not allow him (the plaintiff) to act for him, as he knew the ins and outs of the case. He received a letter from Mr. Shaw, stating that the fee would be 100 guineas. He had heard nothing at all about refreshers, and he had understood that 100 guineas would cover all charges. After the first day's hearing, he received a notice to go to Sir Henry Juta's chambers, and he went over with Mr. Shaw. Sir Henry asked him some questions, and then looked at Mr. Shaw, and Mr. Shaw looked at Sir Henry. Then they asked him quietly to go out of the room, and a little time afterwards Mr. Shaw came out and told him that Sir Henry would want a refresher. He asked what that was. Mr. Shaw said Sir Henry wanted some more money, and witness replied that he thought Sir Henry ought to be satisfied. Shaw told him that Sir Henry might withdraw unless he paid a refresher, and witness handed a cheque on the morning of the second day of trial to Sir Henry. He objected to paying the amount, because Shaw was not entitled to it. He did not give authority to Shaw to disburse any money on his behalf.

Cross-examined by Mr. Burton: He paid for all the evidence being copied, and Mr. Shaw had nothing to do with it.

[De Villiers, C.J.: But, supposing you had been told on the third day of trial that Sir Henry Juta would not continue unless you paid 20 guineas, would you not have paid it?]

Witness: Well, but I was not told that.

Mr. Burton (to witness): You were in your worst plight then.

Witness: I was in the hands of the Philistines.

Mr. Burton: You know, the Philistines in the shape of the nine men in the box had not been got rid of then, and you were in considerable danger, and were prepared to pay at that time.

Witness: Yes, and I am in danger now.

Mr. Burton: Yes, I think you are in very great danger.

Mr. Upington closed his case.

Mr. Upington (for defendant): Our case is that the plaintiff was not retained by the defendant in the usual way, so that all fees were paid over to him.

[De Villiers, C.J.: Must counsel be instructed by an agent in criminal cases?]

No, they can be instructed by the prisoner.

[Mr. Burton: Only from the dock.]

I never heard that before.

[De Villiers, C. J.: Surely Fock was willing to pay refreshers?]

He was not willing. If Mr. Shaw had told him at first that refreshers would be charged, and he had instructed Shaw to proceed, of course he would have been liable: but Mr. Shaw's letter of December 9th is quite inconsistent with that view. I do not know that counsel are entitled to charge refreshers in criminal cases. I imagine that they usually make an arrangement with the prisoner's attorney beforehand. My point, however, is that Mr. Shaw never communicated to Fock that refreshers would be charged. As to English cases, see *Blythe* v. *Funshawe* (10 Q.B., 207), where see the judgment of Baggally, L.J.

[De Villiers, C.J.: Fock paid a refresher for the second day.]

Yes, but that was under pressure. It does not follow that he was bound to pay further refreshers. If Sir H. Juta made an arrangement with Mr. Fock that very fact shows that refreshers are not customary in criminal cases, and therefore it was for Mr. Shaw to have got the defendant's sanction before incurring this charge. Shaw admits that he had no express authority to pay refreshers.

Mr. Burton (for plaintiff) was not called upon.

De Villiers, C.J.: No defence has been raised in the present case that the fees are improper; nor has any special defence been raised that the payment of a refresher in criminal cases is improper or unusual. The defence raised is that the plaintiff had no authority to pay the twenty guineas claimed to counsel. The evidence clearly shows that when the defendant first consulted counsel, counsel desired to be instructed by a lawyer, and accordingly the defendant brought the plaintiff to counsel, and from that time counsel would look not to the defendant, but to the plaintiff for his fees. The fee for the first day was paid by the defendant himself. That is true. He gave a cheque, but the payment must be considered as having been made through the lawyer employed. On the second day, before the case was heard, the defendant admits that he gave instructions for the payment of a refresher, and at all events he then had notice by reason of the demand for a refresher that the original payment of 100 guineas was not to cover the whole charges of counsel, but that for each day's trial some fee was to be paid. The defendant accordingly, fearing counsel might throw up his brief, paid the fifty guineas for the first day's refresher. For the second day's refresher there was no demand beforehand for payment, but I put the question to the defendant as to what he would have done if such a demand had been made, and he admitted he would have paid the fee, because he could not very well have allowed the case to be thrown up at that stage. Well, it is shown that at that stage he considered himself liable to pay. He said he was under pressure when he paid the first refresher, but there was no illegal duress. No demand was made for the amount of the second refresher until about a month after the trial, and then he refused to pay, because there was no authority to plaintiff to pay the fee to counsel. Now, in my opinion, seeing that the plaintiff had been employed to conduct the case, he was justified in making such payments on behalf of the defendant as were necessary for the proper conduct of the case. In the absence of any proof that the fees were unusual or exorbitant, I am of opinion that the plaintiff is entitled to recover the fee paid by him in good faith to counsel, and judgment must be for the plaintiff, with costs.

Kotzé J., concurred.

Judgment was entered for plaintiff for the amount claimed, with costs, to include costs of the postponement.

[Plaintiff's Attorneys: Michau and De Villiers; Defendant's Attorneys: Van der Byl and Van der Horst.]

APPEAL CASE.

THERON v. VAN DER MERWE. { 1903. Sept. 7th.

Rei vindicatio—Value—Procedure in Magistrate's Court.

The plaintiff sued the defendant in a Magistrate's Court for delivery of a mule belonging to the plaintiff or its value.

The plaintiff proved his ownership, but omitted to prove the value. After his case had been closed, the plaintiff applied for leave to prove the value, but the Magistrate refused leave and granted absolution from the instance. On appeal, the case was remitted to the Magistrate, to be tried on its merits, with leave to the plaintiff to prove the value of the mule.

This was an appeal from a judgment of the Resident Magistrate of Calvinia.

Mr. M. de Villiers appeared for the appellant; the respondent was not represented.

The appellant sued in the Court of the Resident Magistrate for delivery of a certain mule, which he claimed as his property, and which was in the possession of the respondent, or for payment of £20, the value thereof. At the trial the mule stood before the door of the court, and a number of witnesses declared it belonged to the plaintiff. After the evidence for the plaintiff had been heard, the defendant's attorney asked for absolution from the instance on the ground that the value of the mule had not been proved. The Magistrate gave absolution from the instance, and from that judgment the plaintiff now appealed. The Magistrate's reasons were as follow: "The plaintiff closed his case without calling evidence as to the value of the mule. Defendant thereupon applied for absolution from the instance. This Court decided that it had no alternative but to grant the application, and that, even did it have any discretion, it would not be wise to exercise it in favour of the plaintiff, owing to the laxity of procedure. It would encourage every litigant to avail himself of the precedent on any occasion when he found he had omitted some point, or he might wish to strengthen his case. The defendant having availed himself of the plaintiff's oversight, the Court felt bound to support him. It was, I may add, with great reluctance that the Court came to this conclusion, as the case is a hard one."

Counsel having been heard in argument on the facts,

De Villiers, C.J.: I think it is very much to be regretted that the Magistrate did not hear the evidence for the plaintiff, even after the case had been closed. The plaintiff claimed the mule as his property, and if he proved his ownership he was entitled to have the mule. He was, therefore, not bound to prove the value of the mule, but even if he was so bound it clearly was a case in which the plaintiff should have been allowed to supply the omission after his case had been closed. This Court has the power to remit a case to the Magistrate for further evidence, even after judgment has been given, but in that case, the final judgment is given by this Court. In the present case, however, the Magistrate did not hear the witnesses for the defence, and the better course will be to remit the case to be tried on its merits. The Court will allow the appeal, with costs in this Court, and remit the case to the Resident Magistrate to be tried on its merits, with leave to the plaintiff to produce evidence as to the value of the mule.

Kotzé, J., concurred.

[Appellant's Attorneys: Van der Byl and Van der Horst; Respondent in default.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZÉ.]

BURGER V. SOUTH AFRICAN MUTUAL LIFE INSURANCE SOCIETY. { 1903. Sept. 8th., „ 12th.

Life policy — Public policy — Death in consequence of illegal acts.

B. insured his life with the defendant society, the policy providing that in case "it shall not have become void by the death of the assured by suicide, whether sane or insane, within one year of the date hereof, the said society will pay to the

executors, administrators, or assigns of the assured, the sum of £200." After paying the premiums for ten years, B. went into rebellion and was killed in an engagement with the British troops.

Held, *that B.'s executors were entitled to recover the amount of the policy.*

This was a special case submitted to the opinion of Court. The case stated was as follows:

Plaintiff is a widow, residing in the district of Clanwilliam, and is the executrix testamentary in the estate of her late husband. The society is a duly incorporated company, carrying on business in this colony, and with its head offices in Cape Town. On or about the 3rd March, 1892, the plaintiff's husband effected a policy of insurance on his life with the said company for £200. By the terms of the said policy, the company agreed that if the annual premiums were paid in the manner aforesaid, the company would, subject to the deed of agreement, pay £200 upon the death of the assured. That was, subject to the policy not having become void by the death of the said Burger by suicide, whether sane or insane, within one year of the date thereof. The premiums of £4 12s. were paid each year. While the policy was in full force he went into rebellion against the King. On or about the 25th March, 1902, in the division of Van Rhyn's 1902, in the division of Van Rhyn's Dorp, the deceased was killed while bearing arms in an engagement between His Majesty's troops and a body consisting of British subjects, then and there in rebellion, and unlawfully resisting the said troops. The society refuse to pay the claim. The plaintiff contends that she is entitled to receive the amount of the insurance. The defendant contends that, by reason of the death of the said Burger while so fighting in the armies of the King's enemies against his Sovereign and his troops, the plaintiff is not entitled to the amount.

Mr. Burton appeared for the applicant, and Sir H. Juta, K.C., appeared for the respondent.

Mr. Burton said that the facts of the case were simple. Eleven years ago Burger, who was represented by the plaintiff, insured his life for £200 upon this policy. He had paid all the premiums up to the date of his death, and due notice had been given of his death. The only point raised now by the defendant was the fact that the assured met his death whilst he was fighting in the ranks of the King's enemies, and the contention was, that in consequence of that fact, the company were not liable to pay. Having referred to the terms of the policy, he thought that, subject to what his learned friend had to say, he should leave the matter there.

Sir H. Juta submitted that the plaintiff had no good ground of claim. No man who insured his life and then lost his life through an unlawful act, say that he was hanged for murder, could possibly claim the insurance money, and where a man went into rebellion and lost his life while fighting against his Sovereign, he could not recover the insurance money. The principle was laid down a good many years ago, in the case of the *Amicable Insurance Society* v. *Bolland* (4 Blythe's Reports, p. 194). Counsel quoted at some length from the judgment given by the Lord Chancellor, and he also referred to *Porter on Insurance, Bunyon on Life Insurance*, and *Crawley on Life Insurance*. He also quoted the case of *Cleaver* v. *The Mutual Reserve Fund Life Association*, arising out of the death of Maybrick, whose wife was convicted on a charge of causing his death. He submitted that in that case Lord Esher, Master of the Rolls, upheld the principle which had been laid down by the Lord Chancellor, Lord Lyndhurst.

Kotzé, J., put it to counsel why the innocent should suffer because of the misdeeds of the father and husband.

Sir H. Juta said that the wife and children did not suffer. Suppose, for instance, this man Burger had devised the benefits accruing under the policy to someone else?

[Kotzé, J.: But confiscation is not recognised in this colony.]

No, nor does it hold in England. It is not a question of confiscation. These are cases where it is contrary to public policy that a man who commits a crime should have the benefit of it.

Mr. Burton said that, as far as he had been able to find, the case of the *Amicable Society* v. *Bolland* was the only one in which a decision had been given in which a man who had committed a felony was not entitled to get the proceeds of a policy on his life. In this case there was no condition inserted as to suicide or dying by his own hand, or any violation of law, as had been inserted in a great many policies. There was no doubt that in the case of the *Amicable Society* v. *Bolland* the Lord Chancellor went further than had been done in other cases that he had been able to find in deciding that, without any condition in the policy, the fact that a man had committed a felony, for which he had been executed, deprived him, on the ground of public policy, of his right to the insurance money. He would submit that their lordships should not be carried beyond this particular decision, in which it was held that the assured was not entitled to receive the money because he had committed an act for which he had been executed, and their lordships would see, in looking through the reports of the case, that the argument went largely on the particular legal effects of felony in England. Counsel for the respondent based his argument upon public policy, but it should be borne in mind that public policy was a very elastic term. After quoting from *Hanson on Contracts* in regard to the relations of public policy and law (p. 181), Mr. Burton went on to say that it would be a most inequitable thing if this insurance company were to escape their liability upon that policy, because in the case which counsel had relied upon, there was no condition whatever laid down, whereas in the present case, the company made a reservation as to suicide within a period of twelve months from the date of the policy, so that, even if death were due to suicide, whether sane or insane, the company would be liable after the lapse of twelve months.

[De Villiers, C.J., said that, if the decision of the Lord Chancellor were upheld, it would not be very material whether the twelve months had elapsed or not if death arose from suicide, because suicide might very fairly be held to be contrary to public policy.]

Mr. Burton said that only showed how necessary it was to insist upon the dangerous character of this doctrine of public policy. He contended that it would be very much more against public policy if a contract of this kind should be set aside. He urged that the company had failed, because this was not a case in which a man had committed a felony, nor was it a case of suicide; but it was a case of a man committing a wrongful act, in the course of which it was very problematical indeed whether he might be killed or not. The question as to the direct consequence of the violation of law had been dealt with in one of the American cases—*Murray* v. *New York Life Insurance Society*—in which the Court said they must satisfy themselves that the act was the immediate and necessary and proximate cause of death. It would be carrying the point very far if it were said that the act in this case was the immediate, proximate cause of his death. This man went into rebellion, but he certainly did not go into rebellion for the purpose of terminating his life, for, no doubt, he never contemplated the question of his death at all.

Sir Henry Juta in reply.

Cur. Adv. Vult.

Postea (September 12th).

De Villiers, C.J.: The question raised by this special case is whether the defendant society, after having for ten years received the annual premiums payable under a policy of life insurance, is entitled, on the death of the assured, to repudiate its liability on the ground that such death took place while the deceased was engaged in active rebellion. It is not suggested that at the time when the deceased insured his life he contemplated rebellion, but the contention is that it would be contrary to public policy to allow his executor to recover the amount of the policy, seeing that his death was a result of his illegal conduct. The policy provides that "if the annual premiums are duly paid, and in case this policy shall not have become void by the death of the assured by suicide, whether sane or insane, within one year of the date hereof, the said society will pay to the executors, administrators, or assigns of the assured, within thirty days next after proof of death, the sum of £200." There is consequently a clear undertaking to pay that amount on the death of the assured, the sole exception

being in case he should commit suicide within one year after the date of the policy. In support of the defendant society's contention that it is not liable, notwithstanding this clear understanding, the Court has been referred to *Fauntleroy's case* (4 Bligh, N.S., 194), where it was held by Lord Lyndhurst, in the House of Lords, reversing the decision of the Master of the Rolls, that the assignees of a life policy were not entitled to recover on the death of the assured at the hands of justice. The Lord Chancellor seems to have treated the case as if a clause had actually been inserted in the policy insuring the deceased against the event of the commission of a capital felony, and he held that, as such a provision would have been void as against public policy, the assignees were not entitled to recover. It is difficult to understand why a provision which neither party to the contract could have contemplated at the time when the contract was entered into, should be treated as inserted in the contract. The judgment was delivered seventy-three years ago, and if it is still to be held binding, it would follow *a fortiori* that, if the deceased in the present case had met with his death by suicide, the society would have been justified in repudiating its liability, notwithstanding the provision in the policy to which I have already referred. In the more recent case of *Clearer* v. *Mutual Reserve Association* (1 Q.B.D., 1892, p. 147), it was held by the Court of Appeal in England that the executors of a person who has effected an insurance on his life for the benefit of his wife can maintain an action on the policy, notwithstanding the fact that the death of the assured was caused by the felonious act of the wife. In the course of his judgment, Lord Justice Fry approved of the principle of public policy invoked in that case, as well as in Fauntleroy's case, on the ground that "no system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person." And Lord Esher, M.R., said: "No doubt there is a rule that, if a contract be made contrary to public policy, or if the performance of a contract would be contrary to public policy, performance cannot be enforced either at law or in equity; but when people vouch that rule to excuse themselves from the performance of a contract, in respect of which they have received the full consideration, and when all that remains to be done on the contract is for them to pay the money, the application of the rule ought to be narrowly watched, and ought not to be carried a step further than the protection of the public requires." If, in the present case, the deceased had been sentenced to death, and executed for high treason, *Fauntleroy's case* would have been a decision in favour of the view that the defendant company is not liable, but the Court is asked to take "a step further" by extending the doctrine to the case of a person killed while in the execution of an illegal act. The step may not be a long one, but it is not one which I feel justified in taking without clear and conclusive authority in its favour. There might have been less difficulty in extending the doctrine to a case like the present if the doctrine had not been coupled with the assumption that the policy contained a clause insuring the deceased against the event of his death in an engagement with the King's troops. Such a clause would have afforded proof that tht parties to the contract contemplated the possible death of the insured while engaged in rebellion, but in the absence of such a clause, it is quite impossible to assume that either party to the contract contemplated the mode of death which actually took place. The possibility of suicide was contemplated, and it was accordingly provided that if this should be the mode of death within one year from the date of the contract, the policy should become void. If, instead of being killed in action, the deceased had committed suicide ten years after the date of the contract, there would have been good ground for invoking the principle of public feeling against the payment of the amount claimed, for there would have been some evidence that the illegal act causing his death had been contemplated. In the present case there is no evidence whatever that the deceased contemplated rebellion, or that he became a rebel with the object of thus hastening his death, and securing the amount of the policy for his representatives. Having regard to the principle that where a person seeks to excuse himself from the performance of a contract in respect of which he has received the full consideration, the rule as to public policy should not be carried

further than the protection of the public requires, I a of opinion that the defendant company is not protected by the rule. The judgment of the Court will therefore be in accordance with the plaintiff's contention, with costs.

Kotzé, J.: The plaintiff, as executrix testamentary of the late Sybrand Burger, claims from the defendant society the sum of £200, due on a policy of insurance effected by the deceased upon his life in February, 1892. By clause 3 of the policy it is provided that, in case the policy should not have become void by the death of the assured by suicide within one year from the date thereof, the society would pay to the executors or assignees of the assured the said sum of £200. The society now maintains that as the assured, while in rebellion and fighting against His Majesty, was killed by the British troops in an engagement, during the month of February, 1902, his executrix is not entitled to the payment of the £200. Public policy it is said will not allow such a claim to be made. A decision of Lord Chancellor Lyndhurst, reversing that of Sir John Leach, Master of the Rolls, in *The Amicable Insurance Society* v. *Bolland* (4 Bligh., N.S., 194), was cited in support of this contention. From the report of that case, it appears that one Fauntleroy insured his life in 1815 in the Amicable Society. In 1824 he was tried and convicted of forgery, sentenced to death, and executed. The Lord Chancellor, although the policy of insurance contained no condition to that effect, construed it as if a condition had been inserted that in the event of the assured committing a capital felony, and being tried and executed for it, his assignees should receive the amount of the policy. As such a condition could not, on grounds of public policy, be recognised, the assignees in bankruptcy of Fauntleroy's estate were held not entitled to recover from the insurance company.

An obvious objection to so construing a written document is that it imports into it terms which it does not contain, and so makes a contract, which is legal upon the face of it, one contrary to law. If, however, we are to understand that all that the Lord Chancellor meant to convey was that as a matter of public policy, no man shall be allowed to benefit by his crime, the decision is at once plain and intelligible. But, even then, the decision must not be too generally applied, and must be taken to have merely decided, as the headnote to the case in 33, Revised Reports, puts it, that "a policy of life insurance is avoided if the party insured die by the hands of justice, so far as regards any claim thereunder by volunteers or by persons claiming under the bankruptcy of the insured." In a footnote to this case, at page 22, it is pointed out by the learned editor that the parties to a contract of life insurance may lawfully agree that in the event of the death of the insured by suicide, or by duelling, or by the hands of justice, the policy shall nevertheless be valid to the extent of any interest which any third person may have acquired thereunder in good faith and for valuable consideration. The subsequent cases of Life Association (1892, 1 Q.B., at p. 159) *White* v. *The British Empire Mutual Life Assurance Co.* (L.R., 7, Eq., 394), and *Cleaver* v. *The Mutual Reserve Fund Life Association* (1892, 1, Q.B., at p. 159) are referred to in support of this. The case of the Amicable Society should, therefore, not be extended to circumstances which are not clearly within its scope. I agree with the observation of Lord Esher in Cleaver's case, that the doctrine of public policy ought not to be stretched beyond what is necessary for the protection of the public. Although capital punishment may under certain circumstances be awarded in the event of a person being tried and convicted of rebellion, the deceased in the present instance was not put upon his trial for rebellion, and did not meet his death at the hands of justice. He was killed in an engagement between His Majesty's troops and the enemy, whom he had joined, and it cannot be said that he had this in contemplation like a person who commits a capital offence, and who knows that when convicted the sentence prescribed by law will in the due and ordinary course of justice follow. I am, therefore, of opinion, upon the special case submitted, that our judgment should be for the plaintiff.

[Appellant's Attorney: P. M. Brink; Respondents' Attorneys: Reid and Nephew.]

STEPHAN v. COLONIAL GOVERNMENT. { 1903. Sept. 6th. „ 12th.

Succession duty—Act 5 of 1864—Devolution of property.

A testator, who was in partnership in business with the appellant, by will gave the usufruct of the residue of his estate to the appellant, and appointed him and certain other persons as heirs of such residue in certain proportions, but as to the partnership property he directed that the partnership should continue, and that in case the appellant should sell any portion thereof he should receive a larger proportion than of the rest of the residue. The testator further directed that the remaining heirs should be paid their shares of the partnership property according to the valuation of the inventory to be framed on his death, but that in case the appellant should sell the whole of the partnership property, they should be entitled to share as heirs according to the original proportions. On the death of the testator, the Master of the Supreme Court assessed the duty payable by the appellant in respect of his usufruct only, and such duty was duly paid. Afterwards the appellant sold a portion of the partnership property for a larger sum than that at which the property was valued in the inventory.

Held, that on obtaining his share of the proceeds under the will the succession duty payable by the appellant should be upon such increased value after deducting the sum paid by him in respect of his usufruct.

This was an appeal brought by Hendrik Rudolph Stephan, Cape Town, one of the heirs in the estate of the late Johan Carel Stephan, against the Colonial Government.

The petition was in the following terms:

1. Your petitioner is one of the heirs of his late brother Johan Carel Stephan, also known as Johan Carel Jacobus Stephan, under the last will and testament of his said brother.

2. On or about 20th November, 1901, a special case was brought before this Honourable Court by your petitioner and the executors in his late brother's estate in order to have the construction to be placed upon the terms of the said will declared.

3. On or about 12th March, 1902, this Honourable Court gave judgment in terms of the first portion of contention (a) of your petitioner to the effect that your petitioner was entitled to one-half of the testator's share in such of the property belonging to the partnership business carried on by your petitioner and his said late brother as was sold by your petitioner whilst carrying on the said business in terms of the said will and that the other heirs in the estate were only entitled to be paid out their one-half share of the testator's share in the property sold according to the valuation made in the inventory framed in terms of the said will.

4. After the testator's death the inventory was duly filed in terms of the will and the Master of this Honourable Court assessed the succession duty on the life interest of your petitioner in the property specified in the said inventory, and the executors paid the amount of such duty, prior to the judgment of this Honourable Court in the special case above referred to.

5. In the month of November, 1902, your petitioner whilst carrying on the said partnership business in terms of the said will sold certain landed property at Rogge Bay, Cape Town, measuring 31 square roods 45 square feet, registered in the name of the said partnership of Stephan Brothers for the sum of £20,000.

6. The value of the said property, according to the inventory, was the sum of £4,250, and the said valuation was a *bona fide* appraisement made by sworn ap-

praisers at the time when the said inventory was framed.

7. Before receiving transfer of the half-share of the property, which was registered in his late brother's name, your petitioner was called on to pay succession duty.

8. For the purpose of deciding on the amount of duty to be paid the said Master assessed the duty upon the amount for which the said property was sold, and called on your petitioner to pay succession duty on a sum of £10,000, less £1,062 10s. (being the amount payable to the other heirs—one-fourth of the value of the property as brought up in the said inventory), but the said Master was willing that from the above sum should be deducted the amount already paid, as aforesaid, upon the life interest.

9. Your petitioner contends that he is not liable to pay any larger sum than the amount payable on his proportionate share of the value as brought up in the said inventory on the ground that he succeeded to the property on the death of the testator, he having decided to carry on the said partnership business in terms of the will, and that the proper sum on which duty must be assessed in respect of the aforementioned property sold, as aforesaid, is £1,062 10s.

10. It was arranged that, inasmuch as transfer had to be passed to the purchasers, your petitioner should pay the duty upon the amount as claimed by the Master without prejudice and subject to the decision of this Honourable Court on this petition.

11. With regard to the sale of the farm Jacobus Kraal, referred to in the special case, your petitioner paid duty upon the valuation, according to the said inventory, but the said payment was made subject to adjustment in subsequent accounts, if necessary.

Wherefore your petitioner prays that your lordships may declare that he is not bound to pay succession duty on any larger sum than his proportionate share of the valuation of the said property, according to the inventory, and that the additional amount paid by him under protest may be refunded to him, or that your petitioner may have such further or other relief as may seem meet.

Mr. Burton for the applicant. Mr. Schreiner, K.C., for the Colonial Government.

Mr. Burton: Succession duty is to be paid on the net value of the estate—Act 5 of 1864, section 2. The question is, when is that net value to be ascertained? Our contention is that it must be ascertained at the time the succession took place, or, in other words, that this duty is a succession duty, and not a duty on the estate.

[De Villiers, C.J.: Should not the value be ascertained at the time the successor comes into possession?]

I contend that we are bound to pay duty only on the value of the property as at the death of the testator. We say that the property vested in us at that time. The subsequent sale of the property can have nothing to do with our liabilities as to succession duty. I cannot find any cases in our own courts as to when the property is to be valued, but see *Attorney-General* v. *Sefton* (12 L.T.N.S., 242). The English Act (16, 17, Vict., C. 51, Sec. 10) is in almost identical terms with our Act 5 of 1864, and neither of these Acts deals with any possible increase or decrease in the value of the property. It is not on the property, but on the succession that duty is paid. The question is then, when did this property vest. The case of *Strydom* v. *Strydom's Trustee* (11 Juta, 423) shows that it vested on the death of the testator, unless something in the will showed that the testator did not intend that it should do so. In this case the will has already been construed by the Court to some extent in *Stephan* v. *Executors of Stephan* (12 C.T.R., 242). The will certainly does seem to present some difficulty, and it is not easy to reconcile clauses 19 and 20 with 22 and 23. My contention is that the testator intended to confer a quarter of his private property and half of the partnership property upon Henry R. Stephan, and I contend that this property vested on the death of the testator. It was then worth £4,250.

Mr. Schreiner, K.C. (for the respondent): The Court has held that H. R. Stephan was to get half of the partnership property when he should realise that property. If he should discontinue the business, all he can get is three-quarters of half. This property was worth £4,250 at the time of the testator's death, but H. R. Stephan had only a life interest in the property till he should sell it, and the Master could claim

duty only on that life interest until it should be sold. The other heirs would have to pay succession duty on the full £4,250, even if the property had depreciated (see clause 23 of the will), but H. R. Stephan might have had nothing to pay in the way of succession duty if the property had materially decreased in value, otherwise it might have happened that he might have had more to pay as duty than his share amounted to. The property having sold for £200,000, H. R. Stephan is entitled to £100,000, and the Master claims duty on that sum. As to the other £100,000, the heirs are to pay on the basis of £4,250. There was no absolute vesting of this property until it was sold: previous to that event there was only a vesting of certain rights, and on these it was impossible to assess duty. The case *Attorney-General* v. *Sefton*, cited on the other side, was decided on Section 21 of the English Act, to which there is nothing corresponding in our Act. See *Hanson on Probate and Succession Duties Act*. Also see the previous case (12 C.T.R., 242) as to the interpretation of the will.

Mr. Burton (in reply): I did not refer specifically to Section 21 of the English Act because that merely provides the machinery by which the land is to be valued. A decrease in the value of the property would effect the succession duty. See judgment of Wensleydale, L.J., in *Attorney-General* v. *Earl of Sefton* (12 L.T. Rep., 242). The whole *ratio decidendi* in that case is to be found in the 10th Section of the English Act. Hence the whole question is, when did the succession take place? It has been argued for the respondent that a quarter of the brother's share vested in the death of the testator. It was evidently the wish of the testator that the business should be carried on, bu if H. R. Stephan was to get half instead of quarter when he sold part of the property, it would have been a direct inducement to him not to carry on the business. I submit that the property vested on the death of testator. H. R. Stephan undertaking to carry on the business.

Cur. Adv. Vult.

Postea (September 12th).

De Villiers, C.J.: This is an appeal against the assessment made by the Master of the Supreme Court of the duty payable by the appellant in respect of his share of the proceeds of certain property under the will of the late J. C. J. Stephan. The Master has appraised the value of such share according to the price actually realised by the appellant, whilst the appellant claims that the appraisement should have been according to the value placed on the property in the inventory made after the death of the testator. Under the will the appellant has a life interest in the residue of the testator's estate, and there are complicated and somewhat contradictory directions as to the division of the property among the heirs. The appellant is one of the heirs, being entitled to one-fourth of the residue, but in regard to property which had been held in partnership by the testator and the appellant, the directions are very peculiar. Should the appellant sell any of the partnership property, then the appellant is entitled, in additon to his half share of the property, to one-half of the testator's share, and must pay the remaining half of the testator's share, or one-fourth of the whole to the remaining heirs. Such is the provision of the 22nd clause of the will, which is, however, inconsistent with the immediately following clause, which directs that the heirs shall receive their share of the partnership property according to the valuation made in the inventory. The Court has already decided that, so far as there is an inconsistency, the later clause of the will should prevail, and that the effect of the two clauses read together is to confer on the appellant one-half of the testator's half share of the proceeds of sales of landed property belonging to the partnership. It is clear that such partnership property was placed on a different footing from the rest of the testator's property, and that the proceeds were not to be distributed in the manner indicated until there had been an actual sale of the property. There is a further provision that in case the appellant should sell the whole of the partnership property the other heirs would be entitled to their inheritance upon the basis directed in regard to the rest of the property. After the death of the testator, the Master appraised the duty payable by the appellant, but he charged the appellant with duty on his life interest. The appellant raised no objection to this course, and the consequence is that if the property had diminished in value he would, on coming

into possession of his share of the proceeds, have been entitled to claim that the duty shall be assessed according to the diminished value. In fact, however, the property has greatly increased in value, and the question is whether the appellant should not pay duty according to such increased value. The case of *Attorney-General* v. *Sefton* (12, L.T., Rep. N.S., 242) has been referred to in support of the view that the value of the property at the time of the testator's death should be the criterion. In that case, however, there seems to have been no doubt that the devolution of the succession took place immediately upon the death of the deceased. At the time of the succession the land had no dutiable value, and it was held that the fact of the land afterwards acquiring such dutiable value did not entitle the Crown to succession duty. The property in question in the present case had a dutiable value at the time of the testator's death, but, owing to the peculiar provisions of the will, no assessment was made of the duty payable by the appellant, except so far as his life interest was concerned. As I have already remarked, he did not object to this course, and, so far as I can judge, it was the most convenient course to adopt under the circumstances. The will directed that the partnership should be carried on by the appellant, and until the contingency happened of any portion of the property being sold, it could not be known what proportion of the partnership property would devolve on him. I am of opinion, therefore, that the Master properly charged the appellant with duty on the amount actually realised, deducting from such duty the amount already paid in respect of his life interest. The appeal must therefore be dismissed, with costs.

Kotzé, J., concurred.

[Plaintiff's Attorneys: Van der Byl and Van der Horst; Defendant's Attorneys: Reid and Nephew.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., and the Hon. Mr. Justice KOTZÉ.]

RIES v. WILLETTS. { 1903. Sept. 11th.

Defamation—Injury—Dishonourable conduct.

To a declaration claiming damages for defamation the defendant excepted on the ground that the words complained of were not defamatory, the words being as follows: "I do not like his mean tricks. I told him he could go elsewhere with his dirty mean tricks."

Held, *that as the words were capable of the meaning that the plaintiff had been guilty of dishonourable conduct, the exception should be overruled.*

This was an argument on exceptions. An action was brought by Michael Joseph Ries, hotel proprietor, Henry Michael Ries, produce merchant, and Alfred John Ries, produce merchant, all of East London, against Henry Noah Willetts, auctioneer, also of East London, for damages for defamation.

The declaration set out that the plaintiffs had had dealings in land with the defendant on several occasions, who had sold on their behalf land at public auction. Prior to the 11th April, 1903, the plaintiffs were jointly interested in certain land purchased from Mrs. Klein, and they entered into negotiations with the defendant for the sale thereof. On the 6th April the plaintiffs informed the defendant that they would not sell the land through him. Thereafter, on 11th April, at a public auction of land at East London—not the plaintiffs'—in the presence of E. Cordiner and a large number of persons, there and then assembled, the defendant made use of the following words: "You may have seen advertised another sale, which is Mrs. Klein's

property, by my friends the Ries party (thereby meaning the plaintiffs); I do not like their mean tricks; I told them they could go elsewhere with their dirty, underhand business." The plaintiffs each claimed £2,500 damages.

Exception was taken to the declaration by the defendant, on the ground that, even if the words complained of were used, they were not defamatory, and could not support the plaintiffs' action in law.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.), was for the plaintiffs; and Mr. Burton (with him Mr. Upington) was for the defendant.

Mr. Burton (for the excipient): The point is whether the words set forth in the declaration support the innuendo? The plaintiff is bound by his innuendo. The only question there is as to the word "dishonest." It is not defamatory to call a man "mean." If the words are susceptible of the meaning attached to them in the innuendo, the question whether they are defamatory or not must be decided at the trial. But I contend that the words used by the defendant do not amount to a charge of dishonesty. If he had intended to charge dishonesty he would have used such words as "swindle" or "fraud." The phrase "mean tricks" does not necessarily imply dishonesty, and that is the whole question. It does not matter what the bystanders understood. As to the plaintiff being bound by his innuendo, see *Odgers* (p. 107, 3rd Edition). To make these words amount to a charge of dishonesty is to carry them beyond their legitimate meaning. Then the defendant said they could "go elsewhere with their dirty underhand business." Here the whole force of the expression lies in the word "underhand," but that only means "sly," and not "dishonest." In a Canadian case, cited by Odgers, it was held that it was not actionable to say that "A.B. has cheated me out of 100 acres of land."

Mr. Schreiner (for the respondent): I would submit that these words are as defamatory as well could be, and no innuendo was really necessary as a matter of law. *Odgers* (p. 106, 3rd Edition). The argument for the excipient has gone chiefly on the word "dishonest." Well, surely "dirty underhand business" implies dishonesty. But the words themselves are *prima facie* actionable. They were spoken of mercantile men, and our law is very careful to safeguard the character of merchants. See *Voet* (47-10-8), *M. de Villiers on Injuries* (p. 89 and notes. Also p. 93 (citing *Voet*, 5-1-21) as to casting reflections upon classes of people, and p. 97 as to *conritium*. This is purely a question of *conritium*. If a man who is accused of being guilty of "mean tricks" has no remedy, it might be argued that every honest man is guilty of mean tricks.

Mr. Burton (in reply): Newspapers often describe the conduct of public men as "mean and underhand." There is nothing on the declaration to show that the defendant gave any explanation of these words tending to support the innuendo.

De Villiers, C.J.: At this stage the Court has to decide whether the words used by the defendant are capable of the meaning attributed to them in the innuendo. The words used are: "You may have seen advertised another sale, which is Mrs. Klein's property, by my friends, the Ries party (thereby meaning the plaintiffs); I do not like their mean tricks; I told them they could go elsewhere with their dirty, underhand business." These words may not necessarily imply dishonesty, though they come very near to implying dishonesty, but they certainly attribute dishonourable conduct to the plaintiff. The defamation may not be of such a nature as to justify heavy damages, but the question to be decided at this stage is whether the words are defamatory at all. If they are injurious to the character or reputation of the plaintiff they must be held to be defamatory. The exception, therefore, in my opinion, should be overruled, with costs.

Kotzé, J., concurred. He said he thought the words as they stood might be taken to mean that the defendant intended to say or to impute that the plaintiffs were guilty of dishonourable and disreputable conduct, in other words, that they were guilty of conduct derogatory to the character of respectable and reputable men.

[Plaintiff's Attorneys: Silberbauer, Wahl and Fuller; Defendant's Attorneys: Fairbridge, Arderne and Lawton.]

KAEDING v. M'BUNJA. } 1903. } Sept. 11th.

Resident Magistrate's Court—Dismissal of claim—Appeal—Costs—Remitting case to Court below—*Res judicata*.

In an action in a Magistrate's Court for goods sold and delivered, the Court dismissed the claim although there was evidence in support of it. On appeal, the case was remitted to the Magistrate's Court, to be tried on its merits but, as the case had been dismissed by the Magistrate without being thereto requested by the defendant, the costs of appeal were ordered to abide the result in the Court below.

This was an appeal from a decision of the Resident Magistrate, of Willowdale, in a case in which the appellant sued for £3 10s., being the balance of an account for goods sold and delivered and for 10s. interest.

The appellant sued in the Court below on a summons, alleging that the respondent was indebted to him in a sum of £3 10s. for goods supplied between 1896 and 1899. The account annexed to the summons showed an item due by respondent of £14, for seven bags of mealies on the 31st August, 1896, an item of 10s. for a jacket supplied on the 30th January, 1899, and credit payments for £11, leaving a balance of £3 10s. It appeared that in 1901 the appellant sued respondent, and one Nomzanqa for a sum of £10 on a promissory note and a sum of £3 for a bag of mealies alleged to have been supplied to respondent on the 21st December, 1899. That case came before the Magistrate, and Nomzanqa, who was sued as surety, admitted the liability, and judgment was accepted against him. That money was paid. In the present case, no exception was raised to the summons, nor was any evidence taken, but there was some conversation at the hearing, and the Magistrate dismissed the summons. The reasons of the Magistrate were as follow: "Defendant is an illiterate native. His proper course would have been to take exception on the ground of *res judicata*," and judgment to have been that the exception was sustained, but under the circumstances it was impossible to sustain an exception not raised. The account attached to the summons does not show a credit of £3 paid by the defendant's surety, and, as plaintiff admitted that the judgment of the 27th March, 1901, was satisfied, the only course was to dismiss the summons, with costs."

Mr. McGregor (for the appellant): The Magistrate has not taken account of the fact that the transactions of 1896 and of 1898 were entirely different.

[Kotzé, J.: What was the evidence in the Court below?]

No evidence seems to have been taken. It would appear that in the account of 1901 they sued for £19, but this is a different case, and the articles purchased are different. It is true that mealies are mentioned in both accounts, but they are not the same mealies. Then the R.M. takes no notice of 10s. for the jacket, which shows that something had escaped his notice. He was misled by the occurrence of mealies at much the same price in both accounts. It is unfortunate that no evidence was taken on oath, and the case seems to have been decided on a conversation between the parties in Court.

[De Villiers, C.J.: The plaintiff sued for the 1896 account; why did he not also sue for that of 1898?]

He had security for the later account.

[De Villiers, C.J.: That does not explain why he never sued.]

I cannot explain; but it may have been that in 1901 the surety was not worth suing, but is now in better circumstances.

The respondent was in default.

De Villiers, C.J.: It is to be regretted that the Magistrate did not hear the evidence, and enter into the merits of the case, because that would have saved considerable costs in this case. The Magistrate in his reasons says: "The defendant was an illiterate native. His proper course would have been to take exception on the grounds of *res judicata*, and judgment to have been that the exception was sustained, but under the circumstances it was impossible to sustain an exception not raised." But on referring to the records, I do not see how the plea of *res judicata* could have availed the defendant, because in

the first action the plaintiff sued the defendant for the price of a bag of mealies purchased on the 21st December, 1898, while in the second case he sued for seven bags of mealies, which were purchased on the 31st August, 1896. There seems to be no connection whatever between the two cases, and a plea of *res judicata* could not apply unless the fresh action had been in respect of the same cause of action as the previous one. So that *res judicata* would not have been a good defence. Then the Magistrate goes on: "The account attached to the summons does not show a credit of £3 paid by the defendant's security, and, as plaintiff admitted that the judgment of the 27th March, 1901, was satisfied, the only course, was to dismiss the summons, with costs." Well, I confess I do not see the force of that reasoning, but is quite possible that all the facts are not now before the Court. The Magistrate had tried the previous case himself, and he remembered more than the Court now knows. It is quite possible there may be evidence forthcoming which supports the view the Magistrate takes, but this Court, as a Court of Appeal, can only be guided by the records, and upon the records as they stand the Magistrate was wrong. The Court will, therefore, allow the appeal, and remit the case to the Magistrate for trial upon the merits. As to the costs of this appeal, I think they should stand over for the Magistrate to decide upon his final decision of the merits of the case. After all, it was the Magistrate's own course to give judgment. The defendant was a native. He appeared in person and was not advised, and the Magistrate seems to have taken this course without being asked to take it. The Court will, therefore, allow the appeal, and the case will be remitted to the Magistrate to decide on the merits, the question of costs of appeal also being remitted to the Magistrate.

Kotzé, J., concurred.

De Villiers, C.J., said the form of judgment would be as follows: Appeal allowed, and case remitted to the Court below for trial on its merits, costs of appeal to abide result in the Court below.

[Appellant's Attorneys: Walker and Jacobsohn; Respondent in default.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice KOTZE.

PROVISIONAL ROLL.

S.A. MILLING CO. v. GRAND JUNCTION RAILWAYS. { 1903. Sept. 12th.

Mr. Gardiner appeared for plaintiffs, Mr. Close for defendants, and Mr. Upington on behalf of certain creditors.

Mr. Gardiner, who asked for the appointment of a receiver in accordance with certain consent papers, read an affidavit by Mr. E. J. Moore, which stated that on September 7 a meeting was held at which the parties' attorneys and Mr. A. F. Hills were present. The meeting was strongly in favour of the further postponement of the application for the adjudication of the estate as insolvent, and consented to Messrs. E. R. Syfret and J. E. Close being appointed as receivers, with powers to collect moneys due to the Grand Junction Railways, and to realise any assets. As the African Banking Corporation was not willing to consent to a distribution, Mr. Gardiner asked that the matter be postponed.

Mr. Upington consented.

Mr. Close said he would leave the matter entirely in the hands of the Court.

De Villiers, C.J., said there was a provisional sequestration against the estate, and the property was therefore in the hands of the Master. It was a somewhat novel procedure to take the custody out of the hands of the Master, and entrust it to someone else.

Mr. Gardiner said that if the application for the provisional order for sequestration were postponed until October 15, and Messrs. Syfret and Close were appointed as receivers, Mr. Hills would in the meantime see what further arrangement could be come to.

De Villiers, C.J., said the case would be postponed until October 15, and in the meantime the Master would be authorised to appoint Messrs. Syfret and Close as curators, but this must be left to the Master's discretion.

WATERMEYER V. HOWES.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £500, with interest, the property specially hypothecated to be declared executable.

Granted.

WOOD V. LOVEGROVE.

Mr. Bisset moved for the final adjudication of the defendant's estate as insolvent.

Granted.

ESTATE ZIERVOIL V. CLIVEIDAN.

Mr. De Waal applied for judgment for £673 on a broker's note.

Granted.

TABLE BAY HARBOUR BOARD V. GARDINER AND EASTON.

Mr. Bisset moved that the provisional order for sequestration of the defendants' estate be made final, but that it be suspended until October 15.

Granted.

LIGHT V. BERNSTEIN.

Mr. Buchanan moved for provisional sentence on two promissory notes for £45 each.

Granted.

PARKES AND SONS V. HUXHAM.

Mr. Bisset moved for provisional sentence for £7 14s. 6d., balance due on a bill of exchange.

Granted.

BARTRAM V. BURRILL AND ANOTHER.

Mr. Van Zyl moved for provisional sentence for £109 on a promissory note, with interest.

Granted.

JACOBSOHN V. DU PLESSIS.

Mr. C. W. de Villiers moved for provisional sentence on a promissory note for £374.

Granted.

ESTATE AHRENS V. CONRADIE.

Mr. Bisset moved for provisional sentence for £82 1s., interest on a bond of £550 from January 1, 1901, and also £9 2s. 6d., insurance premiums paid by plaintiff.

Granted.

CROSBIE V. SALIE.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £3,000, with interest from January 1, 1902, the property specially hypothecated to be declared executable.

Granted.

GRAAFF V. MOHAMED.

Mr. De Waal moved for provisional sentence on a mortgage bond for £550, the property specially hypothecated to be declared executable.

Granted.

GEERINGH V. FREDERICKS.

Mr. Van Zyl moved for provisional sentence for £330 on a bond, with interest at 10 per cent., the property specially hypothecated to be declared executable.

Granted.

HANAU V. SAMUEL.

Mr. Bisset moved for provisional sentence for £120, with interest at 7 per cent. from March 1, 1903, with costs, and £34 balance due on bond, with interest from March 1, 1903, at 7 per cent, the property specially hypothecated to be declared executable.

Granted.

PURCELL AND OTHERS V. HENDRICKSE.

Mr. Buchanan, for the plaintiffs, applied for a decree of civil imprisonment on a judgment for £133, with interest for goods sold and delivered and £8 15s. 3d. costs of suit.

The defendant appeared in person.

De Villiers, C.J.: Have you no means to pay the money?

The Defendant: No.

De Villiers, C.J. (to Mr. Buchanan): Have you found he has means?

Mr. Buchanan: No. He explained that defendant seemed to have used the goods for the purposes of a contract, and that he was turned off from the contract by the owner of the building.

De Villiers, C.J., told the defendant to be present on Monday, and to bring witnesses—if he had any—to prove that he had no means to pay the amount.

Postea (September 14): The Court refused to grant the decree; the plaintiffs not having proved that the defendant was possessed of means wherewith to satisfy the judgment.

ARDERNE AND CO. V. SCARR.

Mr. Bisset moved for provisional sentence for £2 2s. on a promissory note, with interest and costs of suit.

Granted.

ESTATE HERTZOG V. RODE AND OTHERS.

Mr. C. W. de Villiers moved for provisional sentence on a mortgage bond for £4,300, less £50 3s. 2d., paid on account, with interest at 6 per cent. from January 1, 1903.

Granted.

CLARKE AND CO. V. SANDERS AND CO.

Mr. McGregor applied for provisional sentence on two bills of exchange for £61 17s. 6d. and £255 7s. 7d.

Granted.

MADEN V. MADEN.

Mr. Alexander moved for the final adjudication of defendant's estate as insolvent; the provisional order was granted on August 31.

Granted.

MILTON V. FRIESLAND.

Mr. Alexander moved for the final adjudication of defendant's estate as insolvent; the provisional order was granted on August 19.

Granted.

LISSACK V. GLASSBERG.

Mr. Upington moved for the final adjudication of defendant's estate as insolvent.

Granted.

REX V. DEMPERS. { 1903. Sept. 12th.

Act 36 of 1902, Sec. 22—Liability of Landlord—Guilty knowledge.

This was an appeal from a conviction of Mr. Broers, A.R.M., of Cape Town, in a case in which the appellant, Mr. H. J. Dempers, was charged, under section 22 of Act 36 of 1902, in that he did, on divers dates between December 1, 1902, and August 1, 1903, wrongfully and unlawfully keep a brothel at 12, Muir-street, Cape Town. The appeal was brought on the grounds that the conviction was against the weight of evidence in the case, and generally that the conviction could not be supported.

Mr. Burton for the appellant; Mr. Jones for the Crown.

Mr. Burton, in opening the case for the appellant, referred to the Act under which Mr. Dempers was charged. Part 4 of the Act related to this matter of the suppression of brothels, and in sub-section (c) of section 24, it was laid down that any landlord who may be aware that his premises are being conducted as a brothel shall be deemed to be the keeper of a brothel. He (Mr. Burton) might say at once that the evidence showed that Mr. Dempers had been the owner of the premises in question. Counsel then proceeded to read the evidence given in the Magistrate's Court, upon which evidence the Magistrate had brought in a conviction. Continuing, he said that he would like to refer to the terms of the 26th section of the Act, which stated that the onus of proof rested with the prosecution, unless it could be shown that the landlord was receiving a high rent, when it would rest with the landlord to show that the rent was not excessive. In this case, although he had not actually mentioned it in giving judgment, the Magistrate had expressed the opinion that the matter of the rent of the house was not sufficient evidence on which to find the accused guilty. It was quite clear from the evidence given in the Court below, both for the Crown and for the defence, that the rent of the house in question was not exorbitant. Mr. Goldberg seemed to be the only authoritative witness produced by the Crown, and according to his calculations, the rent of the premises would be £45, yet Mr. Dempers only received £22 10s. for the house and £9 for the stables. Persons living in the neighbourhood, who also gave evidence, stated that the rent was not excessive, and showed that if the accused had wished to let the premises to be used as a warehouse, he could have received a much higher rent for them Therefore the onus of proving that the accused knew the house was a brothel rested with the prosecution; and how was this onus discharged? The accused had been convicted upon the evidence of a well-known procuress and her agent. There was the evidence

of the servant who stated that Mr. Dempers called at the house in company with Mr. Van Rynveld, but these gentlemen had visited the place in broad daylight.

[De Villiers, C.J.: Does it appear from any evidence not before the Court why the police allowed the place to continue as a brothel?]

There is not the least evidence to show why this had been done. The police never gave Mr. Dempers the slightest hint that the place was being kept as a brothel, although it was admitted that the practice was to give notice to the owner of the house in such cases. He felt that the police had failed in their duty in leaving this man in ignorance that his house was being used as a brothel. His learned friend might say that the Magistrate had found that the facts did prove, but he submitted that the facts did not prove the accused guilty. The evidence might show that the accused ought to have had a suspicion that the house was being used as a brothel, but there was nothing to show that Mr. Dempers had that guilty knowledge of the nature of the house, which it was the duty of the Crown to prove he had. The woman admitted that the accused had never been near the place until the time he called and spoke to the servant, Alice Williams. The only evidence against the accused as to guilty knowledge was that of the procuress, who, if Mr. Dempers had that knowledge, was his accomplice, as was also her private detective. Taking the evidence of the procuress herself, she said that in January the accused refused to give her a lease, but told her to bring somebody else, and then she brought the man Back. Neither Hyman or Back were produced by the Crown; they were both important witnesses, but they had gone away. What man, what property owner would be safe under such conditions? Here was a man holding a large amount of property, his neighbours made no complaint—two of them said they had no idea that this place was being used as a brothel—and he had been convicted on this woman's testimony. The central point in her evidence was that Mr. Dempers refused her a lease, and told her to bring somebody else, presumably as a blind. But that was contradicted by Mr. Van Ryneveld. How could any Court of Law take the word of a prostitute against the sworn testimony of witnesses like Mr. Dempers, Mr. Van Ryneveld, and Mr. Groenewald? It was straining the right which the Court had of believing one witness rather than another. The Crown had failed to establish guilty knowledge. What motive could the accused have, because he had derived no profit from the immorality which had taken place in the house, and it had been shown that, had he let the house as a warehouse, he could have got a higher rent? I submit that the conviction was not justified by the evidence.

Mr. Howel Jones said that the terms of the appeal were that the evidence was insufficient, not that it was incorrect. The house had been a notorious brothel.

[De Villiers, C.J.: But what I cannot understand is why the police did not prosecute before. Would it not appear—although it seems hard to imagine it—that the police knew that the house was being kept as a brothel, and allowed it, or that it was conducted in such a manner that evidence could not be got to bring in a conviction?]

The woman Madam Sarah has been prosecuted several times.

[De Villiers, C.J.: But this woman comes into court, and says that at that moment she is the keeper of a brothel. Has there been a prosecution since this case of Dempers?]

I cannot say.

[De Villiers, C.J.: Why was no notice given to the appellant. The usual practice was to give notice, but in this case it has not been given. If a landlord did not get notice, how was he to know of the nature of the house?]

I hold that Mr. Dempers must have known it by inference; he had seen this woman.

[Kotzé, J.: But women are good actresses. This woman might have put on a different appearance before Mr. Dempers.]

Mr. Dempers had seen her often, and he must have known what she was.

[Kotzé, J.: Is the evidence of a woman like that to be believed unless it be corroborated?]

I can only argue that the Magistrate believed the evidence of the woman; if not, I have no case. If the Magistrate must be taken to have believed the

evidence of the witnesses for the Crown, then there were numerous circumstances which would justify him in finding appellant guilty. The Magistrate was entitled to believe the woman Sarah from the manner in which she gave her evidence, and he could hardly believe that the appellant was so innocent as to be deceived in the character of this woman into a disbelief as to her true trade and calling.

[Kotzé, J.: The object of the woman when she saw the appellant would be to impress him with the idea that she was not a prostitue, for if she led him to believe she was a prostitute she would not have got the lease.]

She did not get the lease in her own name. When she went to appellant he asked her whether the house was quiet. When Carey paid the rent, Dempers asked him how the house was conducted, and if there were any complaints. If the Magistrate believed that evidence, he could have no other conviction than that the appellant knew that the house was one which might possibly be improperly conducted. If the Magistrate believed that could he believe that the house was anything else than a brothel? It was a peculiar circumstance that when the Act came into force Dempers sent for the woman with the object of turning her out, but she refused to go, as the lease was not up. Another extraordinary fact was the appellant's refusal to take the money from the woman Sarah, when she went to his office with the rent in notes and gold; the presumption was, he knew she was keeping the place.

[De Villiers, C.J.: What is Dempers' explanation of all this?]

He denies it, and if the Court believes his evidence there is no case against him. The fact that the Magistrate convicted him shows that he did not believe Dempers. There is nothing in the deed of sale of No. 12, Muir-street to compel the purchaser to take transfer; he would not forfeit anything by not carrying it out. The person responsible for the house was the registered owner, not a person who might become the owner six months hence. The legal agreement under which the premises were originally let, contained the extraordinary clause, that if they were not kept as a boarding-house only the lease would be terminated. If Dempers did not know that the place was being used as a brothel, the fact that he thought of having this proviso in the lease should have put him on his guard.

[Kotzé, J.: That is not sufficient to show a guilty knowledge.]

Then the rent paid to Dempers, having due regard to that of other dwelling-houses in the neighbourhood, was very high.

[De Villiers, C.J.: What is the number of the house?]

No. 12.

[De Villiers, C.J.: In the lease it is spoken of as No. 4.]

De Villiers, C.J.: It is impossible to acquit the defendant of some degree of negligence in the performance of his duties as a landlord. The ownership of property carries with it obligations as well as privileges, and one of those obligations is that the owner should prevent his property from being used for illegal or improper purposes. In the present case, it appears that the appellant sought to protect himself by inserting a clause in the lease that the property should be used only for certain purposes, but it was not sufficient to insert that clause in the lease—it would have been more prudent to see that a clause of this kind was properly carried out. But the charge against appellant is not that he was negligent or imprudent in the performance of his duties as a landlord, but that he kept a brothel, and it is of the very essence of such an offence that there should be a guilty knowledge on the part of the person so charged. Now in the present case it would appear that it was the practice of the police to give notice to the landlords of premises which were being used for immoral purposes, and I asked for an explanation from counsel for the prosecution why such notice was not given in the present case. It was admitted that notice was not given. If it had been given, there would have been no doubt as to the defendant's guilt, but seeing no such notice was given, the man might fairly believe there was nothing to be said against the manner in which the premises were conducted. It has been said it appeared there had been prosecutions against the woman called Sarah, who lived on the property, and that police reports were put in showing that the tenant of No. 12, Muir-street, was so charged, and that seems to have been taken as one of

the reasons why the appellant should have known that the house was improperly conducted. It now appears that the number of the house on his deed of transfer was 4, so even if appellant had been in the habit of reading the police reports—which he says he is not—and had read a report of the case, he would not necessarily have known that his place, which appeared on the deed as No. 4, was No. 12 in respect of which the prosecution was instituted. There is no dout that some of the evidence given on behalf of the prosecution would afford very fair ground for considerable suspicion against the appellant. Counsel for the Crown has said that the evidence shows that the appellant ought to have known that the place might have been conducted improperly, but that is not sufficient; the evidence ought to show that he must have known, and without such evidence it is impossible to impute to him a guilty knowledge. It is said that this is a pure question of fact, and that the Court is bound to accept a magistrate's decision on this point; but when it comes to a question of a woman's evidence being taken against the evidence of other witnesses - a woman who admits that at the present moment she is conducting this brothel, a kind of procuress, a woman of infamous character--I think the Court should not accept such evidence as conclusive against the evidence of witnesses of repute. I therefore think that the Magistrate was wrong in taking her evidence as conclusive as to what is alleged to have taken place between her and the appellant. The appellant himself never visited the house. It is quite true he ought to have visited it. I quite agree if a man has fifty houses, if he cannot inspect them all personally, he should have an agent to do so. I quite agree, therefore, that he ought to have visited the house; but it does not follow that if he did not inspect it he must be held to know what took place inside. The only time when the appellant visited the house was on the occasion when he had already sold it to Hyam. At that time he visited the house purely for business purposes, and there is no corroboration whatever of the woman's statement that she then said there were some girls there. On that occasion the appellant was accompanied by others, and the evidence of this woman is in no way confirmed by any of the other witnesses. To my mind, the conduct of the police is very extraordinary. They seemed to be aware that the place was being used for immoral purposes, but, notwithstanding that fact, after the last prosecution of the woman no further prosecution took place. The only conclusion open is that they either knew it was being so conducted and did not prosecute—which I should be very loth to accept—or that the house has been so conducted latterly that it would be impossible to prove that it was being improperly conducted. If that were the case with regard to the police, the appellant cannot be blamed for not knowing that this house was being used for immoral purposes. When we come to the evidence given by witnesses for the defence, there is conclusive evidence to show that even the neighbours did not know that the place was being improperly used. A man who lives next door said he never saw anything improper, but the supreme test in cases of this kind, where the landlord is charged with keeping a brothel—I say the supreme test where the offence is not clearly brought home by the prosecution is the rent which the landlord receives. It cannot be for one moment assumed that a gentleman like the appellant, who knows what extreme penalties are connected with this offence, would have continued to let these premises to this woman if he had known that they were used for immoral purposes. If he wished to take the risk of prosecution one would have expected he would have charged an excessive or exorbitant rent, and the whole of the evidence shows that, so far from the rent being excessive, it was fairly moderate considering the rents in Cape Town at the present time. The evidence of the witnesses for the prosecution is clear on that point. Jacob Goldberg said: "I think the house in question is worth £40 or £45 per month. I cannot say I think Muir-street a desirable place for a gentleman's residence." The rent was only £22 10s. per month, and evidence of other witnesses for the prosecution is to the effect that the rent is a moderate one. A man like Mr. Zoutendyk and other respectable witnesses said the rent was fair and moderate. There were no doubt witnesses for the prosecution who said they paid less rent for houses in the same

neighbourhood, but these houses were considerably smaller than the house let to this woman. With regard to Madam Sarah paying the rent, it had been explained that she represented herself to be the wife of Hyam, to whom the house had been let. It is quite possible that on the occasions on which she saw the appellant for this purpose she would be so modestly dressed and have all the appearance of being a respectable woman, and that there would be nothing in her conduct when paying the rent to lead appellant to believe that she was anything but a respectable woman. I am bound to say there are circumstances of suspicion, but cases of this kind should not have been decided on suspicion. The offence is a very serious one, and the object of the Act is that the offence shall be adequately punished, but in every case the guilt should be brought clearly home before a conviction is arrived at. In the present case the evidence, in my opinion, is not sufficient to justify the Magistrate's finding. The appeal must be allowed.

Kotzé, J., concurred.

[Appellant's Attorneys: Dempers and Van Ryneveld.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZE.]

PROVISIONAL ROLL.

LEWIS AND SACKS v. GOODMAN. { 1903. Sept. 14th.

Provisional sentence—Security.

On a claim for provisional sentence the defence of compensation was raised, but as the evidence of the existence of a valid counter claim was not satisfactory, provisional sentence was granted. The plaintiffs, residing outside the jurisdiction of the Court, were ordered to give sufficient security over and above the ordinary security de restituendo.

Mr. Close moved for provisional sentence on two promissory notes, each for the sum of £100, together with interest and costs of suit.

Mr. Schreiner, K.C. (for the defendant) put in the following affidavit:

1. I am the defendant in this suit. I am a contractor, residing at Sea Point.

2. The said plaintiffs owe me between £400 and £500, being the balance due on an account of cash advanced, stock sold, and moneys deposited at various times since the year 1900.

3. I am unable to give exact dates or amounts, because the first-named plaintiff, while in Cape Town in December last, broke open my desk by forcing the lock and took the book in which the account between the plaintiffs and the defendant was kept. The said first-named plaintiff thereupon absconded to the Transvaal, taking the said book with him. I am consequently without exact data.

4. After deducting the amount now sued for, the plaintiffs still owe me between £200 and £300, more or less.

5. Transactions between the plaintiffs and defendant first commenced in Johannesburg in the following manner:

In June, 1900, Samuel Lewis and this deponent entered into a partnership under the style of Goodman and Lewis, trading in the Transvaal as contractors and speculators.

7. George Sacks was at that time employed by Goodman and Lewis. But at that time there also existed a private loose partnership between Lewis and Sacks.

8. In November, 1900, Lewis and this deponent came to Cape Town, leaving Sacks in charge of our affairs, with our general power of attorney.

9. I entrusted to and deposited with Sacks my own personal property, amounting to £500 sterling in sovereigns and about £300 worth of stock.

10. In January, 1901, I left Cape Town for England.

11. Before I left for England I gave Lewis £350 to invest on behalf of Goodman and Lewis.

12. While I was away in England, Lewis and Sacks traded with my personal property referred to in paragraph 9, and mixed up, interchanged, and transferred contracts, moneys, and speculations between Goodman and Lewis, this deponent, and Lewis and Sacks. All this was done without my leave or consent.

13. While in the Transvaal, Sacks forwarded to Lewis, in Cape Town, £400 sterling out of my moneys deposited with him as in paragraph 9.

14. When I returned from England in 1902 I discovered that this had been going on, and demanded a settlement. On my insisting, Lewis absconded with the books as described in paragraph 3 hereof.

15. The books referred to more or less show what was done with my moneys.

16. On June 23rd last this deponent was sued in the local Court of the Resident Magistrate on the first promissory note. The case was withdrawn, however, because Bernard Gabrilch, the plaintiff on that occasion, was only a nominal holder.

17. I have frequently written and legally demanded the delivery of the books or a statement of account, but have received no reply.

The affidavit of Samuel Lewis and George Sacks denied that they owed the sum of between £400 and £500, or any sum whatever; that there had ever been any accounts between them and the defendant, or any books containing such accounts. They denied paragraphs 10 and 12 of plaintiff's affidavit. That they had ever received from the defendant any demands for the delivery of any books or for a statement of account.

The latter affidavit was supported by the affidavits of Samuel Lewis, George Sacks, and Samuel Marks (the plaintiffs' book-keeper).

Mr. Schreiner, K.C. (for defendant): There is a direct conflict of evidnece in this case, and it is very significant that when one Gabric sued plaintiff on a promissory note the action was dismissed. The plaintiff has no remedy within the jurisdiction unless he sues by edict. He does not explain how he came into possession of these promissory notes.

[De Villiers, C.J.: Has he instituted an action?]

No, he could not do so, as the other parties are in the Transvaal.

[De Villiers, C.J.: The affidavit is very meagre.]

He could not give fuller particulars, because he says his books have been stolen and the matter is in the hands of the police. If the plaintiff wishes to go into the principal case he should give ample security. He has offered only £30, which is only sufficient to cover the costs in the provisional case.

[De Villiers, C.J.: What security are you prepared to give, Mr. Close?]

Mr. Close (for plaintiff): In any case we have to give security *de restituendo*.

[De Villiers, C.J.: Yes, but they want security for costs.]

Does not security *de restituendo* cover costs?

Mr. Schreiner: If your Lordship rules that we are content.

[De Villiers, C.J.: What security would you suggest?]

About £120.

De Villiers, C.J.: The plaintiffs are the holders of these promissory notes, and as such they are entitled to provisional sentence upon them unless the defendant can satisfy the Court that there are satisfactory grounds for holding that he has a counter-claim by way of compensation. From the evidence given by the defendant, it may well be that he has this defence, but he does not give a satisfactory explanation as to why he did not sue the plaintiffs on the claim, which he says he has before they left the country. Now, when he is sued upon these notes, he raises this defence. It may be a good defence, but there does not seem to be such a strong *prima facie* ground for holding that there is such proof of the defendant's allegations as to justify the Court in refusing provisional sentence. But at the same time, I think that full security should be given to the defendant by the plaintiffs, who reside out of the jurisdiction, not only for the costs of the provisional sentence, but also for the costs of the principal case. The Court will give provisional sentence for the amount claimed, and direct the plaintiffs to give security to the extent of £120 over and above the ordinary security *de restituendo*.

[Plaintiffs' Attorneys: Michau and De Villiers; Defendant's Attorneys: Dold and Van Breda.]

HEYDENRYCH V. HOCTOR. } 1903.
HEYDENRYCH V. JEFFERY. } Sept. 14th.

Promissory note—Place of payment.

A promissory note made by the defendant in favour of the plaintiff was payable at the office of S. The defendant did not pay the note when it fell due, but some weeks afterwards he paid the amount at the office of S., no intimation having in the meantime been made to the defendant that the amount was to be paid elsewhere. Application for provisional sentence was refused with costs.

Mr. M. de Villiers moved for provisional sentence in the first case against Hoctor on a promissory note for £25 with interest.

Mr. Upington (for the defendant Hoctor) read the affidavit of Hoctor, which stated that he obtained the loan from James Scott, a broker, of St. George's-street, and he attached his cheque for £25, dated September 27, 1902, paid on deponent's instructions by his attorneys to the said James Scott, as agent of the plaintiff in settlement of the plaintiff's claim.

The plaintiff's affidavit set forth that the statement of the defendant that he obtained the loan from James Scott as the agent of the deponent was incorrect. He was a financier, carrying on business in Cape Town, and was frequently applied to by brokers on behalf of their clients for loans. James Scott applied to him for a loan on behalf of the defendant. Scott never had any authority from him to collect the money, nor did he authorise him to act as his agent.

Replying to the Chief Justice, Mr. Upington said that he understood that Scott had absconded.

In regard to the case against Jeffrey, Mr. De Villiers moved for provisional sentence on a promissory note for £105.

Mr. Gardiner, who appeared for the defendant, read an affidavit, sworn by Jeffrey, which stated that he admitted having signed a promissory note for £105, but said that the promissory note had been paid by him, and had been discharged in due course. In October last he approached Mr. James Scott, broker, and applied to him for a loan. Mr. Scott told him that he was not in a position to make him an advance, but subsequently informed him that he had got the money. Deponent received a cheque from Mr. Scott signed by him, and he signed a promissory note for £105, the additional £5 being for interest. He was not aware at that time that the plaintiff had anything to do with the loan. On the 15th November, not being in a position to discharge the said promissory note, he applied for an extension of time, and he subsequently paid James Scott all the money in his possession, about £4, in consideration of the extension of time. On the 29th November he again called at Scott's office, and gave him a cheque for £101, the balance due on the promissory note. He never received any intimation from the plaintiff that he had lent the money until the 23rd August of the present year.

Mr. De Villiers read a replying affidavit by the plaintiff, which stated that he lent money to brokers on behalf of their clients. In October last year he was so applied to by Scott for the defendant. He gave Scott a cheque for £100; the statement that it was signed by Scott was incorrect. Scott was not his agent, and he had not acted on his behalf. His services were rendered on behalf of the defendant, and he took it, were paid for by the defendant. He had not received the sums of £4 and £101 mentioned by the defendant.

Mr. Upington (for defendant): The whole question is whether the payment made to plaintiff's agent is good. The cheque has been put in, and is the cheque of defendant's attorneys. It is dated September 27, 1902. No demand was made upon Scott for a promissory note until he became insolvent. Under these circumstances, the defendant has shown that *prima facie* Scott was agent for Heydenrych. If he was not, why should Heydenrych pay the note through Scott? Again, there is no explanation of the delay in prosecuting this case.

Mr. M. de Villiers (for plaintiff): It is not a question whether Scott was believed to be plaintiff's agent, but whether he was so. The promissory

note was payable at the plaintiff's own office, how then could Scott have been an agent to negotiate loans. The plaintiff never asked defendant to return his promissory note: he only asked Scott, and there is no proof of his agency. Then who paid Scott for negotiating the loan? Scott was defendant's agent throughout, and not plaintiff's.

[De Villiers, C.J.: What do you say to Jeffrey's case?]

There the defence is still more extraordinary. Scott there was clearly defendant's agent. The defendant simply employed Scott to negotiate a loan. Then Scott asked defendant for £4, as he was in financial difficulties, but what had that to do with the plaintiff? But even if he was agent for the plaintiff, how could he give extension of time? The note was payable at Scott's office. This is not a case analogous to one in which payment is to be made at a bank. Extension of time is a most important factor, because if payment is to be made by a certain date, it cannot be received thereafter by the agent. On the due date Abrahams went to the proper place and asked for payment, and therefore defendant is not justified in setting up the defence that we have lain by so long.

Mr. Upington was not heard in reply.

De Villiers, C.J.: It is quite clear from the affidavit of the defendant Hoctor that he understood Scott to be the agent of the plaintiff, not only for the purpose of making the loan, but also for the purpose of receivng payment of the loan. The fact that he so understood it, however, is not enough, because if, in fact, Scott was not the agent of the plaintiff for the purpose of receiving payment, the defendant had no right to pay to Scott. Hoctor himself says it was "clearly understood by me from the plaintiff that this amount should be paid by me to the said Scott for the plaintiff's account." That is denied, and the promissory note which has been produced is somewhat inconsistent with the statement, because the promissory note says that the money shall be payable at the offices of Heydenrych. But that seems to be a printed form of the notes given by Heydenrych, and the objection should not be carried too far. But there is the letter written by Heydenrych on the 17th June, 1903, which goes very far, in my opinion, to support the statement of the defendant. That letter is referred to by the defendant in his affidavit, and there is no explanation given by Heydenrych, the plaintiff, in his replying affidavit as to the statements contained in this letter. In this letter of the 17th June he says: "Sir,—I have repeatedly called at Mr. Scott's office for payment of your promissory note for £25, and interest from the 1st September, 1902, payable at my office as above, and I have received no payment, and Mr. Scott tells me that he had written several times to you. I have, therefore, to demand immediate payment, failing which, I shall collect the rent of the houses pledged to me by you, and charge you with the expenses." Now this letter goes very far to show that Scott may have been writing these letters to the defendant on behalf of the plaintiff, for why should Scott tell him that he had written these letters several times to the defendant unless Heydenrych had employed Scott for the purpose of writing these letters? I am by no means satisfied upon these affidavits that Scott was not employed by Heydenrych. The fact that Scott's office was undoubtedly the place of payment in the second case should not be lost sight of in the first case. Another point that should not be lost sight of is this: that Heydenrych, the plaintiff, delayed taking these proceedings until all remedy as against Scott was lost, but any decision at this stage is not final—the plaintiff will still have an opportunity of going into the principal case, and the defendant will then have better opportunities than he has now of proving the agency, and the Court will then decide the case upon its merits. The Court is of opinion that the plaintiff should go into the principal case, costs to abide the result. In regard to the second case, payment was made by the defendant at Scott's office, where the note was payable, and, *prima facie*, therefore, the payment was good. The note was paid several weeks after it fell due, but the defendant was not directed by the plaintiff to pay the amount elsewhere than at Scott's office, where it had been made payable. In this case, therefore, provisional sentence will be refused, with

costs. In the other case, costs will abide the result.

Kotzé, J., concurred.

[Plaintiff's Attorneys: Van der Byl and Van der Horst; Defendant Hoctor's Attorneys: Fairbridge, Arderne and Lawton; Defendant Jeffery's Attorneys: Dempers and Van Ryneveld.]

REX v. BROWN. { 1903. Sept. 14th.

Liquor Licensing Act (28) 1883—Native locations and areas.

On the trial of the appellant in the Resident Magistrate's Court of Komgha for selling liquor to an aboriginal native in contravention of the 22nd section of Act 28 of 1883, the defence was raised that the Proclamation was illegal, but the evidence shewed that there were aboriginal natives resident in the village of Komgha when the liquor had been sold, and that the appellant had consented to take his licence subject to the Proclamation.

Held, *that although such consent might not estop the appellant from setting up the illegality of the Proclamation, it afforded further evidence to prove that aboriginal natives were located or resident in the village, so as to justify the issuing of the Proclamation.*

This was an appeal from the decision of the Acting Resident Magistrate of Komgha in a case in which Henry Viner Brown, the licence-holder of the Central Hotel, Komgha, was convicted of an offence in regard to the supplying of liquor to an aboriginal native. The charge was under the ordinary jurisdiction, Brown being summoned for a contravention of section 22 of Act 28 of 1883. It was alleged in the summons that the district of Komgha had been proclaimed by Proclamation 245 of 1900 to be included in the area in which section 22 of the Act of 1883 was in force. The charge was that of having wrongfully and unlawfully supplied a half-quart bottle of brandy to one Wilhelm, a Kafir. Exception was taken to the summons on the ground that the proclamation was *ultra vires*. According to the evidence, Wilhelm was a servant of the appellant's. The licence was not produced, but the Government official by whom it was issued stated in evidence that the licence was endorsed as being subject to the provisions of the Proclamation. In evidence for the prosecution, it was stated that 87 boys were employed on railway works at Komgha, and the engineer of the works stated that it would be harmful in his opinion if the unrestricted sale of intoxicants to natives were allowed. There was a location at Komgha, in which there were stated to be some 25 male natives. For the defence, it was stated that at the time the licence was granted the railway works had been started, and no "boys" were then employed thereon. There were then no natives located in the district, excepting a few domestics. After hearing the evidence, the Magistrate imposed a fine of £5. In his reasons the Magistrate stated that in Komgha there was no Municipal Council or Village Management Board when the licence was granted. There were then large public works, including the construction of the Kei-road, while a number of natives were employed on private property in Komgha. The Magistrate stated that for these reasons he considered that the case differed from that of *Rex* v. *Floriquey* (13 C.T.R., 652), recently decided on appeal, in respect to a prosecution in the township of Alice.

Mr. McGregor for the appellant. Mr. H. Jones for the Crown.

Mr. McGregor said the appeal raised certain questions respecting the proclamation issued in 1900 prohibiting the supply of liquor to aboriginal natives in districts in certain areas. The questions at issue were analogous to those raised in the cases of *Rex* v. *Mathebus* and *Rex* v. *Floriquey*, which were recently decided. Notice of appeal had been given to the Attorney-General, in which it was set forth that the appeal was made on the grounds that Proclamation 245 of 1900 was illegal and *ultra vires*; that Komgha was not an area within the meaning of the Act and was not a locality wherein natives were congregated or resident; that the conviction was not supported by the evi-

dence; and that the decision of the Magistrate was contrary to law. He wished to emphasise the fact that the natives in the district were only birds of passage, and had come into the place since the Proclamation was issued. He submitted that the Proclamation was invalid when it was issued, and that the later events, as shown by the evidence, could not validate it.

Without calling upon Mr. Jones, the Court dismissed the appeal.

De Villiers, C.J.: It is not necessary to hear Mr. Jones on the matter. It is entirely a question of evidence as to whether the place where the liquor was sold was such a place as could lawfully be included in an area, in terms of the 21st and 22nd sections of the Act of 1883. The definition in the 21st section is: "In districts where aboriginal natives of South Africa are located, or resident, or are congregated upon public or other works or mines." In the present case there is evidence which has satisfied the Magistrate that the place where this liquor was sold, viz., the village of Komgha, is a place where aboriginal natives of South Africa are located or resident. In addition to the fact that there are natives located or resident there, there is the further fact that on the commonage immediately adjoining is a location, in which a considerable number of natives are living, and the fact that railway works are being carried on upon which natives are employed in large numbers. Without deciding that the circumstances that there are this location and these railway works would be sufficient, I consider the fact that there are a number of natives resident in this small place, in connection with these circumstances, justified the Magistrate in coming to the conclusion that the district is one which could lawfully be included in an area. There was ample evidence to justify the verdict, and I am bound to add that I am impressed by the remark made by my Brother Kotzé in regard to the fact that the appellant himself had given his consent to the licence being issued subject to the Proclamation. Now, this consent would never have been given if he had not at the time believed there was a sufficient number of natives in the place to constitute it such a place as might be lawfully included in the area. It may be quite true that a defendant in a criminal case cannot be estopped from pleading the illegality of a proclamation under which he is charged, but the fact that the appellant consented to take his licence subject to this condition goes very far as evidence that he and others considered that place to be a place where natives are congregated and resident. For these reasons, I think the appeal should be dismissed.

Mr. Justice Kotzé concurred.

[Appellant's Attorneys: Tredgold, McIntyre and Bisset.]

SUPREME COURT

[Before the Hon. Mr. Justice KOTZÉ.]

REHABILITATIONS.

Ex parte DIETERLE. { 1903. Sept. 15th.

Mr. Buchanan moved for the rehabilitation of Frederick William Dieterle. He stated that the estate was sequestrated in 1899, and the debts were £8,791, of which £6,024 were preferent claims. The assets realised £4,184; the costs and charges were £106; and the balance went to pay a preferent creditor, who, however, was not paid in full, consequently nobody else got anything. The applicant was originally a tobacco merchant in Cape Town, and did fairly well, but in 1898 he abandoned this, and took a farm in the Swellendam district. He borrowed money, and the farm did not pay.

An order for rehabilitation was granted.

Ex parte GARDNER.

Mr. Buchanan moved for the rehabilitation of Edward Gardner. The liabilities were £943, and the assets £287, but the latter only realised £188, and the amount for distribution was £147. There was no dividend to concurrent creditors. The trustee's report was favourable. Mr. Buchanan brought to the notice of the Court that there was no certificate by the Master that the trustee had filed the dividend receipts. The trustee was in the country, and could not be induced to

file the receipts. Counsel urged that because of this "cornering" of the insolvent by the action of the trustee, the applicant should not be allowed to suffer. It appeared that the insolvent was unsuccessful. Then he took a boarding-house at Cradock, which was even more disastrous, the insolvent having given unlimited credit to boarders.

The Court ordered the application to stand over.

Postea (September 16).

The application was granted.

Ex parte JORDAAN.

Mr. Gardiner moved, under the 117th section of the Insolvent Ordinance for the rehabilitation of Johannes Arnolders Jordaan. There was consent by the creditors.

The application was granted.

Ex parte HARDWICK.

Mr. M. de Villiers moved for the rehabilitation of Alfred William Hardwick, whose estate was sequestrated on May 28, 1901. All the creditors who proved were paid in full, and there was a surplus of £22.

The order was granted.

GENERAL MOTIONS.

DAY V. DAY.

Mr. Buchanan moved for a decree of divorce against Louisa Cornelia Day, born Strydom. The defendant was to have returned to her husband on August 31, or show cause to-day why the bonds of marriage should not be dissolved. The husband had filed an affidavit showing that, up to date, she had not returned.

The Court granted the usual decree.

THOMSON V. THOMSON.

Mr. Upington moved on behalf of Mrs. James Mudie Thomson, for a decree of divorce. The defendant, the husband, should have returned to his wife on August 31, but had not done so. There was an affidavit by the wife to this effect.

A decree of divorce was granted, with costs.

Ex parte McGRATH. { 1903. Sept. 15th.

Act 3 of 1879—Prescription.

In 1863 M. purchased from one W. a certain piece of land. About a year after this purchase had been completed, W.'s estate was sequestrated (as it appeared). The heiress of W. now opposed a rule nisi *in favour of M. being made absolute.*

Held, *that as M. had been in quiet and undisturbed possession of the land for forty years, and more especially as it was not quite clear that the estate of W. had been sequestrated, the rule* nisi *must be made absolute.*

This was an application to have made absolute a rule *nisi* granted under the Derelict Lands Act.

The affidavit of Sarah Emily Gardiner, of Elsie's River Halt, stated that she was married to James Gardiner, and was the daughter of the late George William White, who was also known as William George White, of Cape Town, and subsequently of Natal. She had perused the order of the Court in this matter published in the "Cape Times," and contended that the George White therein referred to was George William White, her late father. She had reason to believe this, and was aware that one McGrath was in or about the year 1863 a great friend of her father's. In 1864 her father left for Natal, and his estate was compulsorily sequestrated, as far as she could recollect, upon the application of Mr. Kelly. Her father died at Durban in February, 1875, but since the publication of the order of the Court she had been unable to obtain a certified copy of his death notice. She was aware that her late father owned ground at Rondebosch, purchased by him, but of which he never took transfer. At the time of his departure for Natal she was very young, and she had since on various occasions endeavoured to obtain this property, but without avail. She believed that the property

referred to in the petition of McGrath was the property belonging to the estate of her late father. She was not aware that petitioner at any time purchased the property. The affidavit of Claude Joubert Watermeyer, attorney, stated that he had searched the insolvency records in the office of the Master of this Court, and found that the estate of one William George White was compulsorily sequestrated on July 12, 1864, and one Petersen was appointed as sole trustee. No account had since been filed in the estate, nor did it appear that the insolvent had since been rehabilitated.

The answering affidavit of Michael McGrath stated that he did not know the respondent (Mrs. Gardiner). He admitted that in 1863 he was friendly with George White, but he did not know that his name was Wm. George White. He was not aware that George White's estate was sequestrated in 1864, or that he died in 1870. Deponent only knew that White received £60 from him in payment for the land in question, and shortly afterwards left the country, and he had never heard of him since.

Mr. Upington for the applicant. Mr. Close for the respondent.

[Kotzé, J.: You have not attached any document showing payment of this £60?]

Mr. Upington: No.

[Kotzé, J.: What is your objection, Mr. Close?]

Mr. Close (for the respondents): I think the creditors should be informed of this application. They seem to know nothing about it. It would seem that the property left was at Somerset West, and nothing seems to have been done in respect of this land. Looking at the affidavit of Gardiner, I would suggest that the matter should be dealt with in some other way.

[Kotzé, J.: What do you suggest? The applicant has been in undisturbed possession forty years.]

That is my difficulty.

Mr. Upington (for the petitioner): There are two grounds on which this petition is based—(1) that the property in question was sold to the petitioner in August, 1863, for £60. This nobody disputes: but if this was so, the property never came into the insolvent estate for W G. White's estate was not sequestrated till July 12, 1864. Then, again, White never got transfer, and it is for that very reason that we have to apply under the Derelict Lands Act. Moreover, the release given by Mostert was given to Geo. White, of Stellenbosch, while the person mentioned in the insolvency proceedings is William George (or James) White, of Somerset West. The only person who now comes forward is this lady, who was only nine years old at the time of the sale. The property is still registered in the name of Mostert. (2) My client has been in undisturbed possession for forty years.

[Mr. Upington was stopped by the Court.]

Kotzé, J.: The applicant, as far back as August, 1863, purchased from one George White, who was also called William George White, a certain piece of land on the main road to Rondebosch, for the sum of £60. Now that fact, it appeared from the petition of applicant, is not denied by respondent, although she says she is not aware that applicant ever purchased this property, but that is not sufficient against his positive statement made on oath that he did purchase it. Then we have the fact that for forty years he has been in the uninterrupted and undisturbed possession of this property. That being so, it seems to me clear that the objection raised by the respondent, namely, that her father's estate was sequestrated, and that this property was an asset in the estate—ought not now to weigh with the Court in considering the application, because the sale took place a year before the alleged insolvency, and also there is some doubt as to whether the estate sequestrated was that of George White, who sold the property. But even assuming for a moment that it is so, I do not think the Court now ought, in view of the fact that the applicant had been in undisturbed possession for so long a period, to refuse to make the rule absolute. The sale, moreover, was nearly a year prior to the sequestration. Consequently, I am of opinion that the rule should be made absolute, respondent to pay the costs of the opposition.

[Applicant's Attorney: C. P. Hughes; Respondent's Attorneys: Herold and Gie.]

Ex parte PALMER.

Mr. Buchanan applied to have made absolute a rule *nisi*, granted on August 10, under the Derelict Lands Act.

Order granted.

Ex parte DE WET.

Mr. Pyemont applied to have made absolute a rule *nisi*, issued by His Lordship (the Chief Justice) on March 16, under the Derelict Lands Act. Counsel stated that a letter had been received from the respondent's attorneys saying that they would not object to the rule being made absolute.

Order granted, a declaration to be filed within 14 days.

Ex parte LESSING.

Mr. J. E. R. de Villiers applied to have made absolute a rule *nisi*, authorising the petitioner to pass transfer of certain property.

Order granted.

VAN NIEKERK V. VAN NIEKERK.

Mr. Buchanan moved for an order on respondent to pay the sum of £2, in respect to the maintenance of the parties' children.

Mr. Upington appeared for the respondent.

Mr. Buchanan stated that the matter was before the Court on the 20th August, when the petition and affidavits, in which the circumstances of the matter were stated, were read. The case was then ordered to stand over, pending information in regard to the salary of one of the two girls in respect of whose maintenance the application was made. An affidavit was now made by the girl to the effect that she was employed as a teacher, and earned £1 per month. She was engaged to be married, but the date of the marriage was indefinite. Deponent was in a delicate state of health, and in consequence of the small salary she received, she was entirely dependent on the respondent for support. In a replying affidavit, respondent said he was employed in a forage business at Hermann at a salary of £5 a month. He had no interest in the business. The elder daughter had told him that her marriage would take place shortly, and the second daughter had informed him that after her sister's marriage she would take her place in the school as a teacher.

Counsel having been heard in argument,

The Court made an order for the payment of £6 per month, as maintenance of the children.

Kotzé, J., in giving judgment, said: In this matter it appears there are four children of the marriage, two girls and two boys, and when the Court granted a decree of divorce in 1896, the Court also made an order that £2 per month should be paid to the plaintiff—the mother—as maintenance for each child. The Court, however, stated that with regard to the girls, this maintenance was to continue up to their 18th year. Now it seems that both the girls are more than 18 years, the elder girl being 21 and the other 19. Mrs. Niekerk now comes and says that the maintenance of £2 a month in respect to each of the two girls having stopped, she is unable to support them, and that they require support, because they are in a delicate state of health. There are the doctors' certificates in support of that, and though the elder girl is doing her best by teaching in an infant school, for which she gets £1 a month, it is very little. It appears that she is in a delicate state of health, but at the same time she is engaged to be married, and one does not know how soon that marriage will take place. There is nothing to show the Court that it might not take place in the course of a few months. Therefore, as far as the elder girl is concerned, the Court is not prepared at present to make any order. But with reference to the other girl, she is not teaching in school, and, according to the doctor's certificate she seems to be really the more delicate of the two. That also appears from the mother's statement, and under these circumstances I think the maintenance for her ought to be continued, and respondent ordered to contribute £2 per month. I must say it certainly does seem strange that the respondent, who says he is only in receipt of £5 a month, should have been in a position to pay, for the four children, £8 a month, and to marry another wife, and, therefore, I am not quite satisfied that the respondent is a man of very poor circumstances, as suggested by counsel. Under all the circumstances of the case, the order of the Court will be that the respondent pay £6 per month for the

maintenance of the second daughter, and of the two boys. Of course, the respondent will have to pay the costs of this application.

PRETORIUS V. PRETORIUS.

Mr. Buchanan made application for a rule *nisi*, operating as an interdict, to be made absolute. Counsel stated that no opposition was offered by the respondent to this course.

Order granted.

FRIEDLANDER V. KAISER BROS.

This was an application on notice of motion, calling upon the respondent to show cause why an interdict should not be granted restraining him from parting with 200 chairs, valued at £65, until the ownership of the articles had been decided by an action now pending.

Mr. Upington appeared for the applicant and Mr. Buchanan represented the respondent.

Mr. Upington read the affidavit of Maurice Friedlander, in which he stated that the chairs in question had been hired from him by Messrs. Hagerty and Shaw for the purposes of a certain entertainment. Hagerty and Shaw had not paid for the hire of the goods, nor had they paid the respondent for the hire of the hall in which the entertainment was held; and the respondent now retained the chairs in lieu of the rent of the hall. Deponent had an order for 1,000 chairs in hand, and these 200 chairs were required to complete the order.

Mr. Buchanan said that if it could be proved that the chairs had been hired from the applicant, the respondent was willing to give them up.

Kotzé, J., suggested that the applicant should deposit the sum of £65 with the registrar, who might give up the chairs under these circumstances, pending the action to decide the ownership of the articles.

Mr. Upington said that the applicant only required an interdict, restraining the respondent from parting with the chairs.

His Lordship pointed out that applicant, in his affidavit, stated he required the chairs to complete an order.

Mr. Buchanan said that he had no objection to his lordship's suggestion being followed.

Mr. Upington said that he was not instructed as to whether his client would agree to that course.

His Lordship said that he merely threw out the suggestion as a means of surmounting the present difficulty.

The case was allowed to stand over until to-morrow.

Postea (September 16):

Order granted in the following terms, by consent: "The applicant is to deposit the sum of £65 with the Registrar, pending the result of an action to be brought by the applicant for the purpose of having declared that the 200 chairs are his (the applicant's) property, and upon such deposit being made, the 200 chairs are to be returned, or restored by the respondent to the applicant, and costs to be costs in the cause."

McKAY V. DUFFY.

This was a motion on notice calling upon the respondent to show cause why a certain rule *nisi* interdicting the respondent from refusing to allow the applicant free access to a certain passage should not be made absolute.

The affidavit of the applicant stated that the respondent had denied the applicant access to the passage in question, which led into some stores in Bree-street, by locking the door, or by blocking it up with cases, so that the door could not be used.

Respondent's answering affidavit stated that had the applicant asked for a key to the door, before coming into court, the matter could have been amicably settled. If, however, deponent was compelled to keep the door always open, he would be forced to leave the premises, and to sue the applicant for damages.

The answering affidavit of the applicant denied that the door had always been closed.

Mr. Gardiner appeared for the applicant, and Mr. Upington was for the respondent.

[Kotzé, J.: Will the respondent agree to supply the applicant with a key to the door within three days?]

Mr. Upington said that the respondent would be willing to supply a key, but he presumed that the three days would not be insisted upon if everything were done to have the key made as quickly as possible. His client could

scarcely undertake to have the key made in so short a time—for Cape Town, at least, the time was short—but he would do everything possible to have it done.

[Kotzé, J.: I consider the time reasonable.]

Mr. Upington submitted that plaintiff should be ordered to pay the costs, at any rate from the time at which the offer was made of a duplicate key.

Kotzé, J., in giving judgment, said: In this matter it seems to me that the respondent was not justified in refusing reasonable access to the store at the back of the yard. However, in his affidavit, he expresses his willingness to supply the applicant, or the lessee under the applicant, viz., Wilson, with a duplicate key, so as to enable him to have access to the yard or store by opening the gate, and on condition, therefore, that the respondent supplies the applicant with such a duplicate key, the rule will be discharged. But I think the applicant is entitled to the costs of this application, because it was due to the respondent that he (the applicant) was obliged to come to the Court.

Mr. Gardiner: Will your Lordship stipulate any time within which the key is to be supplied?

Kotzé, J.: Three days.

DREW AND CO. V. YE MECCA CAFE.

Mr. Gardiner applied to make absolute a rule *nisi* calling upon the respondent company to show cause why the company should not be wound up under the provisions of the Companies Act of 1892, and why an official liquidator should not be appointed.

The rule was made absolute, and the Court appointed Mr. E. R. Syfret as official liquidator.

AFRICAN BANKING CORPORATION V. A. F. HILLS AND OTHERS.

Mr. McGregor moved for leave to take certain evidence on commission in England.

Mr. Close appeared for the respondent Hills personally and as receiver of the Grand Junction Railways.

Mr. McGregor said that the liquidator of the Grand Junction Railways, Ltd., was joined in the action, but no notice of this application had been served upon him. He simply formally joined in the action, which was set down for hearing on the 16th October. Counsel read an affidavit by the attorneys for the African Banking Corporation, in which it was stated that the Corporation desired to have taken on commission in London the evidence of certain of its officials for the purpose of substantiating certain allegations set forth in the declaration, which evidence was not procurable in this colony.

Mr. Close read the replying affidavit of defendants' attorney, in the course of which it was stated that the only fact in dispute on the pleadings was the question whether notice was given to the African Banking Corporation of the assignment of certain contracts. The matter had been postponed from time to time, and if the application for a commission were not granted the case could not be heard next term. The interests of creditors of the Grand Junction Railways would be damaged by the delay.

Mr. McGregor, in argument, stated that it was not now possible to give the names of the officials in the London office whose evidence it was desired to take. As to the statement made on respondents' behalf that the case could not be heard next term, counsel pointed out that if leave were granted and authority sent by next mail to take the evidence, the evidence would be here and ready in the first week in November. There was, he submitted, every probability of the case being taken next term. He submitted that no prejudice had been shown and that the balance of convenience was distinctly in favour of such a commission being granted.

Mr. Close referred to the extreme urgency of having the matter settled. The sum of £76,000 was awarded by the judgment of the Court to Mr. Hills. The Court subsequently interdicted the payment of the money to Hills, but, in granting the interdict, the Court specially stipulated that it would only be granted until the end of the month of August. The case was set down for the 31st August, but was afterwards postponed on the application of the present applicants until the 4th September. It was again postponed, and finally set down for the 16th October. He submitted that if the present application were granted it would jeopardise the chances of having the case determined in the October term. All sorts of difficulties might arise in getting the evidence on

commission, and it was extremely unlikely that the evidence would be here by the first week in November. If the case were not heard in the next term it would have to stand over until February, and this would involve serious loss.

Kotzé, J.: This is an application for a commission *de bene esse*, to take the evidence of certain employees of the plaintiff company in London. Objection is made on behalf of the respondents, who are the defendants in the action, that great delay might occur if the Court grants this application, and that there is the possibility, even a probability, of the case having to go over the November term; but I think that, if the Court were to grant the application in the alternative by the appointment of one Commissioner, and of another if the commissioner first appointed is not in London, that difficulty would be, to a large extent, overcome, especially if the Court fixes another day in next term, later than the day upon which the action is now fixed for trial for the is now fixed for determination, for the hearing of the case. I must say that, weighing all the circumstances, the balance of convenience seems to be with the plaintiff in this matter, and the plaintiff must surely be quite as anxious as the defendant to have this case go to trial as soon as possible. The Court will grant the application, and will appoint as commissioner Mr. Macarness, and, failing him, Mr. McLean, and will fix the 12th November for the hearing to the action. Of course, it is understood that the applicants must be prompt in the matter of the commission, and have it returned as soon as possible.

Mr. Close asked that it might be ordered that the trial take place on the day named, whether the commission were then returned or not.

Kotzé, J., said he thought it might be better to substitute Mr. Mossop in place of Mr. McLean. Mr. Mossop was an attorney, and would most likely be in the City. He had acted in the capacity of commissioner for the Court previously, and the Court would therefore appoint him as commissioner, failing Mr. McLean. Costs would be costs in the cause.

Ex parte HUMAN.

Mr. Buchanan moved for leave to mortgage certain property, in order to pay a deficiency in the estate of the testator, from whom the minors, of whom petitioner was the natural guardian, inherited the property sought to be mortgaged. The executor approved of the application, and the Master also made a recommendation.

An order was granted in terms of the Master's report.

Ex parte ATHERSTONE.

Mr. Buchanan moved for an order authorising the appointment of a trustee. The present trustee was not in the Colony, and had declined to deal with the property, alleging that the estate had been finally wound up. The appointment of a trustee was asked, in order that a certain asset might be dealt with, this asset having come to light since the last report was filed.

Kotzé, J.: In this matter, as the trustee, Mr. Black, is absent from the Colony, and is resident now in England, he has practically ceased to be a trustee under the Ordinance, and the Court has power to give instructions for the election of a trustee. Such an order will naturally include in itself authority to the Master to take such steps as are necessary to carry out that order. The order the Court will make now is that a new trustee be elected.

HOFFMAN V. COLONIAL GOVERNMENT.

Mr. Howel Jones (for the Government) moved for leave to sign judgment against plaintiff for not having proceeded with his action within the stipulated period.

There was no appearance for the respondent, and the application was granted.

RAKOFF V. COLONIAL GOVERNMENT.

Mr. Howel Jones applied on behalf of the Government for leave to sign judgment against the plaintiff (Rakoff) for not having proceeded with his action within the time prescribed by Rule of Court.

Mr. Close appeared for the respondent.

Mr. Howel Jones put in an affidavit supporting the application, and stating that the time fixed by the Rules of the Court in which the case should have been proceeded with had expired.

Mr. Close put in an answering affidavit of the plaintiff (now respondent), stating that the plaintiff had been suffering from ill-health, which prevented him from proceeding with the case, although he had desired to do so. He now asked for leave to purge his default and to file his declaration. A medical certificate was annexed in support, stating that the plaintiff had been suffering from bronchitis since June 25, and that he was unable to travel.

His Lordship asked on what grounds the claim was made.

Mr. Close replied that he did not know, as he had not seen a copy of the summons. He submitted that, while there had been some delay on the part of the plaintiff, the Court should not now be so strict as to refuse removal of bar, since the plaintiff had been prevented by illness from giving instructions for the declaration.

Mr. Jones said that the medical certificate only stated that the plaintiff was ill on June 26, and that he was unable to travel on that one day. Counsel further pointed out that the summons did not state the cause of action, and the Government was, therefore, ignorant as to the nature of the claim.

Kotzé, J.: In this matter, the applicant—the Government—who is the defendant in the action, asks for leave to sign judgment against the plaintiff, the latter not having gone on with the action, and filed his declaration within the time prescribed by the rules of Court. As against that, the plaintiff now appears, and asks for permission or leave to purge his default, and file his declaration. Now, it is quite apparent there has been some delay on the part of the plaintiff, but on the other hand, again, the medical certificates show he has for some weeks or months been suffering from ill-health, and under all the circumstances of the case I do not think this is an instance where the Court should now peremptorily order that judgment should be entered for the defendant against the plaintiff. It is true that all that is alleged in the summons is that he is claiming against the Government for damages; but it is not usual in the summons to state particulars of the damages. The object of the summons is to bring the defendant before the Court; the real facts upon which the plaintiff relies in regard to his claim for damages are generally set forth in the declaration. I think the plaintiff will be sufficiently punished for his delay by having to pay the costs. I am of opinion, therefore, that this is a case in which the Court should not allow judgment to be entered against the plaintiff, but should grant plaintiff leave to purge his default, and to file his declaration within fourteen days, on payment of the costs.

Ex parte COWELL AND ANOTHER.

Mr. Gardiner, for petitioners, moved for an order authorising the execution and registration of a marriage contract between petitioner and his wife to keep their two estates separate, and for the wife to keep the property to which she was entitled at the time of the marriage, which was solemnised on June 25 last.

The matter was ordered to stand over until October 12, and, in the meantime, a marriage contract to be drawn up for submission to the Court.

HARRIS V. DU TOIT.

Mr. J. E. R. de Villiers moved for the appointment of a commission to take the evidence at Johannesburg of David Anderson Blyth, who was too old to attend the court to give evidence personally.

The Court appointed Mr. Saul Solomon commissioner.

THE MASTER V. DICKSON.

Mr. Howel Jones moved for an order compelling respondent to file a certain liquidation account.

Respondent was ordered to file the account within a month, and to pay the costs of the application.

Ex parte BARNARD AND OTHERS.

Mr. Close moved for an order confirming the sale of certain property, in which certain minors were interested. The Master recommended that an order should be granted in terms of the prayer. The shares accruing to the minors out of the proceeds to be paid into the Guardians' Fund.

The order was granted in terms of the Master's report.

RAUCH V. RAUCH AND SCOTT.

This was an application regarding the payment of alimony.

Mr. Buchanan was for applicant, and Mr Greer for respondents.

The parties were married at Somerset East in May, 1895, and there were two children of the marriage. The husband is bringing an action against his wife for divorce, and she now applied for an order to compel him to pay her a sufficient sum to enable her to defend the suit and, meantime, for funds for her maintenance.

Mr. Buchanan read an affidavit by the wife, who stated that her husband was employed in the Railway Department in Cape Town at a wage of £12 per month and overtime. He also had saved money. She had a good answer to the action for divorce.

Mr. Greer said the husband was willing to pay his wife £1 10s. per month, and to provide her with a room and groceries. The wife had left the home provided for her by her husband, who was supporting the two children of the marriage. He submitted that the husband had a very strong cause of action, and had done all he possibly could with regard to maintaining his wife.

Kotzé, J.: In this matter I do not wish to say anything which might prejudice the merits of the case. The application is twofold. First, the petitioner asks for a certain sum of money by way of interim maintenance, and secondly she asks that the husband be ordered to deposit a certain sum of money sufficient to enable her to defend the action for divorce. Now, from the facts put very ably before the Court by Mr. Greer, I do not think this is an application in respect of which I ought to meet the wishes of the applicant. It appears that the husband is actually paying his wife £1 10s. per month, and so far as his ability to contribute towards the expense of her defence is concerned, it seems to me he is in a position where he receives the very moderate salary of £12 per month, and he has besides two minor children and himself to support, and also to pay the expenses of his own action. Therefore he is not in a position, even if the Court ordered him, to deposit a certain sum to enable his wife to defend the suit. On the other hand, the wife will not be prevented at the trial from bringing forward the facts which she may wish to advance for her defence. If she has no means the law provides a remedy by allowing an application to be made for leave to sue *in forma pauperis*. Seeing she is anxious to defend the action, it will be open to her to make such an application. The present application is therefore refused.

Ex parte GRAND JUNCTION RAILWAYS, LTD.

Mr. Buchanan moved for the confirmation of the liquidator's report.

The application was granted, leave being given to the liquidator to apply at a later stage for the directions of the Court.

Ex parte DUFF. { 1903. Sept. 15th. „ 16th.

Attorney—Examiners outside the jurisdiction of the Court.

Examiners residing outside the jurisdiction of the Court who possess the qualifications required by Rule 293, appointed to examine an applicant residing outside the jurisdiction of the Court, with a view to his admission as an attorney of the Court.

Mr. Buchanan moved for an order authorising the examination of the petitioner at Pretoria as an attorney-at-law.

Mr. Upington opposed the application on behalf of the Incorporated Law Society.

Mr. Buchanan said applicant had passed his law certificate examination, and had served his articles in the Colony, he was unable to come to Cape Town to pass his practical examination, as his employers refused to give the necessary leave of absence, he having already had a week's leave on account of ill-health.

Mr. Buchanan pointed out that the Incorporated Law Society had given no notice of their opposition.

[Kotzé, J.: Their objection may be of a legal character.]

Mr. Buchanan: Anyone else has to give notice of objection, and I do not see why the Law Society should be spe-

cially favoured in this matter. This is not the first time within my knowledge that such a thing has happened.

Mr. Upington maintained that it was not wise to establish a new precedent in this matter. There were examiners here appointed by the Court for the purpose of holding examinations, gentlemen of very high standing in their profession, and in the practice of that Court, which differed to a great extent from the practice of the Court in the Transvaal. The Law Society felt that unless it was an exceptional case, no exception should be made.

[Kotzé, J.: How can the Court make an exception; it must go by a general rule.]

The Court has made exceptions. The Law Society feel that this is a very ordinary case, and that it is not wise to appoint examiners altogether outside the jurisdiction of the Court.

Cur. Adv. Vult.

Postea (September 16).

Kotzé, J.: In this matter, which came before me yesterday, I have looked into the report of the application of one Holderness which came before this Court on the 17th of April last (13 C.T.R., 254). In that case it appears that Holderness had passed on examination as attorney in Bulawayo, having been examined by examiners resident in Bulawayo, and was duly admitted as an attorney by the High Court of Southern Rhodesia. He then applied for his admission in this Court as an attorney, or, otherwise, that this Court should appoint examiners to examine him in the practical part of his profession, with a view to his admission by this Court; and in the course of the judgment the Chief Justice said that, inasmuch as Mr. Holderness had already been admitted, he did not see the necessity for any further examination, and that, if it had been necessary to appoint examiners, he probably would have appointed the same gentlemen who had already examined him in Rhodesia at Bulawayo. From that I draw the inference that the Court saw no objection to examiners being appointed outside the jurisdiction of the Court, but then, when I read Rule 293, I find it is said there that, when the Court does appoint examiners, they must be examiners who possess particular qualifications, viz., they must be an advocate of the Supreme Court and two attorneys of the Supreme Court. Now, in the present case, it so happens there are learned gentlemen in Pretoria who comply with these qualifications, and therefore, following the practice indicated by the case of Holderness, I will now appoint as examiners Mr. Advocate Esselen, who is also an advocate of this Court, and Attorneys J. H. L. Findlay and William Nixon, who are attorneys of more than seven years' standing in this Court. They are to examine the applicant in the practical part of his profession for admission as an attorney of this Court, and will make their report to this Court through the Registrar.

SUPREME COURT

[Before the Hon. Mr. Justice KOTZÉ.]

GENERAL MOTIONS.

GIRATIE v. ESTATE GODDESS. { 1903. Sept. 16th.

This was an application on motion, under section 103 of the Insolvent Ordinance, for an order requiring the trustee in the insolvent estate of Goddess to deliver up a certain agreement of sale and also possession of certain premises, thereby sold, and also for costs of suit.

The Widow Giratie, in her affidavit, stated that in 1901 she sold to the insolvent certain property in Hanover-street, Cape Town, for £2,500, on terms set forth in a certain broker's note. Interest was to be paid on the sum owing under the purchase from the 1st October, at 6 per cent. The insolvent took possession of the property on the 4th October, 1901, and from time to time paid certain instalments of the purchase price; but it did not appear that the insolvent would be able to take transfer of the property within a reasonable time. He declined to give up possession. Deponent obtained judgment against the insolvent on the 6th February, 1903, for the balance of the purchase, £2,400. She was still prepared to cancel the sale, but

this the insolvent declined to do, and deponent was then compelled to take proceedings to have his estate placed under sequestration. Subsequently, on the appointment of a trustee, letters were written to the trustee asking him to decide whether he would execute the agreement for the purchase, or abandon it. The insolvent was still in possession of the premises, and was not taking proper care of the same, and deponent was desirous, either of receiving possession of the property again, or the money for which it was sold. The letters were at first ignored, but afterwards, when notice of the present application was given, the trustee replied that he was not prepared to cancel the agreement without the instructions of creditors, which he proposed to take at the third meeting, to be held on the 2nd October, when he should recommend that the sale should be abandoned.

Mr. M. de Villiers for the applicant. Mr. Pyemont for the respondent.

[Kotzé, J.: The whole question is whether the trustee's contention that he must wait till a meeting of creditors is correct?]

Mr. M. de Villiers (for the applicant): Partly so. According to the Insolvent Ordinance (section 103) it is in the discretion of the trustee to elect whether to hold a sale of the insolvent's property or not. In this case the property is rapidly deteriorating, every opportunity has been given to the insolvent to take such steps as may render the sale unnecessary, and the applicant is the largest creditor. It is for the trustee to decide whether to hold the sale or not, and he need not consult the creditors.

[Kotzé, J.: There may be cases in which the trustee does not wish to take the responsibility.]

Mr. Pyemont (for the respondent): This action is premature—I cannot find any similar case. It is for the Master to fix the date of the meeting of creditors. The letter of August 8 was written before any trustee had been appointed. When he was appointed he called a meeting at the earliest practicable date. It could not legally have been called till September 13, and yet the trustee was called upon to elect on September 12, whether he would hold to the sale or not. The practice is for the trustee to consult the creditors at the third meeting. The English Act of 1883 allowed the trustee three months within which to elect. A later Act extended this period to twelve months, thereby showing that three months was not considered a sufficient time. The applicant has already obtained judgment for £2.400, and if he gets his order he will have the property as well. As to the deterioration of the land, even if no order is made the applicant will not suffer, because he can always come to the Court for damages.

[Kotzé, J.: Why did the trustee delay so long before taking action?]

I cannot say, he is not at present in town, but he virtually asked the applicant to withdraw, and explained what arrangements he had made in respect of the meetings of creditors. The applicant never gave the trustee an opportunity of consulting the creditors.

[Kotzé, J.: Should the trustee do anything without consulting the creditors, would he not be personally liable?]

[Mr. Melius de Villiers: No, he can fall back on the Insolvent Ordinance. The applicant is a poor woman, and she can get neither her property nor her money.]

[Kotzé, J.: But the trustee is acting on behalf of the creditors.]

And the applicant is the chief of these —section 103 of the Insolvent Ordinance is perfectly clear.

Cur. Adv. Vult.

The Court ordered the trustee to consult the creditors, and abide by their decision.

Postea.

Ex parte SCHOOMBIE.

Mr. De Waal moved on behalf of the petitioner for an order removing one John McAllister from executorship, under the will of petitioner's sister, Elizabeth Maria McAllister (born Schoombie). The testatrix made her child sole heir, and it appeared that the said McAllister had left for Johannesburg, and that his present whereabout were unknown. He left the minor child with the petitioner without any means of support, and the liquidation and administration of the estate of the late Mrs. McAllister could not be proceeded with, owing to his absence. Petitioner prayed for an order for the removal of McAllister from the executor-

ship, and the appointment of an executor dative in the said estate and a guardian to the said minor.

Rule *nisi* granted, calling upon McAllister to show cause on the 15th October why the prayer of the petitioner should not be granted, rule to be served personally, failing which, publication in two newspapers circulating in Johannesburg.

Ex parte GOUS.

Mr. Buchanan moved for leave to sell certain property bequeathed by the late Andries Stephanus Gous to the male children of his marriage, and subject to a life interest by his surviving spouse. The property sought to be sold comprised a twenty-fourth share in a certain farm, for which an offer of £181 12s. had been received, and there were interested three major and three minor heirs.

The Master's report was as follows: "In view of the facts set forth in the petition, I beg to recommend that an order should be granted confirming the proposed sale of a twenty-fourth part or share of the farm Heeren Logement (locally known as Klipfontein) to one Johannes C. de Jongh, and that the Registrar of Deeds be authorised to pass transfer thereof to the said purchaser. The shares accruing to the three minors out of the proceeds of such sale to be paid into the Guardians' Fund."

Order granted in terms of the Master's report.

Ex parte BENJAMIN AND FRANK WHEELER.

Mr. Upington, for the petitioners, said that this matter had been before the Court on a previous occasion (see page 801). The petitioners applied for leave to sell certain two diamond rings, pledged to them by one McKee Rankin. A dispute arose in connection with the playing rights of "Magda." Rankin was the manager of a company which had been billed to play "Magda" at the Good Hope Theatre, and Messrs. Wheeler were defendants in an action brought by one Sass to determine the company's playing rights. Rankin gave a guarantee to the Wheelers that he would be responsible for the action. Thereafter, Rankin's company was leaving the Colony, and the Wheelers took proceedings to have him stopped until he had deposited security to cover the indemnity and the guarantee. The Court thereupon ordered that the sum of £226, which was in the possession of the Wheelers, and due to Rankin, should be retained by them as security, and upon those terms Rankin was allowed to go. He appeared to have been in want of funds to take the company Home, and then an arrangement was entered into between Rankin and the Wheelers by which the Wheelers paid over this sum of £226, and Rankin deposited as a pledge certain two diamond rings, which were valued at £240. He gave a written document in which he pledged himself to repay the sum of £226 9s. 3d. by the 31st December, 1902, and if he failed to pay by that date he authorised the Wheelers to realise the diamonds, and pay the proceeds into court, in accordance with the order that the Court made. Now, the Wheelers applied to the Court for a denunciation. The matter had been standing over, because the Court felt, he believed, that as these were valuable rings it might be difficult to obtain a purchaser, and that some effort should be made by the petitioners to see if they could not sell them by private contract for an amount somewhere about the value which Rankin's jeweller set upon them. They had made efforts to sell the rings, and amongst the people applied to was the jeweller himself, but he was by no means prepared to pay the value that he set upon the rings when applied to before. Counsel said the petitioners now had no knowledge of the exact whereabouts of Mrs. Drew, Mr. McKee Rankin's daughter, who had offered to pay Messrs. Wheeler the sum of £160, and to redeem the jewellery from them. When this offer was made, the petitioners could not sell without the authority of the Court. An offer had been made of £155 for the jewellery by a jeweller.

The matter was ordered to stand over until Friday morning, in order that a valuation of the jewellery might be made.

Postea (September 18).

Mr. Upington said that since the matter was last before the Court, he had obtained affidavits, as suggested by their lordships, from two jewellers. Philip Myers made an offer of £155 for the two diamond rings pledged by McKee Rankin with the petitioners as security in an action concerning certain playing rights in "Magda," and another jeweller, Philip Harris, also made a similar

offer. Counsel read a third affidavit from one Harry Farrell, stating that he had noticed from the newspapers that this application was pending, and he was prepared to pay £175 cash for the rings, provided this offer were accepted by Wednesday, the 23rd inst.

An order was granted authorising the sale of the rings for the sum of £175 cash, and the payment from the proceeds of £85 to Messrs. Tredgold, McIntyre, and Bisset, as attorneys for Mr. Sass, in the case of *Sass* v. *Wheelers* and £75 costs incurred by Wheelers in the cases of Sass v. Wheelers and *Wheelers* v. *McKee Rankin*, plus the costs of the present application, any balance remaining to be deposited for and on behalf of the said McKee Rankin with the Master of the Court.

BARTHOLOMEW V. GEISSLER.

Mr. McGregor moved for leave to sue by edictal citation. Judgment had been given in the Magistrate's Court for £32 9s., and a writ of execution had been issued against respondent's movables, to which a return of *nulla bona* had been made. Geissler at present resided at Johannesburg. He was stated to have landed property in the Colony.

[Kotzé, J.: Applicant has the ordinary remedy of proceeding against the movable property, a judgment of a competent Court having been obtained for the amount.]

Counsel said that applicant wished to sue provisionally, and obtain provisional sentence on the judgment of the Magistrate.

Leave was granted to sue by edictal citation provisionally, the citation being made returnable on the 15th October, personal service to be effected.

Ex parte CHAPMAN.

Mr. Buchanan moved for leave to execute an ante-nuptial contract after marriage. Petitioner, acting as attorney for one Losper, was instructed to draw up an ante-nuptial contract between Losper and a lady named Wessels. Before the contract was executed, the marriage took place. It was stated that the contracting parties were under the impression that all they had to do was to sign the power of attorney, which they did prior to the ceremony. The parties had now gone to Johannesburg, but were not domiciled there, and so could not apply to the Transvaal Court.

Leave was granted to have a contract drawn up in terms of the power of attorney, subject to the rights of creditors between the marriage and the registration.

Ex parte DIBBEN.

Mr. P. S. T. Jones moved for authority to register a certain deed of servitude.

Granted.

WRIGHT V. WRIGHT. { 1903. Sept. 16th.

Divorce—Domicile—Jurisdiction.

Jurisdiction in the matter of divorce is founded on the domicile of the husband.

Mr. Gardiner moved for leave to sue by edictal citation.

The applicant is Rose Mary Wright, and the respondent is her husband, Dan Wright. The parties were married in Melbourne in 1895. They came to live at Cape Town, whence respondent proceeded to Melbourne in October, 1901. He left applicant here, and had taken no notice of repeated applications for money to maintain his wife and child. Petitioner wished to sue for restitution of conjugal rights, failing which, for divorce, on the ground of malicious desertion. It was stated in affidavit that defendant left for Australia in connection with a business venture, it being understood that he was not going to remain there, but intended to return to the Cape. The business was one connected with the sending of wheat from Australia to the Cape.

[Kotzé, J.: What jurisdiction has the Court in this case?]

Mr. Gardiner (for applicant): The respondent came to this country with his wife, he resided here for five years, and established a domicile here, and that domicile he has never abandoned.

[Kotzé, J.: He has gone back to Australia.]

Non constat, that, he has taken up a domicile there. He has gone merely to conduct a branch of a Cape Town business. I would suggest that the order be granted, subject to no objection being successfully raised by the respondent.

Kotzé, J.: In this matter there is some doubt as to whether the

husband and the applicant are domiciled in the Cape Colony, and whether, after all, the real domicile is not in Australia. Whatever my own personal opinion may be with reference to the question of jurisdiction in matters of divorce, this case shows that the rule insisting in all instances that jurisdiction must be founded upon the domicile of the husband may operate very harshly, because, supposing the defendant, who is the husband, were to be really domiciled or taken to be domiciled in Australia, then, if his wife has no means, she is unable to proceed to Australia to obtain a divorce there in the Court of the domicile of the husband. But however that may be, the law which this Court has to follow has been laid down in the matter by the Privy Council, in the case of *Le Mesurier* v. *Le Mesurier*, and it is not necessary now for me to say more than that I will grant the leave asked for, that is, to sue the husband by edictal citation for restitution of conjugal rights, and failing that, for divorce. It must be distinctly understood that this will be subject to the Court itself raising the question of jurisdiction, or to the husband raising objection. It is quite possible, however, that the applicant may be in a position to lay such facts before the Court as will show clearly that this Court has jurisdiction, and that the absence of the husband is only temporary. The application will, therefore, be granted.

LORENZ V. LORENZ.

Mr. J. E. R. de Villiers moved, on behalf of Reyner Lorenz, for a commission *de bene esse* in connection with an action for divorce, instituted against her husband. The evidence of plaintiff, who is resident in Holland, was required. Respondent resided at Beaufort West.

The application was granted, Mr. Ernest Scheides being appointed commissioner.

Kotzé, J.: In this case, also, it must be understood that the order will be subject to the question of jurisdiction being raised either by the defendant or the Court itself.

Ex parte VAN DER SPUY.

Mr. Buchanan moved for an order authorising petitioner to take transfer of certain property. Petitioner was the executor in the estate from which the property was asked to be transferred. He had made the highest tender for the property, after tenders had been publicly invited. The amount of the tender—£50—was stated to be a fair one.

Order granted.

Ex parte MASTERTON.

Mr. Upington moved to have a certain contract of sale annulled.

The petition set forth that in December, 1902, petitioner sold certain property to Edward M. Bray and Wm. S. Tarry for £1,000. The purchase price had not been paid. Judgment had been obtained against Bray and Tarry, and a writ of execution had been issued, but the judgment had not been satisfied in any part. Bray and Tarry could not now be found. The petitioner had an offer for the property, but was unable to sell while the contract of sale subsisted. Petitioner was prepared to waive his rights under the judgment if the sale were annulled.

Kotzé, J.: On that condition I will give you the order.

Ex parte CARNOVSKI AND ANOTHER.

Mr. Pyemont moved for an order dissolving a certain partnership. Applicant's affidavit stated that his fellow partner—Eren Berman—was away in Europe, and had committed acts prejudicial to the partnership business. He was not expected to return to this country.

Kotzé, J.: In this matter it appears that the partner of the applicant, one Berman, left this Colony, taking with him the sum of £1,750, which, it is alleged, belonged to the business; and it is also alleged that he falsified entries in the books, making it appear that £1,500 of this £1,750 was paid by him to a certain person of the name of Provoski. Mr. Provoski himself has not made an affidavit; it is said his present whereabouts are not known. Still the applicant and his agent, Jackson, have both made affidavits, in which they say they saw Provoski, and the latter denied all knowledge of having received any money from Berman. Be that as it may, it is quite clear that the applicant must have lost all personal trust and confidence in Berman, who, in the absence of

the applicant, left the business and went to Europe, and his present whereabouts being, it is said, unknown. Under these circumstances, seeing that the personal trust and confidence between the partners is no more, the Court will dissolve the partnership existing between the applicant and Eren Berman, and will appoint, as joint receivers, Mr. Edward Ridge Syfret and the applicant, Carnovski. The costs of the application will come out of Berman's share, if any.

Ex parte LLOYD.

Mr. Buchanan moved for an order authorising the Master to pay to petitioner certain moneys for the education and maintenance of the minor, Russell W. Lloyd.

The Master's report (from which the facts of the case sufficiently appear) was as follows: "The petitioner is the duly-appointed tutor dative to the minor S. E. Lloyd, to whose credit a sum of £216 2s. 11d. has lately been paid into the Guardians' Fund for account of the inheritance accruing to her out of her late father's estate. It is anticipated that a further sum of about £30 will also so accrue to her. It is now desired to place the minor at S. Hilda's School for Girls, Kloof-street, Cape Town, for a period of one year, to enable her to complete her education. It seems to me that it would be for the benefit of the minor to accede to the application. I, therefore, beg to recommend that your Lordships may be pleased to grant an order authorising the Master of the Court to pay over to the petitioner in quarterly instalments the sum of £75 out of the moneys standing to credit of the said minor in the Guardians' Fund for the purpose of defraying the cost of the education and maintenance of the said minor, and the costs of this application."

The Court granted an order in terms of the Master's report.

Ex parte SILBERBAUER AND OTHERS.

Mr. Buchanan moved in the matter of the petition of Silberbauer, Wahl and Fuller, acting as attorneys for one F. W. B. Wilmot, of Laingsburg. Counsel said the case involved a peculiar point of practice. It appeared that Wilmot, acting as agent for FitzRoy George, of Johannesburg, obtained judgment against one G. R. Rogers, of Laingsburg, on a promissory note for £10. A writ of execution was issued, but the execution debtor made an assignment of his property, to which assignment Wilmot refused to be a party. When the messenger went to execute at Rogers's business place, he found the place locked up. He was told that the key was in the hands of Mr. Walter, of the firm of Krige and Walter, law agents. Mr. Walter told the messenger he (Walter) was in possession of the assets, and refused to give up the key, so that no attachment could be made. All the creditors, with the exception of Wilmot, agreed to the assignment. Petitioners contended that the action of Walter in refusing to give up the key was illegal, inasmuch as Wilmot had not consented to the assignment; and applied for an order compelling Walter to give up the key, and to pay the costs of the application. The amount of the judgment was £10, with £2 10s. costs. Notice had not been served on Walter.

Kotzé, J., said he would make an order on Messrs. Krige and Walter to give up the key, and to allow the messenger of the Court at Laingsburg to attach so much of the property as was necessary to satisfy the judgment. The other creditors, if they wished to sequestrate the estate, could take action.

SUPREME COURT

[Before the Hon. Mr. Justice KOTZÉ.]

ADMISSION. { 1903. Sept. 18th.

Mr. Rainsford moved for the admission of Albert Claus Heinrich Wilhelm Cluver as an attorney-at-law and notary public.

Application granted, and oath administered.

GENERAL MOTION.

STEVENS v. STEVENS.

Mr. J. E. R. de Villiers moved, on behalf of the petitioner, for leave to

sue her husband, Frederick Stevens, by edictal citation, for restitution of conjugal rights, failing which, a decree of divorce. Petitioner stated that she was at present residing in Station-road, Woodstock. She was married to the respondent in Cape Town in 1900, but in 1902 he maliciously deserted her, and was now living in Tasmania.

Kotzé, J.: Under the circumstances, as the applicant says that she was married to her husband, Frederick Stevens, in November, 1900, and that he had deserted her and gone to Tasmania, the Court will grant her leave to sue him by edictal citation for restitution of conjugal rights, failing that, divorce; but it must be distinctly understood that it is subject to any question or objection as to jurisdiction which may be raised at a later stage. Personal service must be effected, the rule to be returnable on the 1st February next.

RUTHERFORD AND MASON V. MYBURGH. } 1903. Sept. 18th.

The Pounds and Trespasses Act, 1892, section 36, sub-section (5)—Convenient time.

A Field-cornet at 4 p.m. appointed 9 a.m. the following day for the purposes of inspecting the land trespassed upon, and sent a message to M., the owner of the cattle which had trespassed, to that effect. This message did not reach M. until 8 p.m. The next morning M., on proceeding to a neighbour, for the purpose of getting him to act as his arbitrator, found that his neighbour was ill; M. then drove into Stellenbosch to secure another arbitrator. On arriving on the land trespassed upon with his arbitrator, M. found the Field-cornet and the other arbitrator moving off the land, and they informed him he was too late and that the damage had already been assessed. The Magistrate held that under the circumstances a sufficiently convenient time had not been allowed. On appeal, the Court refused to reverse the Magistrate's decision.

This was an appeal from a judgment of the Assistant Resident Magistrate of Stellenbosch, in an action brought by the plaintiffs to recover £8 4s. from the defendant, being damages and costs assessed by a Field-cornet under the Pounds Act.

The action was brought in the Magistrate's Court at Stellenbosch to recover damages sustained in his garden at Klapmuts, owing to trespass by goats and sheep belonging to the defendant, J. A. Myburgh. The plaintiffs had given notice to the defendant at eight o'clock in the evening that the damages would be assessed at 9 o'clock the following morning. The defendant did not arrive on the ground with his arbitrator until the assessor, Dirk Cloete, Field-cornet for the Klapmuts Ward, had completed his assessment, and the Field-cornet refused to re-consider his decision.

The Magistrate, in giving absolution from the instance, said that the defendant seemed to have had some difficulty in finding a landowner to act as arbitrator, and that he eventually arrived on the ground trespassed on between 9 and 10 o'clock on the day appointed, and that he was then informed that the assessment had been made, and could not again be gone into. He (the Magistrate) gave absolution from the instance, on the ground, as had been urged by the defendant, that the time allowed to him to be represented at the assessment was not "convenient" within the meaning of sub-section 5 of section 36 of Act 15 of 1892. Defendant was not allowed a reasonable time in which to secure a landowner as arbitrator, whereby the intention of the Act was defeated.

Mr. Upington (for appellant): The point in this case is, whether the time fixed by the Field-cornet for assessing the damage was a "convenient time" within the meaning of sub-section 5, section 36, of Act 15 of 1892. We contend that it was. Section 36 provides that the damage shall be assessed by the

nearest Field-cornet or Justice of the Peace, with two landowners as arbitrators. The proprietor of the land on which the damage is done appoints one arbitrator and the owner of the cattle the other.

[Kotzé, J.: But the point is: was the time convenient?]

Yes. As to that, the object of the law is to provide a speedy and cheap means of assessing damage done. The Field-cornet and not the plaintiff had to fix the time. He fixed nine a.m. the following day. The defendant's house was within sight of the place where the damage was done. He had notice at eight o'clock on the previous evening, but he did nothing till the next morning. Then he went to Bosman, who was ill; and then he went to Stellenbosch.

[Kotzé, J.: What more than what he did do could he reasonably have done-]

He could have found out the night before that Bosman was ill. He could then have gone to Beukes the next morning about 7.30, and could have got him; or he might have got a landowner in his immediate neighbourhood. He showed a want of reasonable diligence. He had reasonable notice, and he gives no explanation as to why he left the matter over till 7.40 the next morning. The Field-cornet was, therefore, justified in not re-opening the matter after making his award. The defendant does not allege that the award was excessive, and has not shown that he was prejudiced. When the Act prescribes twenty-four hours' notice, it is clear that it was meant that the proceedings should be expeditious.

[Kotzé, J.: But you did not give twenty-four hours' notice?]

The Act says twenty-four hours' notice after the damage has been done.

[Kotzé, J.: Is it reasonable to expect a man to go out after nine p.m. to look for an arbitrator?]

He could send a boy.

[Kotzé, J.: Suppose the man to whom the boy is sent does not put in an appearance?]

That would be his misfortune. I submit that the Court will never upset an award unless the applicant can show prejudice not arising from his own negligence. Here he has not been prejudiced, and he has certainly been negligent.

Mr. J. E. de Villiers (for the respondent): If any time was wasted, it was wasted by the plaintiff. The Field-cornet made the appointment as early as 4 p.m. the day before, and yet we got no notice till 8 p.m. Then the evidence as to the distance between the farms of the plaintiff and of the defendant, and their distance from Stellenbosch is very vague. The evidence does not show that the defendant had any near neighbour save Bosman. He could not reasonably be expected to inspan a cart and drive round after 8 p.m. to look for a landowner. We are not bound by the Magistrate's reasons for his judgment.

[Kotzé, J.: If the parties were still on the ground when the defendant arrived, why did they not give him an opportunity of speaking for himself?]

They ought to have done so. Subsection 2 of section 36 makes no provision for the case of one of the arbitrators being unavoidably absent. The Field-cornet is thus in such a case thrown back on the common law, and according to that he should have re-opened the case. In this Court, if judgment is given in default, the Court will always grant leave to purge the default. That alone would have justified the Magistrate in refusing to accept the award. Besides, the award should have been given in writing.

Mr. Upington (in reply): The defendant did not object to the time fixed by the Field-cornet. As to the award being in writing, the Field-cornet's evidence is that they had finished the award and were just leaving the farm when the defendant appeared.

Kotzé, J.: In this matter Rutherford and Mason sued in the Court below, before the Assistant Resident Magistrate of Stellenbosch, for damages done to their property by the cattle of Myburgh, and the Field-cornet was asked under the 36th section (sub-section 5) of the Act 15 of 1892, to fix and appoint a time by which Myburgh had to be present, with an arbitrator appointed by him, on the ground for the purpose of assessing the damages conjointly with the Field-cornet, and an arbitrator appointed by the plaintiffs. It appears that at four o'clock on the day previous to the assessment of the damages, the Field-cornet requested one of the plaintiffs to notify to Myburgh that he would be on the spot at 9 o'clock

the following morning. This message was delivered to Myburgh, the defendant, not immediately, but at eight o'clock at night. Well, I think, then, it was too late, it would be unreasonable to expect that Myburg should then at night, at eight o'clock, inspan his cart, or saddle his horse and ride to a neighbour, who might probably live an hour away on horseback to request him to be present there on the following morning. Then it appears that on the following morning Myburgh, at 20 minutes to eight, which, regard being had to the alteration of the time, would really be seven o'clock by the sun, went to a neighbour (Bosman), but Bosman, being ill, was unable to accompany Myburgh to the spot for the purpose of acting as his arbitrator to assess the damages. Then Myburgh rode in to Stellenbosch for the purpose of finding another arbitrator, and eventually he found one Beukes, who accompanied him to the ground. When they got to the spot, or as one of the witnesses said, "when we got on the ground, we saw the Field-cornet and the other arbitrator moving off the ground." Myburgh subsequently went to the Field-cornet, and the Field-cornet then informed him that he was too late, as the award had already been made. In the Magistrate's Court the defendant raised the objection that the time appointed by the Field-cornet was not a sufficiently convenient time within the meaning of sub-section 5 of section 36 of the Act, and the Magistrate, after hearing the evidence, came to the conclusion that a sufficiently convenient time had not been allowed Myburgh, and, therefore, he granted absolution from the instance. The sole point in this appeal is whether under all the circumstances a sufficiently convenient time, within the meaning of the sub-section of the Act, was fixed by the Field-cornet. Now, what is or what is not convenient must depend to a very large extent on local conditions and circumstances, and in judging whether the time appointed is convenient or not, distance must play a very important part; it must be a very material factor in deciding that question. We do not know the precise distances of the various farms from the Field-cornet, or from the spot or the land where the trespass was committed, but still, regard being had to the list put in, showing the expenses charged by the Field-cornet and the other arbitrator, it would appear that they charged for three hours' horse hire that morning. Allowing an hour for the purpose of viewing the damage and assessing it, it would be a very fair and reasonable conclusion that the Field-cornet and the arbitrators each lived about an hour from the spot. Under all the circumstances, therefore, seeing that the Magistrate must be the best judge of local conditions and distances, I must say there is nothing in the evidence to show that Myburgh acted unreasonably, and did not do what a reasonable man under the circumstances would have done to act with sufficient promptitude, in securing a proper and fit arbitrator; and I do not see any reason why I should disturb the finding of the Magistrate on that point. The Magistrate having a far better knowledge of local conditions than this Court possesses came to the conclusion that the time allowed was not sufficiently convenient, and nothing has been urged on behalf of the appellants in this matter to induce me to come to a different conclusion. The appeal will, therefore, be dismissed with costs.

[Appellant's Attorneys: Faure and Zietsman; Respondent's Attorneys: Michau and De Villiers.]

REX V. McCULLY. { 1903. Sept. 18th.

Appeal—Weight of evidence.

This was an appeal from a decision of the Assistant Resident Magistrate of East London. In the Court below the defendant (now appellant), one Horace McCully, master of the British ship Strath-Isla, had been charged with the crime of assault, in that on or about May 12, 1903, on board the said ship, when on the high seas, sailing between the port of Buenos Ayres and that of East London, he did wrongfully assault one James Golightly, a British seaman, serving on board the said vessel, and did with his clenched fist strike and beat him upon his right ear, giving to him then and there, and thereby certain bruises and hurts, and other wrongs and injuries the said Horace McCully to the said James Golightly then and there did.

The prisoner pleaded "not guilty."

Certain witness deposed to having witnessed the assault, while the evidence

for the accused tended to show that they could not have done so: (1) because it was perfectly dark at the time of the alleged assault; (2) because looking to the *locus in quo* it could not possibly have been observed by a certain one of the witnesses for the Crown.

The Court found the accused guilty, and sentenced him to pay a fine of £3, or in the alternative, one month's imprisonment with hard labour, and further declared that the complainant's contract with the accused as seaman should be cancelled.

Mr. Upington (for the appellant): This appeal is brought on the ground that the conviction was against the weight of evidence. The Magistrate did not sufficiently advert to the fact that charges of this kind are not often made by seamen in order that they may get away from their ship. The Magistrate also seems influenced by the fact that the accused, unfortunately, because intoxicated while on shore, was apprehended by the police, and estreated his bail.

[Kotzé, J.: It would seem that the evidence of the master was on one side, and that of the first mate and the cabin boy on the other.]

The second mate is also said to have witnessed the whole occurence, and yet, strangely enough, he had not been called by the Crown.

[Mr. H. Jones: The second mate had broken his wrists, and, therefore, could not attend.]

Judgment was not given in the Court below till six weeks after that accident, and surely he could have attended by that time. The Magistrate ought to have attached greater weight to facts by which he could test the value of the evidence. For instance, the evidence of Mr. Benett, a perfectly independent witness, is quite opposed to that of the cabin boy. Mr. Benett says, it must have been quite dark at the time of the alleged asault; Olsen, the cabin boy, denies this. Then Olsen's evidence is contradicted by Benett, who says that it would have been impossible to see a man at the wheel from the bottom of the companion ladder. Again the complainant says, that he was struck five times: but no evidence has been called to prove any injuries whatever.

Mr. H. Jones (for the Crown) was not called upon.

Kotzé, J.: It is not necessary to hear Mr. Jones. This is an appeal from a decision of the Assistant Resident Magistrate of East London. It appears that the captain of the British ship Strath-Isla was charged by a seaman serving on board the ship with having assaulted him by striking him several times with his clenched fist when the ship was at sea on a voyage from Buenos Ayres to East London. Several matters have been urged, and urged with great ability by Mr. Upington in support of this appeal, but I must say it seems to me that this is one of those cases where the Magistrate is the best judge on the facts. The plaintiff did not merely state the charge and give evidence in support of it, but he is corroborated by the cabin boy. Now it has been said that the cabin boy's testimony must be viewed with a great deal of suspicion, because both he and the complainant may have given evidence against the captain, either out of spite or because they wished to get rid of the ship. But be that as it may, there is nothing on the record to show that anything of the kind was contemplated by either the cabin boy or the complainant. Certain infirmative circumstances have been pointed out in the evidence of the cabin boy, and it is quite right that the Court should consider those circumstances. First of all, it has been said that the boy stated that at the time the assault was committed it was beginning to get light, and that it has been shown by an expert witness—the captain of another ship who examined the log of this vessel and judged from its position at the time—that it must have been dark at the time. Well, it is quite possible that the boy may have made a mistake with reference to the time; but, after all, this does not show that he is not a trustworthy witness. There was a full moon the evening before, and however equally it may have been at sea, there might have been quite sufficient light for him to have seen what he said he did see. Another point urged is that the cabin boy could not have seen the assault from the place where he says he was standing. There is nothing satisfactory to show that this is so. It is true there is the statement of the accused that the cabin boy could not see him from the place where he stood, but the cabin boy is positive that he did see the captain strike the complainant. Then it is also asked how it is that, if the com-

plainant was really assaulted by the captain, no other member of the crew was brought forward either to show that the complainant was assaulted, or that they afterwards saw marks on the ear or face of the complainant. No doubt it would have been far more satisfactory if that evidence had been forthcoming. The absence of the evidence of the second mate is easily explained by the fact of his having been taken to the hospital when the ship arrived, owing to having fallen from a mast and broken his two wrists and injured his spine. Consequently, he could not have been present at the hearing. Although the prosecution might have obtained, or tried to obtain, evidence from one of the members of the crew, still the absence of such evidence is not sufficient to show that the evidence of the complainant and of the cabin boy is not to be believed, as against that of the captain. The captain, although he denied having committed the assault, admitted that when he laid a charge against the complainant of leaving the ship, and when he also made the charge against the cabin boy, who was acquitted, he was under the influence of liquor, and it also appears from the record that the captain was arrested for drunkenness, and that, failing his appearance, his bail was estreated. It is said that the Court must not look at that too particularly, that if, when a captain goes on shore, he may take more drink than is good for him, it does not follow that he might not be steady or sober on board ship. No doubt that might be so in certain instances, but in this case, although the cabin boy says that the captain was sober at the time of the assault, the complainant says that the captain was intoxicated at the time, but sober when he subsequently went to ask him for some oil and wool at 8 o'clock. However, in any case, the complainant and the cabin boy both say that the assault took place, and against that, we have the simple statement of the captain, who denies it. Now the Magistrate is the best judge of this question of fact as to the credibility of the two witnesses on the one side and of the accused on the other, and he came to the conclusion that the evidence for the prosecution was to be believed. Under these circumstances, I do not see any sufficient ground brought forward here to-day to justify me in going behind the decision of the Magistrate and allowing this appeal. The appeal will, therefore, be dismissed.

[Appellant's Attorneys: Silberbauer, Wahl and Fuller.]

"Cape Times" Law Reports.

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT

[Before the Hon. Mr. Justice KOTZÉ.]

REVIEW CASE. { 1903. Oct. 12th.

Magistrate—Remit by Attorney-General.

Where a criminal case is remitted by the Attorney-General to be tried by a Magistrate under his ordinary jurisdiction (Act 20, 1856), the Magistrate cannot pass a sentence in excess of such ordinary jurisdiction. Where, therefore, a Magistrate on such remit had sentenced a prisoner to six months' imprisonment with hard labour, the Court reduced the sentence to one of three month's imprisonment with hard labour.

Kotzé, J.: The case of *Rex* v. *Abdol Kariem* has come before me as judge of the week. The prisoner was charged with fowl-house breaking, with intent to steal, and with the theft of a large quantity of fowls. The Magistrate took a preliminary examination, and at the close of it committed the prisoner for trial. The Attorney-General remitted the case back to the Magistrate under his ordinary jurisdiction, Act 20 of 1856, and the Magistrate sentenced the prisoner to six months' imprisonment, with hard labour. Under his ordinary jurisdiction, he could only sentence the prisoner to three months' imprisonment, with hard labour, and the sentence must therefore be reduced from six months to three months' hard labour.

ADMISSIONS.

Mr. Schreiner, K.C., moved for the admission of George Gerhard Sutton as an advocate.

Application granted, and oath administered.

Mr. Gardiner moved for the admission of Percival Frere Smith as an advocate.

Application granted, and oath administered.

Mr. Buchanan moved for the admission of Benjamin Robert Duff as an attorney-at-law.

Application granted, oath to be taken before the Registrar of the Supreme Court of the Transvaal.

Mr. J. E. R. de Villiers moved for the admission of Johannes Stephanus Marais as an attorney-at-law and notary public.

Application granted, and oath administered.

PROVISIONAL ROLL.

LENG AND MAXWELL AND EARP v. SONENSCHER.

Mr. Buchanan moved for the provisional order granted on the 22nd August for the sequestration of the defendant's estate to be made final.

Order granted.

HOFFMAN AND OTHERS V. SHOFFER.

Mr. Alexander moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

WHITAKER, PATERSON, BROOKES, LTD.' V. ISMAIL.

Mr. Alexander moved for provisional sentence for £445 0s. 9d. on an acknowledgment of debt, less £90 paid on account.

Order granted.

JONES AND SON V. RICHARDS AND SONS

Mr. Gardiner moved for the final adjudication of the defendants' estate as insolvent.

Mr. Upington said he was instructed by the Bank of Africa, who were creditors, to move from the bar for the appointment of a provisional trustee in this matter. The affidavit of the manager of the bank said that the said firm of Richards and Sons was indebted to the bank in the sum of £26,000 and upwards. The firm had in the past carried on business as printers and stationers; a large number of persons were employed in the said business. Since the 1st January, 1903, the said business had been conducted under the supervision and inspectorship of Mr. E. R. Syfret and Mr. C. W. T. Mouatt. Contracts had been taken by and on behalf of the said firm, some of which were still running. Deponent believed that it would be in the interests of the business and the creditors that the business should be continued under a provisional trustee, until such time as a permanent trustee or trustees should be elected by the creditors. Deponent suggested that Mr. E. R. Syfret should be appointed as provisional trustee.

An order was granted, appointing Mr. E. R. Syfret as provisional trustee of the estate.

SCHULTZ AND DE JAGER V. FOWRIE.

Mr. Benjamin moved for provisional sentence on a promissory note for £979 12s., less £273 6s. 6d., paid on account.

Order granted.

LIPSCHITZ V. MEYER.

Mr. Buchanan moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

BENNETT AND LOUW V. SPARGO.

Mr. J. E. R. de Villiers moved for the final adjudication of the defendant's estate as insolvent.

Defendant appeared, but said he had no statement to make.

Order granted.

McLEOD V. VISSER.

Mr. Sutton moved for provisional sentence on a mortgage bond for £1,190, with interest at the rate of 7 per cent., and for the property specially hypothecated to be declared executable. the bond having become due by reason of non-payment of interest.

Order granted.

SMIT V. HOOLE AND STEVENS.

Mr. Bisset moved for judgment for £236 4s. 3d., with interest, on a promissory note.

Mr. Buchanan consented to the application on behalf of Stevens.

Provisional judgment granted against Hoole, and final judgment granted against Stevens.

BAM AND OLIFF V. BLOOM.

Mr. De Waal moved for provisional sentence on a promissory note for £300.

Mr. Alexander, for the defendant, asked for a postponement on the ground that defendant was away in the Transvaal in connection with a case that had an intimate bearing on the present matter. The defendant sold certain property at Worcester to one Captain J. F. Livingstone, and a cheque had been passed in defendant's favour for £1,960, which, however, had not been honoured, and was still in the defendant's possession. The plaintiffs had proposed an undertaking with the defendant, agreeing to stay all proceedings against him pending the action brought by the defendant against Livingstone, in the Transvaal, the defendant, in consideration thereof to pay them £500 as commission on the sale of the pro-

perty. The defendant had not signed the undertaking. The defendant desired the present matter to be postponed for 8 or 10 weeks.

Mr. De Waal opposed the application for a postponement.

Kotzé, J.: I am of opinion that in this matter the Court should give provisional sentence. The defendant has set up the plea that the money was to be paid out of the cheque of one Livingstone. It appears that this cheque had not been paid before the due date of the bill. It is now said by Mr. Alexander that there was a *pactum* between the parties to the suit whereby it was agreed that the plaintiff should not seek to enforce payment of the debt until the defendant's action against Livingstone had been dealt with, but it does not appear that that agreement was signed or ever entered into by the parties

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FEITELBERG V. DELL.

Mr. Buchanan moved for provisional sentence for £78 2s. 4d. and £3 12s. 1d. costs, on a judgment of the Magistrate's Court at Wynberg, upon which there had been a return of *nulla bona*, and for certain immovable property belonging to the defendant to be declared executable.

Order granted.

ILLIQUID ROLL.

SMITH AND HOLDEN V FOX. { 1903. Oct. 12th.

Mr. Greer moved for judgment, under Rule 329d, for £33 16s. 11d., work done and materials supplied, with interest *a tempore morae* and costs of suit.

Order granted.

LEWIS AND PURCELL V. MELLORS.

Mr. Benjamin moved for judgment, under Rule 329d, for £9 1s. 6d., goods sold and delivered. Plaintiff, it was stated, resided at Sir Lowry Pass, and the defendant at Malmesbury. Hence the application was made to the Supreme Court.

Order granted.

MALCOMESS AND CO. V. WALKER.

Mr. Upington moved for judgment, under Rule 329d, for £2,149 16s. 8d., with interest, less £400 paid on account since the issue of summons, and also costs.

Order granted.

ESTATE SOUTHEY V. LUCOUW.

Mr. De Waal moved for judgment, under Rule 329d, for £40 5s. and costs.

Order granted.

HAYWARD V. LEONARD.

Mr. Greer moved for judgment, under Rule 329d, for £82 10s., purchase price of certain property, with interest from the 2nd May, 1903, and costs of suit, plaintiff tendering transfer.

Order granted.

PHILIP BROS. V. WALLACE.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £147 12s. 7d., balance of the purchase price of goods sold and delivered, with interest and costs.

Order granted.

METHUEN AND CO. V. BUCHANAN.

Mr. Smith moved for judgment, under Rule 329d, for £82 17s. 3d., goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

PASHA V. HADIEN.

Mr. Benjamin moved, under Rule 329d, for an order compelling the defendant to pass transfer of certain property in Cape Town, sold by him to the plaintiff, the plaintiff tendering purchase price. Counsel asked that, in case the order were granted, a date should be fixed within which transfer should be effected.

Order granted, transfer to be passed within one month.

ROSS AND CO. V. ROUS.

Mr. Upington moved for judgment, under Rule 329d, for £65 9s. 6d., goods sold and delivered, interest, and costs.

Order granted.

HART V. MATESDORF

Mr. Upington moved for judgment, under Rule 329d, in default of plea, for £210, being commission, interest, and costs. The declaration set out that there was a commission upon an agency to obtain subscribers for certain shares.

Order granted.

ANDREWS V. WOLK.

Mr. Bisset moved for judgment, under Rule 329d, for £43 10s., for rent, less £1 5s. paid on account, together with interest *a tempore morae* and costs of suit.

Order granted.

JACOBS V. PORTER.

Mr. Upington moved, under Rule 329d, for an order requiring defendant to forthwith give transfer and conveyance of certain property at Claremont, bought by plaintiff from him in April, plaintiff having already paid the full amount of the purchase price. There was also a claim for £50 damages, but this had been withdrawn.

An order was granted, calling on defendant to pass transfer within three weeks.

MOWBRAY MUNICIPALITY V. YOUNG BROTHERS.

Mr. Sutton moved under rule 329d for judgment for the sums of £4 4s. and £52 10s. for rates, with interest and costs.

Order granted.

REHABILITATIONS. { 1903. Oct. 12th.

Mr. Alexander applied for the rehabilitation of Henry Cragg. The estate was provisionally sequestrated in March, 1897, and finally in April of that year.

Granted.

Mr. Buchanan moved for an order for the rehabilitation of Harry Hoblin Hards. The date of surrender was the 14th May, 1891.

Granted.

Mr. De Waal moved for the rehabilitation of Gustav Adolf Anderholod Nefdt, whose estate was sequestrated in May, 1895.

Granted.

Mr. P. S. T. Jones applied for the release from sequestration of Petrus Andries Steenekamp. On the 11th May, 1900, the estate was compulsorily sequestrated. All the creditors who had proved had been paid in full, and there was a surplus of £189 11s. in the hands of the Master. The application was under the 107th section.

Kotzé, J., pointed out that in the notice published in the "Gazette," the application was stated to be one for discharge. However, there was a certificate given by the Master, and applicant could take an order for his release.

Mr. Bisset moved for the rehabilitation of Pieter Johannes Olivier, whose estate was sequestrated in March, 1897.

Granted.

Mr. J. E. R. de Villiers moved for the rehabilitation of Frederick Daniel le Roux. The estate was sequestrated in January, 1896.

Granted.

Mr. De Waal moved for the rehabilitation of Paul Johannes Marais. Insolvent surrendered his estate in 1891. He had paid all his creditors in full.

Granted.

Mr. J. E. R. de Villiers moved for an order for the rehabilitation of Gerhard Christian Bedford.

Granted.

GENERAL MOTIONS.

CHAMBERLAIN V. CHAMBERLAIN. { 1903. Oct. 12th.

In deciding as to whether the custody of a child shall be entrusted to the father or the mother, the Court will be guided chiefly by what is in the interests of the child.

Mr. Upington moved on behalf of Wm. Ernest Chamberlain for a decree of divorce. The respondent had failed to obey an order to return to or receive plaintiff. The custody of the minor child was asked for.

Mrs. Chamberlain appeared and gave evidence on oath. She made allegations of cruelty against her husband, saying she had left the house because she did not think that she and the child were safe there. The child was a girl, aged sixteen months, and was now with witness.

In cross-examination, she said she was living at a boarding-house. She objected to the child being placed with anyone; she considered she was the most competent person to look after the child. She intended to proceed with the child to England to her parents shortly. The child was a girl.

Mr. Upington said the father was prepared to place the child with a competent and reliable person at the Paarl. If the mother were going to leave the country, and to take the child with her, the father would not be able to have access to the child.

Mr. Justice Kotzé said the order for the divorce would be granted, but he would make an order as to the custody of the child later.

Postea (October 16th).

Kotzé, J.: This matter came before me on the 12th instant, and the question was with reference to the custody of the child of the marriage. I intimated at the time that a divorce would be granted, but that, as to the custody of the child, I would consider my decision. I have consulted with my brother Maasdorp, before whom and myself the matter first came, and I think the proper order to make is to give the father the custody of the child. The Court, of course, is principally actuated by asking itself the question, What is best in the interests of the child? Seeing that the child is only sixteen months old, the Court probably for the next three or four years would have allowed the mother to have the custody of the child; but he says she is about to proceed to Europe the moment she receives the child from the father, and wishes to take the child with her. Now, the father objects to that, and says he is opposed to the child being removed from the jurisdiction of this Court. If the mother were in a satisfactory position, so far as character is concerned, the Court might think it would be to the benefit of the child that she should have the custody of it. Under all the circumstances, it will be better, in the interests of the child, not to give the mother the custody; consequently the Court will make an order giving the father the custody. The mother, of course, may at all reasonable times have the right of access.

Ex parte WOODHEAD AND SONS.

Mr. Alexander moved to make absolute a rule *nisi* granted under the Derelict Lands Act.

Granted.

Ex parte HAYBITTEL.

Mr. Buchanan moved to make absolute a rule *nisi* granted under the Derelict Lands Act.

Granted.

Ex parte COWELL AND WIFE.

Mr. Gardiner moved for leave to execute a marriage contract. Counsel said the matter had been previously before the Court, when it was ordered to stand over in order that the contract which it was proposed to register might be produced. He now produced a duplicate contract signed by the parties.

Leave was granted as prayed.

MILLAR V. BEST.

This was an application for an order for personal attachment, it being alleged that defendant had committed contempt of Court by failing to comply with an order granted on the 20th August, whereby he was ordered to pass transfer of certain land at Muizenberg, alleged to have been purchased by applicant from respondent in May last.

Mr. Buchanan appeared for the applicant.

The defendant, Alfred John Best, appeared, and gave evidence on oath. He said that the property belonged to one Robertson. He denied that he sold it, and said that the documents relating to the property which he held at the time of his negotiations with the plaintiff were held by him as security for the repayment of money advanced to Robertson by him. Since that time the money had been repaid, and he had given up the documents to Robertson. He contended that there had only been a provisional sale to Millar.

In cross-examination, respondent said he did not appear to oppose judgment, because he did not understand the legal procedure, and was unable to consult an attorney. Robertson was a commercial traveller, and was now, witness believed, in Johannesburg. When he negotiated with Millar he did not tell him that the property belonged to someone else; he

did not think it was necessary to do so. He wrote a letter to the applicant's attorney stating that Robertson had written to him from Maritzburg, stating that the transfer of the property to him was registered in the Deeds Office in December, 1897.

Mr. Buchanan said that search had been made in the Deeds Office among the deeds registered in December, 1897, but no trace of this could be found.

In further cross-examination, the witness admitted that on the 20th May, 1903, he gave Millar a document in the following terms: "Mr. Millar, I herewith give you refusal until the 25th instant for two plots of land at Muizenberg on the corner of Royal-road.—A. J. Best. Meet me at 2 p.m." Witness did not keep the appointment to meet at two o'clock. He saw Millar again on the 22nd May, and gave him a document, which read: "I have this day sold to Mr. Millar two plots of ground at Muizenberg described as lots 21 and 22, corner of Royal-road, and newly-made road, for the sum of £100. Meet me at 2.10 on Sunday." Witness did not keep this appointment.

In reply to the Court, witness said he had not told Robertson he had sold this property. Robertson had asked him to sell it. Witness took up the position that there was no sale.

Kotzé, J., told Best he had better think the matter over seriously until Thursday, when counsel could again mention the matter. Best had better be ready with some proposal then, or see Mr. Millar and try to make some arrangement with him.

Postea (October 15).

The Court granted an order as prayed, but (by consent) suspended execution for a month. The question of costs to stand over.

HENDERSON AND ANOTHER V. HANEKOM. | 1903, Oct, 12th. „ 21st. „ 29th.

Appeal to Privy Council—Final judgment—Decision on exceptions.

In an action brought by the cessionary of a mining lease against the lessor to have it declared that the rights under the lease were vested in the lessor, the defendant excepted to the declaration on the ground that it disclosed no cause of action. The Court having disallowed the exception, the defendant applied for leave to appeal to the Privy Council.

Held, *that the decision overruling the exception was not a final judgment in terms of the 50th section of the Charter of Justice until the plaintiff obtained the benefit of the decision by a judgment in his favour on the declaration.*

This was an application brought by Jurgens Johannes Hanekom, of the district of Hay, for leave to appeal to the Privy Council against a decision of the Supreme Court in the matter of Henderson and others v. Hanekom.

Sir H. Juta, K.C. (with him Mr. Buchanan), was for the applicant; and Mr. Schreiner, K.C. (with him Mr. Benjamin), was for the respondents.

Mr. Buchanan said that the action raised the question of the assignability of certain prospecting rights in the defendant's farm, and was commenced in the High Court of Griqualand. The defendant excepted to the declaration, and the High Court upheld the exception, but on appeal to the Supreme Court, the exception was overruled. The defendant now applied for leave to appeal to His Majesty in Privy Council from the judgment of the Supreme Court.

Mr. Schreiner: The original action was brought by my clients, now the respondents, that action is still pending in the High Court of Griqualand, exception was taken to the declaration by the defendant, who did not plead in any way, setting forth that the declaration disclosed no cause of action; the High Court of Griqualand upheld the exception, and against that decision an appeal was brought before the Supreme Court as the Court of Appeal, and that appeal was successful. The Supreme Court disallowed the exception, with costs, and caused judgment to be entered overruling the exception, with costs. Of course, the case was then remitted to

the High Court of Griqualand for further hearing. We then oppose this application on the ground that the judgment given by this Court, sitting as a Court of Appeal, was not a final judgment, from which alone an appeal lies to the Privy Council; see Charter of Justice and Act 35 of 1896, section 22. By this Act (section 19) the Supreme Court is constituted as a Court of Appeal under the Charter of Justice. Section 24 provides for an appeal from the High Court to the Supreme Court, even on interlocutory matters, but no appeal lies from the Supreme Court (our Court of Appeal) save against "a final judgment, decree, or order thereof." The question whether an appeal can be granted on an exception has never been clearly decided, but the case of *Jones* v. *Town Council of Cape Town* (12 S.C.R., 144) is somewhat in point. In this case we stand without any judgment. We asked for a declaration of rights, and that has neither been granted nor refused. No final judgment has been given either in this or in any other Court in this case.

[Kotzé, J.: Surely the decision that the declaration disclosed no cause of action was final?]

I submit not—at all events, according to English cases. See *Salomon* v. *Warner and Co.* (1 Q.B.D., 1891, p. 734). Here the judgment on the exception was not a final order, and it would be most unfair if the applicants could appeal on an exception taken by their own counsel.

[Kotzé, J.: The question is whether this Court did not finally dispose of the question of the assignability of a mining lease?]

I submit not. A judgment is not final till it has been given on a declaration and is perfected by the signing of judgment. What would be the position if your lordship gave leave to appeal? I should have to ask for the execution of the judgment. But there is no judgment to execute, and therefore there is nothing to appeal about. If exception had been taken in the High Court, and there had been a plea over the exception might be over-ruled and the plea over admitted.

[Kotzé, J.: Do you then mean to argue that the argument on exceptions does not affect your case?]

Absolutely. Section 50 of the Charter of Justice shows that the Court has no power to grant leave to appeal on exceptions. We might go to the Privy Council, but they cannot, because the order was made on our exceptions. Had our declaration been set aside, according to our practice we might have had a right of appeal; and in this our practice differs from the English practice. See *Jones* v. *Insole* (64 L.T., 703) as to interlocutory and final orders. That is the latest decision as to English practice, and shows that an appeal cannot be taken on an exception or a demurrer, which, of course, is the same as our exception; and very rightly so, for a demurred may be of a most frivolous character. If the defendant wants to appeal he can file his plea, or he can go to the Privy Council for leave to appeal.

Mr. Buchanan (for applicant): There have been many cases in which leave has been granted to appeal on an exception. Counsel for the respondent has referred to the case of *Kimberley Waterworks* v. *Kimberley Town Council* (12 C.T.R., 205), but in that case the appeal was refused only because the application was merely for an interdict pending an action. Had a perpetual interdict been asked for the Court would have granted the appeal, even if final judgment had not been given. In England an appeal is allowed even on interlocutory matters. The only question is as to the time within which notice must be given; but if an interlocutory order has the practical effect of a final order, it is certainly appealable. In England the term "interlocutory" has a much wider meaning than it has here, and hence English cases do not altogether apply. To show the difference between our terminology and that of England, I would refer to the *Encyclopædia of the Laws of England* (Vol. 9, p. 311). I submit that this is such a judgment or order as can be appealed against.

Mr. Schreiner (for respondent): As to the difference between a final judgment and an interlocutory order, see *Onslow* v. *Commissioner of Revenue* (63 L.T., 513). I would also submit that your lordship sitting alone has not the powers of a Court of Appeal (Act 35 of 1896, section 20).

[Kotzé, J.: I think I have the full powers of the Supreme Court.]

But I submit not of a Court of Appeal.

[Kotzé, J.: I will take time to consider that point.]

Mr. Buchanan cited *Trowell* v. *Shenton* (1878, 8, Ch. D., 318) as to the meaning of the term "final order."

Cur. Adv. Vult.

Postea (October 21).

Kotzé, J.: The question arose as to whether or not the sentence or judgment of the Court on the exceptions had the effect of a final or definite sentence or decree. Another point was raised by Mr. Schreiner, viz., that inasmuch as the Court in giving judgment sat as an Appeal Court from the decision of the High Court of Griqualand West, the question was whether, regard being had to the Act 35 of 1896, known as the Better Administration of Justice Act, one judge sitting alone in this Court had jurisdiction to entertain such application for leave to appeal to the Privy Council. He had since had an opportunity of looking through the Act, and he found that section 22 of the Act was clear on the point. It said that an appeal to Her Majesty in Privy Council shall be allowed by the Supreme Court sitting as an appeal court in any decision, judgment, or decree, and so forth. Now, the other case he had mentioned, viz., the action that came before him alone, was the case connected with what was known as Contat's Colliery Company. That case came before the Supreme Court in the first instance, not in its appellate, but in its ordinary jurisdiction. Therefore the point that arose in this case did not arise in Contat's Collieries. Regard being had to the express language of section 22, he did not think that sitting alone he could entertain the application. Therefore, he thought the matter should be referred to the full Court in its appellate jurisdiction—*i.e.*, as a Court of Appeal. Some future day could be fixed for hearing it, when three judges were present.

Postea (October 29).

[Before De Villiers, C.J., and Maasdorp and Kotzé, J.J.]

Mr. Buchanan (for the petitioner): When this application came before his lordship, Mr. Justice Kotzé, on October 12, exception was taken that we could not appeal in this case, inasmuch as no final order or judgment had been given by this Court, but see *Jones* v. *Cape Town Town Council* (5 C.T.R., 172). The whole question is, "Is this a final judgment or not?"

[De Villiers, C.J.: Surely they have given security?]

But only for the costs of appeal, not for the damage they have done on our farm. Then as to whether or not this is a final judgment. My client will suffer irreparable damage if these prospectors are allowed to come on his ground. The defendants did not plead over (as they might have done) to our declaration. We cannot admit section 2 of their plea, nor can we meet it with a categorical denial, because if we do the other side will meet us with an exception. A judgment which goes to the root of the whole question, as this judgment does, is a final "rule or order in this action." See also section 10 of the declaration, which contains the whole gist of the declaration. The whole question raised in the declaration was with respect to the assignment of the contract. Should the Court grant leave to appeal, two actions may be going on at the same time. See also section 50 of the Charter of Justice, which says that "any rule or order . . . having the effect of a final or definite sentence" may be appealed against. The wording of the section clearly shows that no rule or order made on motion is appealable.

Mr. Schreiner (for respondents): The order under section 15 of Act of 1896 was that the appeal was to be allowed. He merely filed an exception, and did not plead over. The exception was upheld, and the paragraph of his pleadings to which that referred was struck out. Section 15 of the Charter of Justice and Act 22 of 1893 show that no exception can be taken on an appeal. In the meantime, we are being kept out of our rights and out of our money. If we were to go on with our action we could not well appeal: for if we did, how could this Court give judgment on the appeal while an appeal was still before the Privy Council?

[De Villiers, C.J.: But was not this a final judgment? Here there was no cause of action, as the Court held by final judgment that there was no good exception.]

But see sections 24 and 15 of Act 35 of 1896. We are the successful parties, and yet we have no legal rights.

[Kotzé, J.: But, on your exception, were not all the facts admitted?]

No, only for the purpose of the argument on exceptions. Suppose A sues B for £1,000 damages. A is not called upon to give any security for costs, and there is nothing to prevent a dozen civil cases from going on at once against B. Here the exception of *res judicata* is quite out of place. To refer to one or two English cases. See *Salomon* v. *Warner* (3 Q.B., 1891, Vol. 1, p. 734), where see judgment of Esher, M.R., and that case is quite on all fours with the present one. See also judgment of Fry, L.J., as to interlocutory and final orders *in re Alabama Railway Company* (1891, Ch., 1-246). Hence here the order was not final or effectual. See *Jones* v. *Insole* (64 L.T., 703), in which *Salomon* v. *Warner* was followed. See also Act 35 of 1896, section 26.

[De Villiers, C.J.: But has not the rule as to striking out of pleadings superseded the old rules as to demurrer?]

Demurrer is an old English law term no longer recognised (see Order 25, Rule 2). A decision on a demurrer would not be final.

[Kotzé, J.: Should this Court judge this case by Roman-Dutch Law or English Law?]

We must look to the view the Privy Council would take, and I admit that if Dutch Law were decided on this point the Court would be bound by Roman-Dutch Law. *McPherson's Privy Council Practice, Onslow* v. *Commissioner of Revenue* (63 L.T., 513), and *Tronson* v. *Dent* (8 Moore's P.C., 419).

Mr. Buchanan (in reply): See *Trowell* v. *Shenton* (8 Ch. D., 318). I admit that case was quoted in *Salomon* v. *Warner*, but that was a very peculiar case. Surely a judgment which says that a declaration discloses no cause of action is a final judgment; but suppose the decision had been the opposite, would that have been final? Surely not. The terms "final" and "interlocutory" are very indefinite, and are understood differently in our law from what they are in English law. That is shown by Rule 58 of the English Rules of Court. See also *Encyclopædia of the Laws of England* (Vol. 7, p. 116). The *ratio decidendi* in *Salomon* v. *Warner* is not so much the *effect* of the judgment as the *time* when the decision was given. Here we have an exception which to all intents and purposes was final.

De Villiers, C.J.: In this case an exception was taken to the declaration in the Court below that the declaration disclosed no cause of action. The exception was allowed, but, on appeal, the exception was disallowed. It is unnecessary now to decide whether, in case the judgment of the Court of Appeal had been different, the judgment would have been a final one or not. There is much to be said in favour of the view that, in case the judgment had supported the decision of the Court below, it would have been a final one, but I am clearly of opinion that a judgment in favour of the plaintiff upon exception did not amount to a final judgment. The words of the Charter of Justice are: "An appeal against any final judgment, decree, or sentence of the said Court, or against any rule or order in any civil suit or action having the effect of a final or definitive sentence." In my opinion the order of the Court of Appeal is neither a final judgment, nor is it a rule or an order having the effect of a final, or definitive sentence. Before the plaintiffs could obtain the benefit of the decision of the Court, it was necessary for them to proceed further, to proceed to trial, and obtain judgment, and until that judgment was obtained and the object for which the action was brought was attained, it is impossible to hold that there was a final judgment. It was interlocutory so far as the plaintiffs were concerned. The plaintiffs therefore, ought, in my opinion, to be allowed first of all to proceed with their action; the defendant can then raise further defences; it is possible that the defendant may have a valid defence to the action. If we consider the matter from the point of view of convenience, the effect of allowing an appeal at the present stage of the proceedings might be to create a multiplicity of appeals, but no inconvenience or injustice could result from letting the appeal stand over until a final judgment has been given. The plaintiffs must, of course, proceed with due despatch with the action. I take it there will be no delay on their part in proceeding with the action. The

present application must be refused, with costs.

Mr. Schreiner asked whether the order as to costs would include costs of the previous application.

The Chief Justice said that that was so.

Maasdorp, J., concurred.

Kotzé, J., said that, under the circumstances, he concurred in the judgment, although with some hesitation.

[Applicant's Attorneys: Syfret, Godlonton and Low; Respondent's Attorney, H. J. Sonnenberg.]

COHEN AND ANOTHER v. A.R.M. OF CAPE. { 1903. Oct. 12th.

Magistrate—Mandamus.

An application for a mandamus, compelling the Magistrate to have certain questions put to and answered by a witness, a police constable, in a preparatory examination: refused on the ground that it would be contrary to the interests of justice to do so.

Mr. J. E. R. de Villiers appeared for the applicants; Mr. Howel Jones for the respondent.

Mr. De Villiers said that the application was for a mandamus compelling certain questions to be answered by one Campbell, a detective. The questions were asked of Campbell in a case in which applicants were charged with theft, and were as follows: (1) Whether Campbell had information on which he arrested accused; (2) from whom he received information; and (3) what the information was. Campbell had refused to answer the questions unless ordered by the Court, and the A.R.M. had refused to make such order. It was stated on affidavit that if the questions were not answered, the interests of the accused would be prejudiced.

Kotzé, J.: This is an application for a mandamus to issue against the Assistant Resident Magistrate of Cape Town to compel him to have certain questions put by the agent of the accused to a certain police constable named Campbell. It appears that a preliminary examination was held by the Magistrate in question against one Cohen and one Feldman, and that they were both charged with the crime of theft, and in the course of the proceedings, Campbell was called as a witness for the prosecution. The agent for the accused asked him whether, besides what he had already stated, he had other information upon which he acted in arresting the accused, and he, according to the affidavits of both the accused and their agent, answered in the affirmative. Thereupon, the further question was put by the agent of the accused to the witness: "What was the information?" The witness declined to answer that question, and appealed to the Magistrate whether he was bound to answer it or not, and the Magistrate ruled that he was not bound to answer it. The Magistrate, however, in his affidavit, gives a different account of what actually took place, and I see no reason to doubt the accuracy of what the Magistrate states in this matter. The Magistrate states that the question which was asked was whether, in addition to the information on which he acted, Campbell had any further information about the accused Feldman at the time the arrest was made. Well, that is a very different matter, and this the witness declined to answer. Then on the 17th September, some weeks after the previous occasion, Campbell was recalled during the progress of the preliminary examination, and he was asked again whether he had any further information at the time, and, if so, from whom he had the information. That he declined to answer unless ordered to do so by the Magistrate, and the Magistrate ruled he was not bound to answer these questions. Now upon that the accused come to this Court, and apply for a peremptory order or mandamus to be served upon the Assistant Resident Magistrate compelling him to have these questions again put to the witness, and duly answered by him. Now it appears to me that the whole point turns upon the question whether or not the putting of these questions would be or are in the interests of criminal justice. Of course, if they are in the interests of criminal justice they may be so in one of two ways; either it may be in the interest of the prosecution that this information should not be given, or it may be shown that if these questions are not put and answered the accused would be materially prejudiced. Looking at it from either point of view—the punishment of the guilty as well as the protection of the innocent—

there is absolutely nothing before me except the bare, unsupported statement of the accused or their agent to show that these questions were of great consequence to the defence. The record is not before me, and I am not in a position to say that the Magistrate's ruling was wrong and contrary to law. It appears to me that the Magistrate sitting there hearing the evidence was the best judge as to whether or not the questions would really affect the point of the guilt or innocence of the accused, in other words, whether it was in the interests of justice that they should be put, and the witness ordered to answer them. It is quite possible that there are many people who give information to the police who do not wish to have their names disclosed, and if the channels through which the police get information were made public in this way it is very probable that the interests of criminal justice might suffer. Of course, had it been clear that the interests of the accused would suffer, in other words, if they would have been prejudiced in their defence had these questions not been put, or had the Magistrate refused to allow them to be answered, then the matter would have been quite different, because then it would have been in the interests of justice that they should be answered. But nothing of that kind appears, and that being the case I should not be justified now in holding that the Magistrate acted contrary to law, or, even assuming that the Magistrate had a discretion in the matter, that he exercised his discretion wrongly. Under these circumstances the application must be refused.

Ex parte BUISSINNE.

Mr. Upington moved for an order removing petitioner's name from the list of advocates of the Supreme Court. Counsel stated, in reply to the Court, that Mr. Buissinné wished to join the sidebar.

Order granted.

SUPREME COURT

[Before the Hon. Mr. Justice KOTZE.]

GENERAL MOTIONS.

Ex parte ESPINOSA. { 1903. Oct. 13th.

Act 48 of 1882—I.D.B.—Appeal.

This was an application for leave to appeal from a conviction of the Special Court at Kimberley under the Diamond Trades Act. The affidavit of the petitioner said that on the 10th July, 1903, he was tried and convicted by the Special Court at Kimberley, constituted under Act 48 of 1882, of having contravened sections 2 and 3 of the Diamond Trades Act, in that (1) on or about the 11th June, 1903, at or near Beaconsfield, in the district of Kimberley, he was found in wrongful and unlawful possession of five rough uncut diamonds, and was not able to account satisfactorily for possession or prove his right to the same; and (2) upon the date and at the place aforesaid, the petitioner, not being duly licensed under Act 48 of 1882 to deal in rough uncut diamonds, or carry on the trade of a diamond cutter, did wrongfully and unlawfully buy, deal in, or receive, either as principal or agent, five rough uncut diamonds. Sentence was passed upon him of ten years' imprisonment with hard labour. He was afterwards removed to the gaol at Kimberley, and owing to the prison regulations, he had no opportunity of consulting his legal adviser with a view to instituting an appeal within the period specified by the Act. Subsequently he was removed to Cape Town, and he then had an opportunity of consulting his legal adviser as to the desirability of appealing. The petitioner, having failed to comply with the requirements of section 52 of the aforesaid Act, now applied to this Court for leave to appeal. Communications had been opened with the Attorney-General, who intimated that no objection would be raised to an application for leave to appeal, provided that application were made in the proper course.

Mr. Howel Jones (for the Crown) said that, as representing the Attorney-General, he did not object to the present application, but

he wished to correct a statement made in the petition. The petitioner said that, owing to the prison regulations, he had no opportunity of consulting his legal adviser while he was at Kimberley. The statement was incorrect. The Magistrate at Kimberley had been communicated with, but, unfortunately, he (counsel) had not got an affidavit on the point.

Mr. Benjamin (for the appellant): This application is made under section 52 of Act 48 of 1882. The Court can extend the time within which the prosecution must be met: though there is no provision to extend the time of notice. *Snayman* v. *Le Grange* (Buch., 1878, p. 110). I quote this case merely by way of analogy, and would also refer to *Smith* v. *Pinto* (Buch., 1868, 105). I think it has always been the practice of the Court to extend the time in cases in which the Attorney-General raises no objection.

The Court granted leave as prayed.

ROHLAND v. ROHLAND'S CURATOR. { 1903, Oct. 13th.

Curator of lunatic—Transfer of quit-rent title.

R. had obtained a licence on behalf of his son H. R. for the grant of certain Crown land on quit-rent tenure, and effected certain improvements thereon. Thereafter H. R. was declared a lunatic, and the curator to his property took out a quit-rent title to the land in question. R. now applied for an order of Court, ordering H. R.'s curator to transfer this land to him (R.)

Held, *that the order must be refused.*

Semble: *that if R. had made a reasonable offer as consideration for the value of the land, the Court would, in view of the improvements which had been effected by R., have ordered transfer if they considered that it would be in H. R.'s interest that R.'s offer should be accepted.*

This was an application brought by Christian Rohland, of Stellenbosch, upon notice of motion, calling upon the curator of his son, Heindrichs Rohland, to show cause why an order should not be granted requiring him (1) to apply to the Colonial Government to issue a quitrent title to certain lots 8 and 9 of Crown land at Stellenbosch, the licence of which was granted to Heindrichs Rohland; and (2) on the same being obtained, to transfer such title gratuitously to the applicant without payment or security, but at the cost and charge of the said applicant, or such other order as the Court might deem fit.

It appeared the applicant was the father of Heindrichs Rohland, to whom certain lots of Crown land at Stellenbosch were granted in 1897. The son Heindrichs was now an inmate of the Valkenberg Asylum, and under an order of the Court, he had been declared of unsound mind, and Mr. Steytler had been appointed curator of his property, and his father, the present applicant, had been appointed curator of his person. Counsel read the affidavit of the applicant, which stated that his son lost his reason some little time after the grant of land had been made, and in the meantime the property had been looked after by the deponent, who had erected buildings thereon, and considerably enhanced the value of the property. Petitioner's son had been desirous of transferring the said land to his father, as appeared from two letters which he had written to him. The lots 8, 9, and 11 were originally secured by the petitioner for the benefit of his two sons. He had built a shop and store on lots 8 and 9, and had converted waste into arable land. His son had not spent a penny on the improvement of the ground. Deponent had spent about £700 on the ground.

[Kotzé, J.: Have the terms of the licence been complied with?]

Mr. Schreiner: That is the point. We say that the father, on behalf of his son, has complied with them. I suppose that, strictly speaking, the Government might have forfeited the licence, but they have

taken a broad view, and do not wish to do this. The affidavit of the respondent, Mr. Steytler, stated that he had obtained quitrent title to lots 8 and 9 on behalf of Heindrichs Rohland. He declined to make transfer of the property to the said applicant unless authorised or directed by the Court so to do. He had no means of verifying the statement made by the applicant as to the money he had expended on the ground. The land, in his opinion, was worth probably about £1,500.

Mr. Schreiner, K.C. (for respondent): The Court appointed Mr. Steytler simply as curator of the property. He can sell it, but he cannot give it away either to the father or to anybody else. He is quite ready to realise the property and to pay out to the father whatever he has spent. But he has nothing to guide him as to what the father has spent beyond the father's bare word. The son may recover, or may die, and in either of these contingencies either he or his heirs *ab intestato* (as the case may be) will demand their property. Why should the property of the son, which may be required for his comfort and support be given away to his father?

Mr. Buchanan (for applicant): The father has paid off all obligations on the farm, and should be compensated.

[Kotzé, J.: Is he paying for his son's maintenance?]

I do not know, but the whole action of the father in paying quitrent shows that he was acting in his son's interest. The father thought that as he had improved and cultivated the land, he could treat it as his own. No doubt, he was wrong in law, but the mistake was not unnatural.

[Kotzé, J.: *Ignorantia juris cuique nocet.*]

Of course, that is so in strict law, and my client would get no preference if father and son are to be treated as strangers; but I submit that such treatment would scarcely be equitable, and that the father should be dealt with on a liberal basis. I would suggest that the curator should transfer the land under section 34 of Act 1 of 1897 to the father, either without payment or, at all events, on very favourable terms.

Kotzé, J.: In this matter, Christian Rohland, the applicant, appears in the year 1897 to have obtained a licence for the grant of certain Crown land, situated at Stellenbosch, and he did so for and on behalf of his son Heindrichs. After that he effected certain improvements on the land, he put up certain buildings, for instance, he turned waste land into arable land, and effected other improvements, and after that the son was declared by this Court of unsound mind. The father was appointed curator of the person, and Mr. George Steytler was appointed curator of the property. After Mr. Steytler had been appointed curator of the property, he, as curator, took out the quitrent title to this Crown land, and now the father, who had effected these improvements, comes to the Court and asks the Court that the curator shall be ordered, gratuitously, without any consideration, to transfer this property, this quitrent title, to him (the father). Now I quite agree with Mr. Schreiner that the Court must regard this as a valuable asset in the estate of the lunatic, and the curator is quite right in opposing this application. The father, having obtained this land, originally in favour of his son, and put these buildings on the land, may be entitled to some equitable consideration, but that is not now the question for me to consider. The only request before me is that I should grant an order directing the curator to transfer this property to the father (the applicant); in the absence of any offer made by the father, which the Court might consider as to whether it would be in the interests of the lunatic or not to grant, I am wholly at a loss to conceive how this Court may now grant the application in its present form. The proper course for the applicant to pursue, it seems to me, would be to approach the curator and proceed to make some fair and reasonable offer. I don't say whether the Court would approve that offer or not, and I don't wish to be understood as binding the Court in any way to sanction a particular course. As a matter of fact, I would like it to be an open question. The application in its present form clearly cannot be entertained, and must be refused, and refused with costs.

Mr. Schreiner said he supposed that the curator could move the Court if he were approached by the father with some offer.

His Lordship: Certainly, only I wish to say nothing in any way that would lead

to the belief that the Court would give or withhold its sanction.

[Applicant's Attorneys: Silberbauer, Wahl and Fuller. Respondent's Attorneys: Fairbridge, Arderne and Lawton.]

DREWFS V. DREWFS.

Mr. Upington moved on behalf of the petitioner, Fritz Heindrichs Drewfs, residing in Carnarvon, for leave to sue his wife, Emilie Drewfs, by edictal citation, for restitution of conjugal rights, failing which a decree of divorce. Petitioner said his wife wrongfully and maliciously deserted him in April, 1901, and she was now supposed to be living somewhere in the neighbourhood of Johannesburg, but her exact address was unknown.

Replying to His Lordship, Mr. Upington said he did not know whether desertion took place at Carnarvon.

Kotzé, J.: Leave to sue will be granted, personal service to be effected, if possible. It must be understood that so far as divorce is concerned, it is subject to any objection that the wife may raise as to jurisdiction. There have been several of these cases lately before the Court, and I think the Court should be very careful. In the present case, failing personal service, there must be the usual publication in the "Gazette," and, further, two publications in a local newspaper, circulating in Johannesburg, the citation to be returnable on the 1st February next.

CAPE DIVISIONAL COUNCIL V. COLONIAL GOVERNMENT. { 1903. Oct. 13th. ,, 14th.

Rule *nisi* discharged.

The Court discharged a rule nisi, *calling upon the Government to shew cause why it shall not be restrain'd from proceeding with the construction of a certain overhead bridge until the plans thereof had been submitted to and approved by the applicant, and why the respondent shall not be restrained from breaking up a main road, on the ground (1) that the applicant had not first applied for and been refused an inspection of plans by the respondent, and (2) that as the applicant was plaintiff in an action, in which it was ordered that the bridge should be made by the respondent, it must be taken to have consented to the work necessary for commencing the construction of the bridge.*

This was an application to make absolute a rule *nisi* calling on the respondents to show cause why they should not be interdicted from proceeding with the erection of a certain overhead bridge over the main road at Salt River, until the plans of such bridge had been submitted to and approved by the Council, and from breaking up the said road without the consent of the Council, and, further, why they (the respondents) should not be ordered to pay the costs of this application. Mr. Benjamin was for the appli-tion.

The affidavit of Mr. Westhuysen, the clerk of the Divisional Council, stated that the respondents were, in March last, directed to remove certain rails which passed over the main road within six months, unless they were prepared to give an undertaking to construct an overhead bridge within twelve months for the conveyance of the ordinary road traffic. So far as he was aware, no steps were taken to comply with the said order until the early part of September, when the department intimated that they were constructing a temporary road pending the erection of a bridge. The applicant Council objected to the erection of the said bridge until plans had been submitted to them. The Council specially objected to the gradient of the proposed road, as they believed it was to be 1 in 20, which gradient was found in the case of the existing bridge to be dangerous and inconvenient.

The answering affidavit of Mr. J. D. Shannon, district engineer of the C.G.R., stated that on the 1st July last he wrote to the Council informing them that a temporary diversion of the road would be necessary. He denied that there had been any refusal on the part of the Railway Department to show plans of the proposed bridge to the Divisional

Council, in fact, rough plans had been shown to the Council's engineer, and all available information had been given, but complete plans could not be shown now, as they were being prepared by the consulting engineers in England. The Divisional Council had been informed that complete plans would be shown to them as soon as they arrived. With regard to the gradient, deponent pointed out that 1 in 20 was the gradient of the present bridge at Salt River, and of the bridge at Claremont. He was not aware that the existing gradient had been found to be dangerous or inconvenient. There were several streets and roads in Cape Town which had equally steep gradients. On the 29th June last a temporary road was commenced, and it was completed in September. They had commenced to break up the road, so as to prepare for the erection of the bridge. If the work were to be delayed until the plans arrived from the consulting engineers in London, it would be quite impossible to complete the bridge within the time specified by the order of Court.

The replying affidavit of Mr. Shand, engineer of the Council, said that no plans had been shown to him of the proposed bridge. With regard to the gradient, he considered that 1 in 20 would, in view of the volume and character of the traffic over the road, be highly inconvenient to say the least.

Mr. Benjamin for the applicants; Mr. Schreiner, K.C., for the respondents.

Council were then heard in argument.

Cur. Adv. Vult.

Postea (October 14):

Kotzé, J.: This is an application by the Cape Divisional Council to make absolute a rule *nisi* calling upon the Colonial Government to show cause, firstly, why it shall not be restrained from proceeding with a certain overhead bridge across the main road at Salt River until the plans for the said bridge have been submitted to and approved by the Divisional Council, and, secondly, why it shall not be restrained from breaking up the said main road. It appears that in March last there was an action in this court between the parties, and the Court then ordered the Colonial Government to take up or remove certain rails or a line of railway, which had been laid across the main road within six months, unless the Government should within twelve months commence and complete a bridge over the said main road. This judgment of the Court was given on the 9th of March, and on the 7th July, nearly four months afterwards, the Government intimated to the Divisional Council that it had decided to erect the bridge and also at the same time stated that a temporary deviating road had been commenced, and that when that temporary road was finished due notice of it would be given to the Divisional Council, so that it might be used for public traffic. The Divisional Council now seeks to restrain the Government from commencing this bridge until the plans have been submitted to and approved by it, and it does so for two reasons. It is alleged by the Divisional Council, firstly, that it has a right to satisfy itself that a proper gradient will be made from the road to this bridge, and, secondly, that it has a right also to satisfy itself that proper provision is being made for drainage and storm water. Now, this is not a case of the Government constructing a new main road, and then handing it over again to the Divisional Council, but it is a case where a bridge has to be made to connect two portions of an already existing main road. Seeing that, by the Act, the care and maintenance of the main road are entrusted to the Divisional Council, it appears to me that the Council has a *locus standi* in the matter, and a right to inspect the plans of the proposed bridge, which will connect the two portions of the main road under its control. The Government, in the affidavit which has been filed in its behalf, says that it is perfectly prepared to allow and give an inspection of the plans of the bridge when these plans have been prepared and completed, and also that it had never been asked for inspection, nor had it refused any inspection of plans. In answer to that, it is said that there were no plans to inspect, because the affidavit states that these plans have been sent for examination to England by the consulting engineers there, and have not yet been returned to South Africa. That, it appears to me, does not relieve the Divisional Council from its preliminary duty of, in the first instance, having shown that an application was made for an inspection of plans, and had been refused by the Government. Therefore, so far as the first branch of the rule is concerned, I think that the Divisional Coun-

cii has been premature in coming to the Court, and moving the Court for a rule and a temporary interdict. Then, in regard to the second portion of the rule, which seeks to restrain the Government breaking up this main road, I think the Divisional Council must be taken to have consented, and to be bound by the judgment of the Court in the action, which I have mentioned, and, therefore, when a bridge is to be made, and the Council was a party to that and is bound by it, it follows that it must be taken to have consented to all those things that are necessary as preliminaries and preparatory work for the erection of the bridge. All that appears from the affidavits is that this road has been broken up on two sides for the purpose of commencing the erection of the bridge, and the Divisional Council must be taken to have agreed to that, and to be bound by it. But, then, it has been urged by Mr. Benjamin that in section 8 of the original affidavit, not merely does the Divisional Council complain that the road is being broken up, but that the Government, through the Railway Department, has also used the material of this broken up portion of the road for the temporary deviating road, and that this the Railway Department had no right to do. Well, of course, the material of the road broken up does not belong to the Railway Department, and the Railway Department, therefore, should not have used it in this way, but that does not form any portion of the rule. The rule does not call upon the Government to show cause why it shall not be restrained from further removing this material, and using it for its own purposes, but merely that the Government shall be restrained from breaking up the road. There is nothing before me to show that this road has been broken up in an improper manner, and that it is not necessary for commencing the preparatory work for the erection of the bridge. That being so, I must discharge the rule, and I think the rule must be discharged with costs.

[Applicants' Attorneys: Moore and Son; Respondents' Attorneys: Reid and Nephew.]

Ex parte SWEEGERS AND ANOTHER.

Mr. Buchanan moved for an order authorising the transfer of certain property, in which minors were interested. The Master recommended that the application be granted.

An order was granted in terms of the Master's report.

IMMELMAN V. VISSER.

Mr. J. E. R. de Villiers moved for leave to sue by edictal citation. Respondent had been domiciled at Fraserburg until six months ago, but his present whereabout were unknown. Applicant wished to sue to recover the purchase price of certain property sold and transferred by him to Visser.

Kotzé, J., said he was not disposed to grant service by edict, because it did not appear that respondent had left the Colony. All that was said was that he had left the district of Fraserburg. He thought proceedings should be taken in the ordinary way, and he would direct that besides service at the last place of residence the process should also be published in a Dutch newspaper, circulating in the district of Fraserburg.

Mr. De Villiers: That is, an ordinary summons.

Kotzé, J.: Yes.

Ex parte READ.

Mr. Alexander moved for leave to mortgage certain property for the purpose of building on property belonging to minors. The Master's report was favourable.

An order was granted in terms of the Master's report.

RAKOFF V. COLONIAL GOVERNMENT.

Mr. Howel Jones moved, on behalf of the Government, for leave to sign judgment against the plaintiff, in default of filing his declaration. An affidavit sworn by Mr. Allan Reid, of the firm of Reid and Nephew, stated that the defendants' costs had been taxed, but plaintiff had failed to pay the same.

Order granted.

ACHMATT AND ANOTHER V. BRUYNS. { 1903. Oct. 13th.

Rule 329D—*Ignorantia Juris.*

Judgment having been obtained under Rule 329d against the

applicants by the respondent, the Court refused, upon their application, to set aside the judgment and give them leave to plead.

This was a motion for an order setting aside a certain judgment of the Court, and giving leave to the applicants to enter appearance and defend the action. The affidavit of Alli stated that he was one of the defendants in the original application in May, 1903. The respondent brought an action in the Magistrate's Court, Cape Town, against deponent and the other applicant for £28 3s. 9d., for goods alleged to have been sold and delivered. The action was tried on the 26th May, 1903, and absolution from the instance granted therein. Deponent and the other applicant were under the impression that they had won their case, and they thought it would not be possible to bring another action against them arising out of the same matter. He and the other applicant were Indians, and he did not know that the respondent could bring another action for the same thing. Afterwards, on his calling at the office of the Deputy-Sheriff, a summons was tendered to him by the Deputy-Sheriff's officer, but he declined to accept it, and said it must be served upon him at his place in Loop-street, and the officer then threw the summons at his feet. Subsequently, on consulting his attorney, he found that judgment had been granted against them for £28 3s. 9d. in the Supreme Court, under Rule 329d, on the 12th September, 1903. Deponent denied that he owed the sum of £28 3s. 9d., or any part thereof. The other applicant, Alli Ahmed, had gone to India, and had not yet returned.

The answering affidavit of Andries Bruyns, of Lakeside, Muizenberg, stated that the debt was one for sand, clay, and lime supplied by him personally to both the applicants, to enable them to build their house at Lakeside. He swore positively that he supplied these goods. There could be no defence to the action. The affidavits of Frederick Wm. Herbert, Deputy-Sheriff's officer, deposed to serving the summons on the applicant at his office. The affidavit of one Shurkley, a clerk deposed to one of the applicants calling at the office with respect to the Supreme Court summons, and being urged to defend the case or come to a settlement.

Mr. Benjamin (for the applicant): Leave should be granted to the applicant to purge his default. He thought that absolution from the instance in the Magistrate's Court concluded the case. Judgments under Rule 329d can always be re-opened.

[Kotzé, J.: Not as a matter of right.]

No; but this is exactly one of those cases in which the Court should allow the case to be re-opened. In this case there was a gross breach of confidence as between attorney and client. I would like Schiffman (Karie's clerk) here to cross-examine him, and as he is not here I object to his affidavit.

[Kotzé, J.: What do you say to the affidavit of the Sheriff's officer?]

He thought that there was nothing to compel him to come into Court. There is no evidence of service on the second applicant, and if he can have the case re-opened, so can my client. The applicant denies the debt, and his reasons for being in default are easily explained.

Mr. Upington (for respondent): The applicant can only say that he thought that absolution from the instance concluded the whole case; but it is clear that this judgment was brought to the knowledge of his agent, who must have known what was meant by "absolution from the instance," and then he allows judgment to go by default. The other plaintiff must have known that when served with a summons it was his duty to appear. I submit that no cause has been shown for setting aside the judgment and re-opening the case.

Mr. Benjamin was not heard in reply.

Kotzé, J.: In this matter, it appears that both applicants were sued in the Magistrate's Court for the sum of £28, and the Magistrate granted absolution from the instance. After that a summons was taken out in this Court against the applicants by the now respondent—the plaintiff in the action—who obtained judgment on account of the non-appearance—the default—of the present applicants. Now the applicants come here and allege that they did not know the nature of the proceedings in this Court, that they were under the impression that, when judgment was given by the Magistrate for absolution from the instance,

that finally settled the matter. Well, supposing for a moment that the applicants were under that impression at the time, surely that impression must have been removed from their minds when the fresh summons was taken out in this Court, personal service of which was made upon one of the applicants by the Sheriff's messenger.. It also appears that the law agent of the applicants had notice of this summons from the Sheriff's officer. A person cannot be allowed to set up ignorance of the law in this way. It is a well-known principle that ignorance of the law will not excuse, and the applicants cannot now come and say that, when the messenger served the summons taken out in this Court, the idea in their minds was that that was simply a nugatory performance and a void act. I am quite satisfied that the applicants must have known that it was a solemn document, and that they were called upon to enter appearance and plead any defence they had in the action. They did not do that, and I do not see any sufficient cause to justify me in setting aside the judgment. The application must therefore be refused, with costs.

[Applicants' Attorneys:: Freidlander and Du Toit; Respondent's Attorney: H. P. Hughes.]

SIPIKA V. NONKOMANISI AND OTHERS.

Mr. Upington appeared for the applicants, Aliel and Elias Sipika, to move for an order to have certain property transferred to them, as heirs of one Manisi, under native law and custom. The matter was before the Court (Aug. 20—13 C.T.R., 766).

[Kotzé, J.: Is there any affidavit of service?]

No; there is only a certificate by the messenger.

[Kotzé, J.: There should be an affidavit.]

Mr. Upington said there was an irregularity in this respect, but he would suggest that the Court should hear the case and make an order subject to an affidavit being made. Proceeding, counsel said that when the matter was before the Court on the previous occasion, it was ordered to stand over in order that service might be effected upon the parties interested. It was then an *ex parte* application, and no notice had been given to these persons, and the Court ordered that service should be made on the persons interested, and also suggested that a statement should be given by the Resident Magistrate as to what the native law and custom were. The petition set forth that petitioners were natives, and were the sons of the late Manisi, who died in 1895, possessed of the property now in question. Manisi had married three wives according to native law and custom, and petitioners were the elder sons of the first two wives, the third having died without male issue. They claimed to be the heirs of Manisi, and prayed that the property registered in their father's name should be transferred to them. A certificate was now produced in which the Magistrate stated that the applicant, Aliel Sipika, was the heir according to native law and custom, being the eldest son of Manisi by the chief wife. Aliel Sipika made a supplementary affidavit to the same effect. Counsel said it would appear that only the first-named petitioner was entitled to transfer.

[Kotzé, J.: Elias Sipika may show some good reason why the other applicant should not have transfer.]

Mr. Upington said that the original petition, which had not been amended, asked for transfer to both.

[Kotzé, J.: The matter had better stand over for the production of an affidavit of service.]

DELL V. ESTATE RICCI. { 1903. Oct. 13th. Nov. 11th.

Proof of debt—Contingent claim—Partnership.

A partner, having a claim against his co-partner, cannot prove in respect thereof against the separate estate of the co-partner while any of the joint creditors are unpaid.

This was a motion for an order as to the ranking of a counter claim, compelling the Master to admit and rank a proof of debt tendered by the agent of the applicant at the third meeting of creditors in the insolvent estate of Ricci held on the 24th July last, which proof of debt was refused by him on grounds unknown to the applicant. The affidavit of Alfred

Samuel Fowler set forth that he acted as agent for J. P. W. Dell under power of attorney. On the 20th August, 1902, Dell executed a deed of partnership with George da Costa Ricci, in connection with a hotel business at Claremont. In the deed of partnership, it was provided that applicant should contribute £5,000 to the partnership business, payable £1,000 on the 1st September, 1902, and £1,000 on the 1st October, 1902; that at the expiration of six months from the date of the partnership, the position of the business should be ascertained, and if it be found that the state of the business was such as to warrant its being successfully carried on, the applicant should contribute the further sum of £3,000, making the total £5,000; and that if, at the end of one year from the date of the partnership, it should be found that there was no prospect of successfully carrying on the business in future it should be open to the applicant to give notice to withdraw from the partnership, in which case it would be incumbent upon Ricci to make restitution of the money paid by applicant. The affidavit went on to state that on ascertaining the position of the business six months after date of the partnership, applicant gave notice to withdraw from the partnership. The estate of Ricci was placed under provisional sequestration by order of the Supreme Court on the 23rd May, 1903, and was finally adjudicated on May 30. On the 15th June, deponent, in his capacity as agent for Dell, duly filed a claim on the estate of Ricci for the sum of £2,000, being the amount paid into the partnership by Dell. On the 19th June, at the second meeting held in the estate, Mr. Colton, acting under power of attorney, presented the claim of the applicant, and on objection being taken thereto, it was deferred until the third meeting of creditors. At the third meeting a week later, Mr. Colton again presented the claim, but the Acting Master refused to admit the claim, without assigning any reason for his refusal. The secured debts, amounting to £42,000, were contracted prior to the 1st September, 1902, as also were large portions of the concurrent claims.

The answering affidavit of Mr. G. W. Steytler, one of the trustees in the insolvent estate of Ricci, referred the Court to the report of the trustees. Therein it was stated that before Dell gave notice to terminate the partnership certain liabilities were incurred, and were in existence at the time of the report, and for these the trustees held that Dell was undoubtedly liable. At the second meeting proof of debt was presented on behalf of Dell for £2,000. The trustees took legal advice, with the result that the claim was not admitted, the advice given by counsel being that Dell's claim could not rank with those of the other creditors, he being in the position of a partner, and that the liabilities to him could only be defined after the liabilities to the partnership creditors were liquidated.

Mr. Upington (for applicant): Dell wishes to prove on the insolvent estate for £2,000, said to be owing by Ricci. The trustee says that Ricci is responsible for all debts owing to applicant. I admit that Ricci has no preference in respect of the other creditors. As to the voice of the majority of debtors, see *Copestake* v. *Alexander* (2 Juta, 137). In the resent case some such relief should be granted as was conceded in that case.

[Kotzé, J.: Is Ricci's private estate sequestrated?]

Yes, I submit that it is. It is not clear from the trustee's report that there is any movable property in the estate. The only thing before the Court is a statement by the insolvent. There is nothing else to show what the liabilities of Ricci and of Ricci and Dell are. If Dell has any claims against the estate he should be allowed to prove contingently on his paying out the joint creditors. Of course, a partner cannot compete against joint creditors, but that is not the present case.

Mr. Schreiner (for respondent): The first point to determine is whether the Master is bound to admit Colton's proof of debt. Under section 27 the Master must either admit or refuse to admit the debt. The applicant relies chiefly on section 31, which is quite inapplicable to the present case. It is admitted that a partner cannot compete in case of insolvency with partnership creditors; but this is a question of debts contracted before the partnership was carried on. When applicant's counsel admits that Dell could not claim in preference to partnership creditors, he admits my whole case. All the assets are now in the hands of Ricci. The whole business was carried on in his name. Possibly Dell may have a good defence should he

be sued personally for the firm debts, but the fallacy of the counsel for the applicant was that he did not seem to acknowledge Dell's liability. Dell may have been a silent partner, but even if that was so, he was liable for his share of the £45,000. I submit that the applicant cannot prove on the insolvent estate.

[Kotze, J.: Why cannot he prove subject to the claims of the preferent creditors?]

The law makes no provision for such a case as this. Dell put his cash into the business, and by the deed of partnership was bound to share loss as well as profit. The first point to be determined is: "How much was swallowed up by repairs?" and the Master must either admit or reject this or any other claim. I would not object to the applicant proving his debt, but I do say that even a sleeping partner cannot prove as against ordinary concurrent creditors, even if he has advanced money to the firm. *Copestake* v. *Alexander* (2 Juta, 137) is quite a different case from this.

[Kotze, J.: Would Dell be liable for partnership debts contracted before he became a partner?]

Not personally, but if he put money into the firm, that money would be liable. All the Master had to do was either to admit or reject the proof of debt. The only other case I can find bearing on the point is *Watermeyer* v. *Kerdel's Trustees* (3 Menz., 424). I quite admit that the judgments of Wylde, C.J., and of Kewich, J., are against me, but that of Menzies, J. (who goes very fully into the Common Law authorities) is quite in my favour.

[Kotze, J.: I feel bound by the decision of the Court.]

Of course, but that case was not quite the same as this. Here Ricci has no estate, as far as we know, save partnership assets. In Watermeyer's case the majority of the Court found there was no partnership; had they found that there was one ,they would, no doubt, have gone as far as Menzies, J. See also *Pothier* (Chap. 2, Secs. 102, 160, and 161).

Cur. adv. vult.

Postea (November 11).

Kotze, J.: This is an application to compel the Master to admit and rank a proof of debt tendered on behalf of J. Dell at the third meeting of creditors in the insolvent estate of George da Costa Ricci, but which was refused by him. On the 30th May, 1903, the estate of George da Costa Ricci was finally sequestrated, and, on the 19th June, Messrs. J. J. Wessels and G. W. Steytler were elected trustees. It appears that Ricci, the insolvent, carried on an hotel and sanitarium at Claremont, and, in order to secure further capital for the purpose of continuing and carrying on the business, he, on the 26th August, 1902, entered into an agreement of partnership with Dell. By this agreement it is stipulated: (1) That the partnership shall commence on the 1st September, 1902, and shall continue for the term or period of five years, unless it shall be sooner determined under the provisions hereinafter contained. (2) That Dell shall contribute £2,000 towards the partnership capital in order to carry on the business of the said hotel on the following terms, viz.: £1,000 to be paid by Dell on the 1st September, 1902, and £1,000 on the 1st October, 1902, this latter sum of £1,000 to be for the exclusive use of Ricci. At the expiration of the first six months the position of the business was to be ascertained, and, should it then appear to Dell that the position was such as to justify a successful carrying on for the future, he undertook to contribute a further sum of £3,000, which said sum should also be for Ricci's exclusive use and benefit. It is also expressly stipulated that if at the end of the year it should be found that there is no prospect of successfully carrying on the said business in the future, it shall be at the option of Dell to give notice that he withdraws from the partnership, and in that event it shall be incumbent on Ricci to make due restitution of the sum of £2,000. (3) Ricci shall submit the goodwill, valued at £2,000, for the benefit of the partnership, and absorbing into the partnership the whole of the property at present occupied by him and conducted as an hotel, valued at £45,000. (4) the profits and losses of the business shall be shared equally by both parties, but neither partner shall be responsible for the debts or engagements of the other contracted before the entering into of this partnership. (5) Both partners shall devote their whole time and attention to the partnership business. (6) At the expiration of six months, should it be mutually decided to continue the said

business, then six months' notice on either side shall be required to terminate the partnership, such notice to be in writing; the partner so giving notice shall be entitled to receive not more than £5,000 as his share of the partnership.

Dell duly paid to Ricci £2,000 in two instalments of £1,000 each, as provided by the deed of partnership, and, having ascertained the position of the business at the expiration of six months from the date of the partnership, he gave notice to Ricci, withdrawing from the partnership, and did so withdraw. This withdrawal was about three months before the sequestration of the estate of Ricci, who continued the business. Dell now seeks to prove in the insolvent estate of Ricci for the amount of £2,000, maintaining that ,by the deed of partnership, on his withdrawing from the business, it became incumbent on Ricci to repay him that sum. The trustees of the insolvent estate of Ricci oppose this application on the ground that the proof cannot be accepted until the partnership creditors are paid in full. It is admitted on behalf of the applicant that he cannot claim or prove against the partnership estate in competition with joint creditors, but it is contended that he is entitled to prove his claim as a contingent one against the estate of Ricci. It is difficult to see how the claim of Dell to be repaid his £2,000 advanced for the purpose of the partnership can be regarded as contingent within the meaning of section 31 of the Insolvent Ordinance. Reference was made to *Copestake* v. *Alexander* (2, Juta, 137), where this Court, by a majority, allowed a proof of debt by a late partner on an insolvent estate contingently on his having to pay any of the debts of the late partnership. The decision in that case was, however, arrived at in view of circumstances differing from those of the present application. Alexander, who with one Fisher, traded as Alexander and Co., retired from the partnership, which was dissolved under an agreement, by which he was to receive £500, and leave all the assets to Fisher, who undertook, by reason of the cession of all the assets of the firm to him, to hold Alexander harmless against all claim and demand which might be made against him in respect of the co-partnership, and all losses, damages, and costs which he might incur in respect thereof. The Chief Justice, in his judgment, made the following observations: "The indemnity given to him must surely constitute him a creditor of Fisher for any moneys he may pay in respect of debts which were owing to the firm of Alexander and Co. at the time of the dissolution of partnership. Even without such an indemnity he would, after paying the joint debts of the firm, have been entitled to prove as a separate creditor for the amount of the share which ought to have been paid by Fisher . . . . . The respondent has, therefore, been properly admitted as a creditor of Fisher's estate for the amounts due by him to the creditors of Alexander and Co., but he is merely a contingent creditor, and until the condition upon which his debt depends shall be performed, he is only entitled to a dividend upon such sum as represents the value of the debt." In the present case Dell is not seeking to prove against the separate estate of Ricci for joint debts of the partnership, which he has paid. The £2,000 paid by Dell to Ricci is expressly stated by the agreement entered into between them to be a portion of the partnership capital in order to carry on the joint business of the partnership. Although the agreement provides that on the retirement of Dell from the partnership Ricci shall be obliged to repay him the £2,000, this will not entitle Dell to prove on that account against the insolvent estate. It has been held that a partner, who has a claim against his co-partner, cannot prove in respect thereof against the separate estate of the latter, while any of the joint creditors are unpaid, because by so doing he would diminish any surplus of the separate estate, which, after satisfying the separate creditors, might be coming to the joint estate. (*Ex parte Carter*, 2, Glyn and Jameson, 233, and *ex parte Ellis*, Ib., 312). It may be said that the proof should be allowed subject to the contingency that, after all, the joint creditors are paid, a surplus shall be found to exist. But that is entirely problematical, and until it appears that there will be a surplus, no question as to its application or distribution can arise. As was observed by Lord Chancellor Cairns in *Vanson* v. *Gordon* (L.R., 1, App. Co., 203), "It is not the habit of the Court, and would not be right in the Court, to investigate what might be called the outcome of the

accounts, in order to determine, *a priori*, whether the rule ought or ought not to be applied." I see no reason why the Master should be ordered to allow the proof of debt, which he has rejected. The application must be refused, with costs.

[Applicant's Attorneys: Michau and De Villiers; Respondents' Attorneys: Van Zyl and Buissinné.]

KRAEMER v. KLEINBACH.

Mr. J. E. R. de Villiers moved to make absolute a rule *nisi* calling upon respondent to show cause why an order should not be granted restraining the police authorities from parting with certain moneys, pending an account being filed. Counsel said the matter had been postponed from the previous day, owing to there being no proof of service. An affidavit of service was now produced.

The rule was made absolute.

SUPREME COURT

[Before the Hon. Mr. Justice KOTZE.]

Ex parte COPPIN. { 1903. Oct. 14th

Mr. Benjamin moved on behalf of the petitioner, who is Bishop and head in South Africa of the African Methodist Episcopal Church, for an amendment of the transfer of a certain plot of ground at Claremont, acquired by the local branch for church purposes. It appeared that the property, which was purchased in June last, had been registered in the name of the African Methodist Episcopal Church, and was thus vested in the board of trustees, resident in America, with the result that there was no one in this country who was competent to deal with the property It was desired that the land should be transferred to the trustees of the Claremont Station, as they were anxious to raise a mortgage to meet the bills of the contractor, who was engaged in erecting a building on the ground.

[Kotze, J.: I do not see how we can transfer land from the board of trustees of the Church, even though they are resident in America, without the consent of the trustees.]

Mr. Benjamin said that the trouble had probably arisen from an error on the part of the conveyancer. The purchase price of the property was only £52, the building operations had been commenced, and it was of the utmost importance that there should be no delay in raising a mortgage on the land and buildings.

A rule *nisi* was granted, calling upon the board of trustees of the Church to show on the 1st February next why an amendment of the transfer should not be made as prayed.

Ex parte DE PAARLSCHE GANDAAUL-COOP MAATSCHAPPIJ.

Mr. Benjamin moved for confirmation of the report presented by the official liquidators in this matter. The report, he said, had been laid open for inspection, as ordered by the Court, due publication had been made, but there were two special orders that were now asked for: (1) that the Court should fix a day on or before which all claims must be filed, the liquidators suggesting a period of 30 days; and (2) that they should be authorised to institute and prosecute such legal proceedings, as they might be advised, to recover £600 and interest, originally advanced to one D. F. du Toit and others, and also to proceed for the recovery of damages against the estate of F. J. G. Perold, and if so advised, against the directors of the defunct company.

Order granted as prayed.

Ex parte HOFMEYR.

Mr. Buchanan moved for an order authorising petitioner's examination as a notary public. It appeared from the petition that Mr. Hofmeyr had been admitted as an attorney of this Court, and that he had formerly been in practice in Johannesburg, having been admitted as a notary of the Supreme Court both prior to and since annexation of the Transvaal.

Mr. Upington intimated that the Incorporated Law Society raised no objection to the application.

Order granted as prayed.

VAN DER HORST v. THE COLONIAL GOVERNMENT. { 1903. Oct. 14th. „ 20th.

Rule 333D—Discovery—Privilege.

In obedience to an order for discovery under Rule 333, the respondent in an affidavit stated that he has in his possession "voluminous departmental correspondence," and objected to disclose this on the ground that such correspondence is privileged. In an application to compel the respondent to disclose and produce this correspondence.

Held (*1*) *that official correspondence as such is, in the absence of some further or special circumstances, shewing that it would be contrary to the policy of an Act of Parliament or injurious to the public interest, not privileged from disclosure;*

(*2*) *that sufficient information should be given with regard to the documents comprising the correspondence, in order to enable the Court to judge whether any or all such documents are privileged.*

The Court consequently directed that the respondent should file a further and more complete affidavit, setting forth with sufficient accuracy the particular grounds for such objection.

Chester & Gibb v. The Big Ben G.M. Company (*4 H. C. 374*) *followed.*

This was an application upon notice of motion calling upon the Government to show cause why they should not disclose and produce the correspondence which had passed between the Commissioner of Public Works and the Cape Government Railway Department, and between the various departments of the C.G.R., relating to matters connected with the subject of the suit.

The affidavit of Mr. Van der Byl, plaintiff's attorney, stated that the applicant had instituted proceedings against the respondents for the recovery of £5.000, as and for damages sustained through injuries received owing to the negligence of the Railway Department. Pleadings had been closed, and the case had been set down for hearing on the 4th November next. On the 1st September last applicant obtained an order in this Court requiring the respondent to make discovery of all documents relating to the subject matter of the action. Upon the said order being served on the respondents' attorneys, they filed an affidavit disclosing certain documents, and stating that there were other documents, which they declined to disclose. Thereupon certain correspondence ensued, and it transpired that the respondents' attorneys declined to make discovery of voluminous departmental correspondence, and of the letters between the General Manager and Messrs. Reid and Nephew (attorneys to the Railway Department) and Messrs. Reid and Nephew and the General Manager. Applicant contended that the affidavit filed by the respondents was not sufficient, and was not in compliance with the rules of the Court, and that departmental correspondence were not documents which were privileged. The answering affidavit of Mr. McEwen, General Manager of Railways, stated that he had, to the best of his knowledge and belief, disclosed all documents relating to the matter, save and except voluminous correspondence and letters addressed by him to Messrs. Reid and Nephew, and by Reid and Nephew to himself, which were privileged.

The affidavit of Mr. J. H. Reid, respondents' attorney, stated that, so far he knew, in no case had departmental correspondence in any action against the Colonial Government been disclosed, such correspondence not being regarded as relating to the case within the meaning of the Rule of Court.

Mr. Benjamin (with him Mr. Van Zyl), for applicants; Mr. Schreiner, K.C. (with him Mr. H. Jones), for respondents.

Mr. Benjamin said that the application came before the Court, under Rule 333d, which set forth that any party might apply to a judge for an order for the discovery of any document which might be in possession of the other side relating to any matter in question in the action, saving all lawful and just exceptions. It would be his contention that the only "lawful and just exception" to the rule was privileged matter, and practically the only privileged matter was the matter that had passed between the respondents and their legal advisers. There was a similar rule in force in the English Courts, which had been interpreted by a number of decisions. In the 1903 edition of the "Annual Practice" (p. 399, rule 12), the editor defined such documents as should be disclosed thus: "Documents containing information which may either directly or indirectly enable the parties seeking discovery, either to advance his own case or damage that of his adversary, or which may fairly lead him to a train of inquiry." Counsel contended that he was entitled to the discovery of all such documents, quite apart from the fact of whether they were relevant or admissible at the trial. The only exception was privileged matter, and it rested upon his learned friend to prove that the documents which were not disclosed were privileged.

[Kotzé, J.: What is the point in the case?]

Mr. Benjamin said the case arose out of an explosion on the railway. An employee was sent on the railway——

Mr. Schreiner (interposing): No, not an employee.

Mr. Benjamin: Well, we contend that it was an employee who was sent on the railway with some dynamite, and in delivering this dynamite he threw it out of the window. An explosion took place, and the plaintiff, who was travelling in one of the carriages of the train at the time, was injured by the explosion, and his wife was also hurt.

[Kotzé, J.: Then the point seems to be whether the man who had charge of the dynamite was an employee of the C.G.R. or not.]

Mr. Benjamin (continuing his argument) said he was entitled to have discovery of any documents which might throw some light on the question of whether this person was an employee. He proceeded to cite the cases of the *Compagnie Financiers* v. *Peruvian Guano Co.* (Vol. 48, Law Times Reports, p. 22), and *Buyskes* v. *White* (Vol. 34, Law Times Reports, p. 385). He contended that the Government enjoyed no greater privilege than a private individual.

[Kotzé, J.: According to your argument, secrets of State would have to be disclosed?]

Mr. Benjamin: That is a privilege, my lord. There is nothing on affidavit here to show that this is a secret of State. If they could make an affidavit to that effect here, then they may claim that privilege. Continuing, counsel said that it had been held in an English case that a plaintiff was bound to disclose a letter, written to him by his mercantile agent, though the letter contained only a personal opinion on the plaintiff's chances of success, based on no more knowledge than was common to the parties, and was quite irrelevant to the action. In what different position was the Government to a private individual? Counsel submitted that plaintiff was entitled to have disclosed any documents in the possession of the other side, which were not privileged. On the question of what could be privileged, counsel quoted from page 376 of the *Annual Practice*, where under the head of "Legal Professional Privilege," it was stated that privilege did not exist in respect to any person except a legal professional agent. He also cited the case of *Wheeler* v. *L'Marchant* (17, Chancery Division, pages 681, 682) and the Colonial cases of the *London and South African Exploration Company* v. *the Beaconsfield Municipality* (3, High Court Reports, p. 182), *Kendrick* v. *Central Diamond Mining Company* (3, High Court Reports, p. 352), *Chester and Dibb* v. *Burtam Gold Mining Company* (4, High Court Reports, p. 374), and *Milcrist* v. *European Diamond Mining Company* (2, Appeal Cases, p. 78). He submitted that as far as this Court had gone it had adopted the interpretation given to the rule by the English Courts.

Mr. Schreiner referred to the case of *Fraser* v. *Sivewright* (3, Juta, p. 375),

and contended that this showed the clear privilege which attached indubitably to communications which passed between a minister and the officers of his department. The ruling in that case absolutely deprived the plaintiff of any right to claim that departmental documents should be disclosed. What would the position of the Government be if it were open to any person to come with a fishing application and demand to see such documents? It was not for this particular case that one was contending, it was for a principle of very great importance. The privilege which attached to departmental official communications was in exactly the same category as the privilege which attached to counsel's opinion. Counsel quoted from *Taylor* on evidence (9th edition, paragraph 937), and went on to argue as to the difference between the meaning of the terms "discover" and "disclose."

[Kotze, J.: I would like to hear Mr. Schreiner on the point whether it was sufficiently clear that this departmental correspondence fell within the second or third head of the classification mentioned by the Chief Justice in the case of *Fraser* v. *Sivewright*.]

Mr. Schreiner submitted that it did fall within the second head. He admitted that the General Manager's affidavit might have been amplified in this sense that the correspondence could have been more fully described. He submitted that it was sufficiently clear from the words "departmental correspondence" that the documents referred to were the official communications which passed between the different officers of the department and came within the classification of the Chief Justice, and "made by a subordinate official to his superior officer in obedience to some law or order."

Mr. Benjamin said there was absolutely nothing in the affidavits to show why the correspondence was privileged. He contended that the applicant was entitled to an order for the production of the documents, because it had not been established that they were privileged. He submitted that if there was a document in existence instructing the man to carry this dynamite from the stationmaster that document could not be held to be privileged. There was absolutely nothing before the Court to show that the production of these documents would be injurious to the public interest.

Cur. Adv. Vult.

Postea (October 20th).

Kotzé, J.: This is an application to compel the Colonial Government, the defendant in an action at suit of the plaintiff, to disclose and produce certain correspondence which has passed between the Commissioner of Public Works and the Cape Government Railways Department, and between the various departments of the Cape Government Railways, relating to matters in question in the above suit. The action is instituted for the recovery of £5,000, as and by way of damages for injuries said to have been sustained by the plaintiff and his wife, by reason of alleged negligence on the part of certain employees or servants of the Railway Department. On the 1st September the applicant obtained an order, under Rule 333, directing the respondent to make discovery on oath of all documents, papers, and writings which are or have been in his power, possession, or control, or in that of his attorneys or agents, relating to matters in issue in the suit. Thereupon the General Manager of Railways made an affidavit on the 9th September, in which, after stating that he has in his possession certain documents set forth in a schedule annexed, he proceeds to say that he has not any other document or copy, or extract from any document, material to the matters in issue, "save and except such documents as are privileged." Upon its being pointed out by letter from the plaintiff's attorney that the defendant must state what these documents are, and upon what grounds he objects to produce them, the General Manager on the 24th September made a further affidavit "that the documents referred to as being privileged in the affidavit sworn to by me on the 9th day of September, 1903, consist of voluminous departmental correspondence, and letters addressed by me to J. and H. Reid and Nephew, and by J. and H. Reid and Nephew to me." The applicant, while admitting that the letters to and by Messrs. Reid and Nephew, the solicitors of the respondent, are privileged, maintains that departmental correspondence is not privileged from disclosure unless it is made sufficiently to appear that the production of this correspondence would be detrimental to the public interest. The applicant contends that there is nothing before the

Court to show that this is so in the present instance. It is provided by Rule 333c, which is similar to the rule existing in England on the subject, that a party against whom a discovery order is made shall in his affidavit specify which, if any, of the documents therein mentioned he objects to produce. In the form given in the Appendix No. 2 to this rule, it is said that the party should state upon what grounds the objection is made, and verify the facts as far as may be. In the cases of the *London and South African Exploration Co.* v. *The Beaconsfield Municipality* (3 H.C., 182) and *Chester and Gibb* v. *The Big Ben Gold-mining Co.* (4 H.C., 374), the High Court of Griqualand West ruled that particulars should be stated as to the documents with regard to which privilege from production or disclosure is claimed, and the grounds upon which it is based. In the latter of these two cases, it was held that it is not sufficient merely to allege the existence of certain correspondence, and to object to produce the same on the ground that it consists of "professional and confidential communications." In most of the English cases the objection to produce or disclose certain documents on the ground that it would be contrary to the public interest to allow their production has been taken at the trial, and not in an application for discovery. An attempt was made on behalf of the present applicant to draw a distinction between disclosure of a document in evidence during a trial of an action, and disclosure in obedience to an order for discovery. It was contended that many documents which cannot be put in as evidence at the trial, have nevertheless to be disclosed on discovery. That, no doubt, is a statement which cannot be disputed, but it does not follow that, so far as privilege from disclosure of a document on the ground that it would be contrary to the public interest to allow its production is concerned, this distinction applies. No authority has been cited in support of it, and there is at least the opinion of Wills, J., against it. In *Hennessy* v. *Wright* (21 Q.B.D., 521), which was an application for discovery, the learned Judge says: "It is obvious that whatever difference may exist between the case of evidence asked for or tendered at the trial, and that of an application for discovery or inspection is altogether in favour of a refusal to order discovery in the earlier stages of the case." In that case, like in *Fraser* v. *Sivewright* (3 Juta, 375), the more important English decisions are reviewed, but it is not now necessary to consider them. I will merely refer to *Smith* v. *The East India Company* (1 Phill., 50), where Lord Chancellor Lyndhurst held that official correspondence is not privileged as such. It is only so when it would be contrary to the policy of an Act of Parliament, or injurious to the public interest to allow its production. Hence, in *Fraser* v. *Sivewright* it was held that an official report made by Sivewright as General Manager of Telegraphs to the Postmaster-General, with whose department Sivewright had no direct official connection, the responsible head of the Telegraph Department being the Commissioner of Crown Lands and Public Works, and the responsible head of the Postal Department being the Colonial Secretary, was not privileged from disclosure. It has been urged on behalf of the respondent that the departmental correspondence mentioned in the affidavit of the General Manager of Railways falls within the second class of official communications, which were said by the Chief Justice in *Fraser* v. *Sivewright* to be privileged from disclosure, viz., those made by a subordinate official to his superior officer in obedience to some law or legal order. But now the affidavit of the General Manager of Railways simply says that the documents in his possession consist of "voluminous departmental correspondence." There is nothing to show that the responsible executive head of the department, that is the Commissioner of Public Works, objects to the production of this correspondence or any portion of it, nor is there anything before me from which I can judge and decide whether the disclosure of any or all of these documents will be contrary to the public interest. The allegation that the correspondence is departmental may amount to a statement that it is principally official, but that is not enough, for official correspondence, as such, is not in the absence of some further or special circumstance privileged from disclosure. As suggested during the argument, there may be letters written by the Railway De-

partment to the alleged employe or servant, through whose negligence the injuries are said to have been caused, directing him or consenting to his removing by a passenger train certain packages of dynamite, the explosion of which seriously injured the plaintiff and his wife. The pleadings show that whether one Pearce was or was not in the service or employ of the Railway Department is a principal, if not the main issue in the case, for the defendant denies such service or employment. The Court must, therefore, have some more definite information before it in order to be able to say whether or not the departmental correspondence or any document or documents comprised thereunder are privileged from production. In *Hennessy* v. *Wright* the affidavit of the plaintiff, the Governor of a colony, stated: "I have in my custody, but acquired and held by me in my capacity of Her Majesty's Governor of Mauritius, and subject to the directions of the H.M. Secretary of State for the Colonies, a number of copies of various despatches, reports, and other communications, with the enclosures referred to therein, which passed either between H.M. Secretary of State and myself, as such Governor aforesaid, or between the Royal Commissioner appointed by Her Majesty to inquire into the affairs of Mauritius and myself as such Governor, or between the said Royal Commissioner and the said Secretary of State. The attention of the Secretary of State has been directed to the nature and dates of the said documents, and he has directed me not to produce or disclose the said documents and to object to their production in these proceedings on the ground of the interest of the State and of the public service In consequence of those instructions and of the rules and regulations of Her Majesty's Colonial Service, I am unable to produce the said documents, and I object to produce them on the ground aforesaid." The case was one of an application for discovery made by the defendant in a libel action, brought against him by the Governor. Although there was no affidavit by the Secretary of State for the Colonies that he had examined the documents and considered them State papers, or that their production would be injurious to the public interest, and although no copy of the rules and regulations of the Colonial Service appears to have been submitted, the Court, consisting of Field and Willis, J.J., held, after a consideration of the authorities, that there was sufficient information before the Court that the documents in question were privileged from discovery, and consequently refused the application. There could not be any doubt as to the nature of the documents in that case. According to the description given of them they were either State papers, or of a kind which it would have been contrary to the public interest to have ordered to be produced. In the present instance, it cannot be said that there is enough before the Court to enable me to rule that the correspondence referred to is privileged. The documents comprising this correspondence must be more particularly described and detailed. The administration of justice between party and party is a matter of public concern, and although it may be quite true that the interest of a party to a suit cannot weigh against what is contrary to the interest of the State, it must sufficiently appear that this will be the case before the Court will hold that documents relating to the matter in dispute are protected from disclosure. The onus of establishing privilege from production rests on the parting claiming it. I will follow the course adopted in *Chester and Gibb* v. *the Big Ben G.M. Co.*, which I venture to think is a proper and correct one to adopt, and order the respondent to file a further and more complete affidavit setting forth with sufficient accuracy the particular documents which he objects to produce and the particular grounds for such objection.

[Applicant's Attorneys: Van der Byl and Van der Horst; Respondent's Attorneys: Reid and Nephew.]

Ex parte VAN DER WALT.

Mr. J. E. R. de Villiers moved for an order authorising the registration of certain property, which the petitioner and one Sweegers had purchased from a certain estate, part by private sale and part at a public auction. The sum paid was certified to be fair and reasonable. The petitioner was one of the executors dative in the estate from which purchase was

made. He was not an executor at the time of the private sale.

Kotzé, J.: The matter had better stand over, in order that an affidavit may be made by the executor, from whom petitioner purchased privately.

Ex parte SAIT.

Mr. Bisset moved for leave to raise a certain sum of money on mortgage in order to make improvements on property belonging to the heirs under the joint will of petitioner and her deceased husband. Petitioner had ordered the improvements under the belief that she was the absolute heiress, whereas she only had a life interest.

The matter was ordered to stand over for further information as to the value of the property and the ages of the two heirs.

Postea (October 16): On the required information being furnished on affidavit, an order was granted as prayed.

Ex parte THE WORCESTER BUTCHERY CO. (LTD.).

Mr. Buchanan presented the second report of the liquidators.

The report was ordered to lie for inspection as usual, and to be published in certain four newspapers.

Ex parte WHITE.

Mr. Upington moved for leave to dispose of certain property. The property belonged to the two children of petitioner, one of whom was a minor, and it was stated that a very high price could be obtained for the land, the market being exceptionally good at present. The property had been sold, subject to the leave of the Court. The major heir had decided to sell his half-share. The Master's report was favourable.

An order was granted in terms of the Master's report.

Ex parte GIDDY AND ANOTHER.

Mr. Buchanan moved for leave to transfer a certain farm in the district of Barkly East to one of the executors dative in the estate of the late John Frank Giddy. The property was offered for sale by public auction, and after spirited bidding, was knocked down to Edward Wm. Quinn Giddy, one of the executors, for £3,700, which was considered a fair and reasonable price.

Leave was given to effect transfer as prayed.

SOLOMONS V. ROSENBERG.

This was an application for an order compelling plaintiff (Solomons) to furnish security for costs.

From the statement of counsel, it appeared that the present applicant was the defendant in an action for malicious prosecution, and the matter came before the Court on notice of motion calling upon Solomons to show cause why he should not be required to furnish to the defendant or his attorneys sufficient good security for costs in the action. The affidavit of David Rosenberg stated that summons was issued against him on the 14th March last, and as he believed that plaintiff was domiciled in the Transvaal, he instructed his attorneys to write to plaintiff asking for security. This the attorneys did on the 18th March, but the plaintiff's attorneys replied stating that plaintiff was not domiciled in the Transvaal, but in this colony. In view of this assurance, deponent took no further action at the time, but in September last, being satisfied that plaintiff was domiciled in Johannesburg, and outside the jurisdiction of the Court, again instructed his attorneys to write to the plaintiff. Solomons replied offering the guarantee of Mr. W. B. Shaw for the sum of £40 as security for costs, but applicant, not knowing the financial positon of Mr. Shaw, was not satisfied with the guarantee, and therefore brought the present application. Applicant had ascertained that plaintiff had come to this colony from the Transvaal as a refugee, and had returned before the end of the war.

The answering affidavit of Mr. W. B. Shaw stated that plaintiff had made the offer, and still made it, to give security for £40. He objected, however, to paying this sum in cash to the present applicant—for several reasons, one being that applicant would not give security for the sum if deposited. Deponent made a statement as to being worth over £40.

Mr. Buchanan for applicant; Mr. Rainsford for respondent.

After hearing counsel,

Kotzé, J.: The order I shall make will be that the plaintiff in the action—the present respondent—shall give security to the satisfaction of the Registrar of the Court for the amount of £40, and that the costs of this application be costs in the cause.

Ex parte EYBERS.

Mr. De Waal moved for leave to mortgage certain property, in which minors were concerned. The petitioner was curator dative. The Master recommended that an order be granted in terms of the prayer of the petition.

An order was granted accordingly.

REX V. STERN. } 1903. { Oct. 14th.

Bechuanaland Proclamations Nos. 64 and 113—Bastards.

Bastards are included in the term Native under Proclamation No. 64. It is not essential to prove that Bastards are descended from aboriginal natives or are living as members of a native community or kraal. Consequently the Court upheld a conviction for the sale of liquor to Bastards in the district of Gordonia.

This was an appeal from the decision of the Assistant Resident Magistrate of Gordonia. The accused was charged with a contravention of section 2 of Bechuanaland Proclamation 64 of 1869, as amended by Proclamation 113 of 1881, in that he unlawfully sold or supplied liquor to two Bastards named Maasdorp and Moitong. He was convicted, and sentenced to pay a fine of £10, or to undergo fourteen days' imprisonment. The appeal was made on the grounds that the conviction was unsupported by the evidence, and was contrary to law, and that the Court of the Assistant Resident Magistrate of Gordonia had no jurisdiction in the case, inasmuch as he tried the case upon an allegation of facts which could not constitute such an offence in terms of the Proclamation, which only applied to natives or persons of mixed race, or Bastards resident in the district of Gordonia, and did not apply to men domiciled in German South-west Africa, where Maasdorp and Moitong were stated to be domiciled. In their evidence, the men Maasdorp and Moitong said they were resident in German South-west Africa. They deposed to having been supplied at Stern's store, the one with four and the other with twelve bottles of brandy, which they stated they intended for consumption at their own homes. The bottles of brandy were found by the police in the wagon which they were driving.

In his reasons the Magistrate stated that the word "natives" figured in the summons, but "Bastards" had been substituted without any objection being made at the time. The whole case hinged upon the question whether Bastards domiciled in German territory were on the same footing as residents of Gordonia. It was contended at the trial that the men Maasdorp and Moitong had only to observe the laws of their domicile, but the Court could not take this view of the case. Even if this were so, it was not the bastards who were charged, but the defendant was charged with an offence committed by him in Gordonia. The men were originally of one people, who resided in Gordonia, and were engaged in transport work between Gordonia and German South-West Africa.

Mr. Gardiner for the appellant. Mr. H. Jones for the Crown.

Mr. Gardiner said that the term "native" included aboriginals whether full or half-caste. "Aboriginals" referred to natives belonging to the country in question, for which the legislation was passed, and it could not be held that someone born in German South-West Africa could be an aboriginal native of British Bechuanaland. He contended that the natives in question were not "Bastards" of British Bechuanaland, but of the adjoining German territory. Proclamation 64 distinctly specified "aboriginal native." He submitted that the law should be administered as favourably as possible in a matter of doubt such as this, and especially where foreigners to the district were concerned, who were not specifically referred to.

Mr. Howel Jones said his friend's argument seemed to be so weak that it was difficult to know what to say in reply.

He contended that the persons in question were embraced in the definition set out in the Proclamation, and that it was of no importance whether they actually belonged to the district of Gordonia or not.

Mr. Gardiner in reply.

Kotzé, J.: This is an appeal from the Assistant Resident Magistrate of Gordonia. It appears that one Wm. Stern was charged before the Magistrate with selling a quantity of liquor to two persons, who are described in the charge as "Bastards," viz., one Maasdorp and one Moitong, and there can be no doubt, according to the evidence of these two persons themselves, that they are "bastards," and there is nothing on the record to rebut that. Therefore, the Court must take it as proved that these two people are "Bastards" to whom the liquor or brandy was sold. Now, it is argued by Mr. Gardiner that these two persons do not fall within the definition of the word "Bastard," as defined by Proclamation 113. Well, Proclamation 113 refers back to Proclamation 64, that being, apparently, the first Proclamation on the subject, and that Proclamation in section 2 says that whoever shall sell, whether licensed or unlicensed, to any native in British Bechuanaland any spirituous liquor commits a criminal offence and it also goes on to say that the word native shall for the purposes of this section mean "any aboriginal native belonging to any native tribe or community, and shall include half-castes, and all persons of mixed race, living as members of any native community, tribe, kraal, or location." This Proclamation was extended by Proclamation 113 to "Bastards." The Proclamation provides that the word "native" in the Proclamation No. 64, "shall for the purposes of the said Proclamation, so far as the district of Gordonia is concerned, be taken to include all persons of mixed race commonly called Bastards in the said district, whether such persons be living as members of any native community or not." Mr. Gardiner has very ingeniously argued that the Court, in order to come to a right conclusion as to what is meant by a Bastard under this Proclamation 113, must consider the previous Proclamation No. 64, where the word native is defined as meaning an aboriginal native or a person of mixed race living as an aboriginal native in a kraal. But the Proclamation 113 does not say that the words aboriginal native shall be taken to be extended to "Bastards," but it says that the word "native," as it is defined in Proclamation 64, shall also be taken to include "Bastards or persons commonly called Bastards in the said district of Gordonia." That evidence shows that these two people, who were at the time doing transport with their wagons in the district of Gordonia, described themselves as being "Bastards" in that district, and, that being so, I think that they fall within the term "Bastard" as mentioned in Proclamation No. 113. I am, therefore, of opinion that the decision of the Magistrate on that point was correct, and that this appeal should be disallowed.

[Appellant's Attorneys: Syfret, Gedlonton and Low.]

REVIEW CASE.

REX V. BOLINKI.

Mr. Benjamin moved, under the 190th rule of Court, for the review of certain proceedings before the Assistant Resident Magistrate of King William's Town in a case in which Bolinki was convicted of supplying liquor to an aboriginal native.

Mr. Howel Jones appeared for the Crown.

It appeared that the proceedings had been before Mr. Justice Sheil for review, and that he had confirmed the sentence.

Mr. Justice Kotze said he was doubtful as to whether one judge of the Supreme Court could adjudicate in a case which another judge had already confirmed on review, but, in any case, he thought it desirable that the matter should be heard by a full bench, and he therefore ordered that it should stand over.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZÉ.]

A REFERENCE.

REX V. MAWABE. { 1903. Oct. 15th.

Mr. Justice Maasdorp said that, in the case of Rex v. Mawabe, heard in the High Court of Southern Rhodesia, a point had been reserved, and the Supreme Court was asked to appoint counsel to appear for the prisoner, who had not got means to appear. His Lordship asked Mr. J. E. R. de Villiers to accept the reference.

Mr. De Villiers acquiesced.

ADMISSION.

Mr. Schreiner, K.C., moved for the admission of Robert Charles Farquharson as an attorney-at-law and notary public.

Application granted, oath to be taken before the Resident Magistrate of Queen's Town.

PROVISIONAL ROLL.

COLLEY V. PARKINS.

Superannuated judgment—R.M. Court—Revival.

In the absence of any authority the Court refused to revive a R.M. Court judgment which had become superannuated.

Mr. M. Bisset moved for a sentence passed in the Court of the Resident Magistrate of Vryburg to be revived, and for provisional sentence to be decreed upon the following amounts: £20 11s. 2d., £28 2s., and £17 10s. 4d. Counsel said that the judgment, which was given in 1895, had become superannuated, and it was now sought to put it in force.

[Maasdorp, J.: Can this Court revive a judgment which has been superannuated?]

Mr. Bisset: Yes. See *Van der Linden* (Bk. 3, Part 1, Chap. 3, Sec. 3).

[Maasdorp, J.: Can this Court revive a judgment of a lower Court.]

Yes; the only effect of our going back to the Magistrate's Court would be to multiply costs. A portion of this debt has been admitted.

[Maasdorp, J.: Since that admission was made the respondent may have had a counter claim.]

But see *Bank of Africa* v. *Kimberley Mining Board* (2, Appeal Court,).

[Maasdorp, J.: How can we direct a lower Court to revive its judgment?]

[Kotzé, J.: I understand that this summons has not been personally served?]

It has been served in accordance with the Rule of Court. See *Garlick* v. *Broido* (7 C.T.R., 159). That case differs from the present, (1) because there was no evidence that any writ had been issued on that judgment. (2) because it was a judgment of a foreign inferior Court.

[Maasdorp, J.: What is the difference between reviving a judgment in an inferior Court and in a superior Court?]

There the inferior Court was a foreign Court. See *Kenny* v. *Murray* (7 C.T.R., 207). A wide distinction must be drawn between cases in which objection is taken to a judgment being revived and those in which no objection is raised. Should your lordships order us to go back to the Magistrate's Court costs will be multiplied unnecessarily.

Maasdorp, J.: I think the ordinary practice should be followed in this case of going to the Court where the judgment was given, and there to have it revived. Then application should be made to this Court to have execution taken. In the absence of any authority that this Court should revive a judgment of the Magistrate's Court that has become superannuated, no order will be made in this case.

Applicant's Attorneys:
Respondent in default.

BARRY BROS. V. MOLYNEUX.

Mr. Smith moved for provisional sentence for £92 17s., with interest from the 15th July last, upon a dishonoured cheque drawn on the Port Elizabeth branch of the Standard Bank.

Order granted.

STROTHER V. HADIEN.

Mr. Smith moved for provisional sentence for £200 on a mortgage bond, and interest at the rate of 8 per cent., the

bond having become due by three months' notice, and also asked for the property specially hypothecated to be declared executable, and costs.

Order granted.

ESTATE HERTZOG V. MCMULLEN.

Mr. Nightingale moved for provisional sentence on a mortgage bond for £1,000, with interest, less the sum of £14 12s. 6d paid on account, and on a further bond of £3.023, with interest, both having become due by reason of the non-payment of interest. Counsel also asked for the property specially hypothecated to be declared executable.

The defendant (McMullen) said he should like a month's time in which to realise, so as to satisfy the debt.

Maasdorp, J., advised the defendant that the best course would be for him to approach the plaintiff and try to arrange about grace.

Provisional sentence granted as prayed.

TABLE BAY HARBOUR BOARD V. GARDINER AND EASTON.

Mr. M. Bisset moved for the discharge of the provisional order for the sequestration of the defendant's estate.

Provisional order discharged accordingly.

VAN DER BYL V. BOOYSEN.

Mr. J. E. R. de Villiers moved for provisional sentence for £800 on a mortgage bond, and interest, and for the property specially hypothecated to be declared executable, and costs. The proceeding was by edictal citation. The Court had allowed substituted service, and the summons had been duly advertised.

Order granted.

LOUBSER V. MATESDORF.

Mr. Pyemont moved for provisional sentence for £300 on two promissory notes—one due on the 8th August for £150, with interest, and the other due on the 25th August, with interest—and also costs of suit.

Order granted.

BRAND AND OTHERS V. VAN DER MERWE.

Mr. Van Zyl moved for the provisional order for the sequestration of the defendant's estate to be made final. He stated that he had seen a copy of the affidavit sworn by the defendant, and he failed to find any reason for refusing the application.

Order granted.

ASSERSOHN V. BUTCHINSKY.

Mr. Benjamin moved for provisional sentence on a judgment of the High Court of King's Bench Division in England for £304 4s., with taxed costs, £10 10s.

The defendant said he was willing to pay the amount by instalments, and to deposit his deeds as security. He had only been in this country about six weeks, and he was hoping when things improved to meet this obligation. He was an auctioneer.

Order granted.

DE VILLIERS V. KEUN.

Mr. C. W. de Villiers moved for provisional sentence for £383 17s. 6d., balance due on a promissory note for £505

Order granted.

OLIVER AND CO. V. MADDOCKS.

Mr. C. W. de Villiers moved for a decree of civil imprisonment upon a judgment of this Court for £18 3s. 6d., with costs.

Defendant said he had no means, and was surrendering his estate. He was an auctioneer, and owed a great deal of money. He was at present earning £30 a month. He offered £5 a month. He owed about £40,000.

Maasdorp J. (to Mr. De Villiers): You had better take the £5.

Defendant said he would be able to pay the first instalment of £5 to-morrow.

Order granted; to be suspended on payment of £5 per month.

LAITE V. WHALES.

Mr. Alexander moved for provisional sentence on a bill of exchange for £25 14s. 3d., with interest, and also judgment

under rule 329d, for £3 5s., goods sold and delivered.

Order granted as prayed.

ESTATE VAN NOORDEN V. ADAMS.

Mr. M. Bisset moved for provisional sentence for £80, on a certain mortgage bond, with interest at the rate of 6 per cent., and for the property specially hpyothecated to be declared executable.

Order granted.

MALMESBURY BOARD OF EXECUTORS V. VAN DER WESTHUYSEN.

Mr. Searle, K.C., moved for provisional sentence on two mortgage bonds for £200 and £400 respectively, with interest, the bonds having become due and payable by reason of the non-payment of interest; and for the property specially hypothecated to be declared executable.

Order granted.

MANSON V. MADDOCKS.

Mr. Van Zyl moved for provisional sentence for £141 11s. 9d., amount due to the plaintiffs on a judgment obtained against the defendant in the first Civil Magistrates' Court at Johannesburg.

Order granted.

ILLIQUID ROLL.

COLONIAL GOVERNMENT V. MOLYNEUX. { 1903. Oct. 15th

Mr. Howel Jones moved for judgment under rule 329d for £2,781 5s. 10d., Customs duties upon goods illegally removed from the Bonding Warehouse at Port Elizabeth by the defendant.

Judgment as prayed.

LIQUIDATORS OF THE FRENCH BANK V. MATESDORF.

Mr. Buchanan moved for judgment under rule 329d, for £157 16s. 11d., cash lent and advanced, less £10 paid on account. The summons, he said, was addressed to Edward Matesdorf, and the real defendant was Ernest Matesdorf, and counsel asked for amendment of the summons accordingly.

Maasdorp, J., pointed out that service had been effected on Edward Matesdorp.

Mr. Buchanan said that under the circumstances he would not press for the amendment of the summons.

Judgment as prayed.

HENDRICKS V. ALY.

Mr. Upington moved for judgment under Rule 329d, for £50, being rent, and costs.

Order granted.

REHABILITATION. { 1903. Oct. 15th.

Mr. Buchanan moved for the rehabilitation of Jacobus Johannes Hooper, whose previous application had been standing over pending the production of a proper balance sheet. The balance sheet had now been supplied. The estate was sequestrated in December, 1883, and only realised sufficient to pay the expenses of administration.

Granted.

GENERAL MOTIONS.

FICK V. FICK.

Mr. C. W. de Villiers moved, on behalf of the petitioner, for a decree of divorce, in default of compliance with an order for the restitution of conjugal rights, plaintiff to have custody of the minor children, and defendant to be declared to have forfeited the benefits of marriage in community.

Decree granted in terms of prayer.

ASHMAN V. ASHMAN.

Mr. Buchanan moved on behalf of the petitioner (the wife) for a decree of divorce, in default of compliance with an order for the restitution of conjugal rights, for a division of the joint estate, custody of the minor children, and payment of maintenance at the rate of £2 per month for each child until such child attains the age of sixteen, and costs. The plaintiff was willing to accept as an alternative, £500, and a cession of an insurance policy.

Maasdorp, J., said he was not willing to order the payment of £500

from the defendant's estate, without any evidence that the defendant consented.

Mr. Buchanan said he believed the defendant was quite willing to make this payment, but he had no definite information on the point.

Maasdorp, J., said that the defendant should be communicated with, and the case mentioned again later.

Ex parte STIDWORTHY.

Mr. Van Zyl moved for a rule *nisi* granted under the Derelict Lands Act to be made absolute.

Order granted.

Ex parte HENNING.

Mr. De Waal moved that a certain rule *nisi* under the Derelict Lands Act be made absolute.

Order granted.

Ex parte VAN DER MERWE.

On the motion of Mr. Benjamin, a certain rule *nisi* under the Derelict Lands Act was made absolute.

Ex parte VAN HEERDEN.

Mr. Van Zyl moved to make absolute a certain rule *nisi* granted under the Derelict Lands Act.

Order granted.

Ex parte WILCOCKS.

Mr. J. E. R. de Villiers moved that a certain rule *nisi* under the Derelict Lands Act be made absolute.

Order granted.

COETZEE V. RICH.

This was an application upon notice calling upon respondent to show cause why his return as a member of the Divisional Council of Namaqualand should not be declared null and void, why his seat should not be declared vacant by reason of his not possessing the requisite qualifications, and why he should not pay the costs of the application. It was stated on affidavit that respondent was the only candidate for the seat, and was duly declared elected. Applicant had since discovered that, according to the Divisional Council valuation, respondent was the registered owner of property in the division to the value of £400 16s. 8d., whereas it was required that a member of the Council must be the registered owner of property to the value of not less than £500.

Mr. Benjamin moved.

Maasdorp, J., said it was quite clear that respondent was not qualified to be elected as a member of the Divisional Council, and consequently the election must be declared null and void, and the seat declared vacant, respondent to pay the costs.

VAN RENSBURG V. GEORGE LICENSING COURT AND FOTHERINGHAM.

New Liquor Licence—Memorial Voters' List—Act 25 of 1891.

This was a motion calling upon respondents to show cause why the proceedings of the Licensing Court of George, held on the 2nd September, regarding the granting of a liquor licence for premises belonging to the respondent Fotheringham, should not be set aside on the ground that the provisions of sub-section 1 of section 13 of Act 25 of 1891 had not been complied with in that the memorial lodged by Fotheringham in favour of the granting of the licence was not signed by a majority of the registered voters. Counsel read affidavits to show that two memorials were lodged, one, in favour of the application, containing 138 signatures, while the other, against, contained 74 signatures, all of persons purporting to be duly registered voters. The Licensing Court pronounced the voters' list to contain the name of 229 voters. They also reviewed the memorials, and found that 21 of the 229 registered voters had signed both memorials. The Court removed this number from the memorial in favour, and also removed the names of three persons for valid reasons. This left 114 valid signatures to the memorial in favour, but the Court then wrongfully removed the 21 names appearing on both memorials from the voters' list. This reduced the number of registered voters to 208, and the Court held that there was a majority of ten voters in favour of the application. It was contended that the Court acted wrongly in removing the 21

names from the voters' list, and that, the number of registered voters being 229, the 114 names on the memorial in favour of the application did not constitute a majority of the registered voters as required by the Act.

Mr. Schreiner, K.C., moved, and stated that the facts in this case were similar to those in the recent case of *Strydom* v. *Uniondale Licensing Court* (13 C.T.R., 628).

Maasdorp, J.: In this case it appears that the respondent Fotheringham applied to the Licensing Court for a new liquor licence. It is provided in sub-section 1 of section 13 of Act 25 of 1891 that it shall not be lawful for a Licensing Court to grant a new licence unless there shall be lodged with the Resident Magistrate of the district, at least four days before application is made to the Licensing Court to consider such application, a memorial or memorials, signed by a majority of the voters for the Divisional Council within the limits of the Divisional Council district. In this case memorials were lodged with the Licensing Court both for and against the granting of this licence, and it appears that after examining these memorials it was found that the memorial in favour of this licence contained 114 valid signatures. There appeared to be on the voters' roll the names of 229 voters. The 114 therefore would just fall short of one-half the number of voters on the list, and consequently that memorial, containing 114 valid signatures, would not contain the signatures of a majority of the voters for the Divisional Council in that district. The question therefore solves itself, and the Licensing Court had no power to grant this licence. It appeared that upon these different memorials 21 signatures appeared, which were the signatures of the same voters, and in terms of the Act these were struck off as of no effect. The question was then raised in the Licensing Court whether in striking off these signatures the names of the voters should not also be struck off the voters' roll. In that case the voters' roll would have been reduced and the 114 signatures would have been the signatures of a majority of the voters, but there is no provision made in this law for interfering with the voters' list. The number of voters on the voters' list remains the same, however many names may be struck off the memorials, because the voters had signed both. The only effect of the provision is that the voters who signed both may be regarded as not having signed at all. That is really the only effect which the provision has; it excludes these double signatures from memorials. Under the circumstances, it appears that the memorial in favour of granting this liquor licence did not contain the signatures of a majority of the voters of the Divisional Council, and consequently the licence should not have been granted. The Court will therefore order that this licence be cancelled, and that the respondent Fotheringham pay the costs of this application.

Kotzé, J., concurred.

BEELER V. COLE.

Mr. Greer moved for leave to sue by edictal citation for money advanced on a mortgage bond, for interest, and for property specially hypothecated to be declared executable. Respondent was now resident in England.

Leave was granted to sue by edictal citation, personal service to be effected if possible; otherwise service to be made by one publication in the "Daily Telegraph." The citation was made returnable on the 12th January.

WILSON V. WILSON.

Mr. Searle, K.C., moved that a certain deed of separation entered into between the parties should be made a rule of Court. The parties had been previously before the Court, in a case in which the husband sued for restitution, the Court then refusing his application.

Maasdorp, J., said that it was a rule of the Court that it would not be a party to separation unless there were legal grounds for such separation.

Mr. Searle said that at the time of the previous proceedings it pretty clearly appeared that the parties could not live together again.

An order was granted as prayed.

GLASS V. GLASS.

This was a motion for an order on the respondent—the husband—to pay

to applicant the sum of £50, to enable her to institute an action for judicial separation, and to pay the sum of £10 per month for the maintenance of applicant and her daughter, pending the hearing of the action.

The affidavit of the applicant stated that she was married to the respondent in London in 1887. She made allegations of cruelty against the respondent. The respondent owned property to the value of £2,000, and earned money as a builder and carpenter. An affidavit was made by applicant's sister in support of the charges of cruelty. Applicant now supported herself and daughter out of the profits of her boarding-house.

In an answering affidavit, respondent denied the charges of cruelty, and said there had only been slight altercations, incidental and peculiar to married life. He had been obliged to dispose of the property he was stated to possess for the sum of £1,500, of which he had only received £100, the balance going to pay off mortgage and other debts contracted in improving the property. His weekly earnings did not amount to more than £2 10s., and he was unable to work regularly.

After hearing counsel on the facts,

Maasdorp, J., said that, under the circumstances, as it appeared that respondent was a man of some means —though not of very large means—the Court would order him to pay over to the attorney of the applicant the sum of £20. No order would be made as to maintenance. Costs of the application would be costs in the cause.

BUFFALO SUPPLY CO. v. FEDERAL SUPPLY CO. { 1903. Oct. 15th. „ 27th.

Arbitration—Act 29 of 1898—Construction of deed of submission.

The F. Co. had agreed to take over the business of the B. Co. on certain terms. Disputes having subsequently arisen between the parties as to whether the B. Co. had not misrepresented its profits to the F. Co., it was agreed to refer the matter to arbitration. On the matter being brought before the arbitrator, the B. Co. alleged that the F. Co. had abandoned all claim to compensation in respect of any misrepresentation made by the B. Co., in consideration of the latter abandoning certain claims against the former. This abandonment was alluded to in the Deed of Submission, but was therein excluded from the scope of the arbitration. The arbitrators now asked for the ruling of the Court as to whether it was competent for them to receive evidence regarding the abandonment by the B. Co. of the said claims.

Held, *that this evidence was admissible.*

This was a special case submitted by certain arbitrators for the decision of the Court as to the construction of a certain deed of submission entered into between the above parties.

The application was made under section 27 of Act 29 of 1898.

The case stated was that the Federal Supply Company was formed to take over the business of the Buffalo Company. After flotation, certain disputes arose between the two companies. The Buffalo Company claimed £167,608, and the Federal Company claimed £73,140. The latter included a claim of £60,000 for damages, founded upon alleged false representation guarantee as to the profits of the Buffalo Company's business, and upon which representation and guarantee the Federal Company was floated. There were three heads of claim: (a) The question of demurrage *re* the Highland Lassie, and liability for the Sussex cargo; (b) liability by the Federal Company for certain stock shipped from Buenos Ayres; (c) the Federal Company's claim for damages. By the deed of arbitration which was entered into between the parties, (a) and (b) were excluded from the arbitration, the Buffalo Company having agreed to take over the liability of (a), and the Federal Company having agreed to take over the liability for certain stock. The Federal's claim

for damages still stood. In the course of the arbitration proceedings, one of the witnesses (Mr. Williamson) was re-examined by Mr. Wiggins as to whether the Federal Company did not agree to abandon their claim for damages on the Buffalo undertaking to pay demurrage. Counsel for the Federal Company objected to evidence being led on this point. The arbitrators now wished to know whether, in terms of the deed of submission, these questions could properly be gone into, and they asked the Court for a ruling on the point whether it was admissible for evidence to be led before the arbitrators, to show that, in consideration of the Buffalo Company agreeing to pay the demurrage of the Highland Lassie, the Federal Company agreed to waive their right to claim damages.

Mr. Searle, K.C., for the arbitrators; Mr. Schreiner, K.C. (with him Mr. Burton) for the Buffalo Supply Company; Sir H .Juta, K.C., for the Federal Supply Co.

Mr. Schreiner said that he left the matter entirely in their lordships' hands. If the Court desired to see the documents, of course they would leave the question in the hands of the Court. He was not in possession of the claims respectively filed by the two companies. If necessary, the documents could be wired for to East London, and the question could be argued on another day. This was the first case of the kind that had come before the Court.

[Kotzé, J.: Can the arbitrator go into the question of abandonment?]

Mr. Schreiner: Oh, undoubtedly, my lord, because this deed, I submit, is perfectly clear that it does not refer to this particular claim. We say that when the deed was signed the claim for damages was dead and done for. They chose to put in this claim or any other cock-and-bull claim, or any other settled claim, and bring it before the arbitrators, and then they said, "You must not lead any evidence for the defence," because we show that before the deed was signed we agreed to take upon ourselves the responsibility for claim (a), referred to in the deed in consideration of their giving their assurance that they abandon the claim for damages, which we have always repudiated and denied.

Sir H. Juta said that this was an agreement between two parties to submit certain things to arbitration, and upon this deed must depend the decision whether a certain thing could be submitted to arbitration or whether it could not. The deed was perfectly clear; it said that all disputes between the parties should be referred to arbitration, bar two. His learned friend (Mr. Schreiner) said there were three. He (Sir H. Juta) contended that, the parties having entered into a contract in the form of this deed of submission, they could not add to alter or vary it by any parole evidence to show that there was another large and most important claim that had been omitted from the arbitration. It was part and parcel of the deed that the Buffalo Co. should pay this demurrage. The Buffalo Co. now said that the consideration for this clause in the deed was the abandoning by the Federal Co. of the large claim for damages, which was not in the deed at all. In other words, it was attempted to show that a consideration was included in the written document, which was altogether outside the written document. They were told that the payment of the demurrage was conditional on the claim for damages being abandoned.

[Maasdorp, J.: Is this deed of submission a contract?]

Surely it is. The parties agree to certain terms, and we say that no parol evidence can be admitted to vary those terms.

[Maasdorp, J.: May it not be that the one party has abandoned certain claims in consideration of the other party giving up others?]

The agreement says: "We will drop certain claims. I will pay one and you shall pay the other; and now they want to go back on this.

[Maasdorp, J.: Suppose they said: "We will not press if you charter ships to bring cattle from Buenos Ayres?]

Should we fail to do so, surely the Court would not uphold such an agreement. The written document is an undertaking to pay, but now an attempt is made to show that this agreement was varied by a subsequent mutual understanding. We cannot go back from the written contract.

Mr. Schreiner (in reply): All we wish to do is to give effect to the deed and not to vary it in any particular. The whole point is that the respondents object to our proving our claim, and we contend that we have a right to do so.

Cur. Adv. Vult.

Postea (October 27):

Maasdorp, J. : It appears that an agreement was entered into by the Buffalo Company and the Federal Company, by which the latter company agreed to take over the business of the former. Disputes and differences arose between the two companies which they were unable to adjust, and they ultimately agreed to submit their differences to arbitration. Amongst their differences was a dispute as to liability to pay demurrage in connection with the ship Highland Lassie, and to bear the loss on a shipment of mutton; and another dispute as to a claim made by the Federal Company for damages sustained through misrepresentation of profits of business by the Buffalo Company. In the deed of submission to arbitration, it is recited that certain differences have arisen between the parties as to the terms of sale and purchase, and the carrying out of agreements between the parties, and they were desirous of referring the said differences and disputes to arbitration, under the provisions of the Arbitration Act of 1898. They therefore agreed that all differences and disputes between them shall be referred to two arbitrators. Two matters in dispute were excluded from arbitration, one of them being a dispute as to demurrage claim in connection with the ship Highland Lassie, and any loss in regard to the third shipment of mutton which has been directed by the Buffalo Company for delivery to A. Bergl, Cape Town, for sale. The Buffalo Company hereby accepting full responsibility in respect of these two matters, and agreeing to pay as between the Federal Company and themselves. It is provided in the deed that the differences to be decided are to be all claims and disputes which the parties shall notify to each other in writing within three months. Among the claims sent in by the Federal Company is one for £60,000, being damages for misrepresentation already mentioned. When this claim came before the arbitrators, the Buffalo Company proposed to prove that the Federal Company had abandoned it in consideration of the Buffalo Company giving up the claim for demurrage in connection with the Highland Lassie. Evidence to that effect was adduced, but objected to. The question arose in the minds of the arbitrators whether it is admissable under the deed of submission for the Buffalo Company to lead evidence to show that its agreement to pay the demurrage on the Highland Lassie, as stated in the deed, was in consideration of the Federal Company agreeing to abandon any claim for damages for misrepresentation it might have against the Buffalo Company. This point the arbitrators have now submitted as a question of law for the opinion of the Court, under section 27 of Act 29 of 1898. The Court has now to construe the deed of submission in order to ascertain whether there is anything contained in it which debars the Buffalo Company from resisting the claim for damages, from proving that it gave up its claim for demurrage, on condition that the Federal Company abandoned its claim for damages. As I understand the contention of counsel for the Federal Company, it amounts to this, that the deed of submission is an agreement within the four corners of which we must look for all the consideration which passed between the parties as an inducement for them to go to arbitration. In other words, that the consideration for the abandonment of the claim of the Buffalo Company lies inside the agreement to refer, and cannot be looked for in some prior agreement which is not recited in the deed. To put it more pointedly, that the consideration for the Buffalo Company's withdrawal of their claim for demurrage was the consent of the Federal Company to submit all other differences to arbitration. If this latter position were really borne out by the terms of the deed then I think it would not be open to the Buffalo Co. to set up any consideration other than that mentioned in the deed. The question is whether that is the true construction of the deed. That the deed does not say so in so many words is quite clear, otherwise I do not think this difficulty would have arisen. Upon reference to the wording of the deed we find that the question of demurrage is spoken of as one of the differences between the parties, but it is excluded from the arbitration, and the Buffalo Company accepted full responsibility for it, and agreed to pay it. Taking the ordinary meaning of these words, it would amount to no

more than saying that the Buffalo Company undertook to pay moneys for which they had at one time contended the Federal Company was responsible, and the matter was consequently no longer one of the differences which the arbitrators had to deal with. Why the Buffalo Company agreed to pay, and why they abandoned the claims is not mentioned. The question now arises whether it is a necessary implication of law upon the true construction of the deed of submission that they abandoned the claim in consideration of the Federal Company submitting all the other differences to arbitration, or in consideration of the other stipulations contained in the deed. I am of opinion that in adopting this implication we should put too strained and narrow a meaning upon the words employed in the deed, and that it is not inconsistent with the deed to hold that the claim for demurrage was abandoned for a consideration not specified. If that be so, there would be nothing to prevent the Buffalo Company from proving that such consideration was the abandonment of some claim by the Federal Company. The main object of the parties was to get certain differences settled by arbitration, and in specifying the differences which were referred, and those which were excluded, it would not be necessary for them to go into detail as to the conditions upon which the latter were settled or compromised. It was urged that if the contention of the Buffalo Company is allowed, the claim for damages would virtually be withdrawn from the consideration of the arbitrators. But that would not be the case any more than it would be in respect of any other claim with reference to which either party offered evidence of settlement or compromise. I am of opinion, therefore, that it is open to the arbitrators to inquire whether the agreement to pay the demurrage in the Highland Lassie was in consideration of the Federal Company agreeing to abandon their claim for damages, and the question submitted by the arbitrators must be answered accordingly. Question of costs left to that arbitration.

[Attorneys for the Arbitrators: Syfret, Godlonton and Low; Attorneys for the Buffalo Co.: Walker and Jacobsohn; Attorneys for the Federal Co.: Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

SHOYER V. SHOYER AND THERON. { 1903. Oct. 16th.

This was an action brought by Harry Shoyer against his wife, Nellie Sophia Shoyer (born Aspinall) for decree of divorce, and for £100 damages against the second defendant, Stephen Theron, by reason of the adultery of the two defendants.

The declaration set forth that the plaintiff resided at Rondebosch, and the defendants at Maitland. Plaintiff and the first defendant were married without community of property at Cape Town in April, 1897, and the said marriage still subsisted. There was issue of the marriage—a boy, four years old. After the birth of the child differences arose, and the parties entered into a notarial deed of separation. In 1902 and 1903, and at divers places, the first defendant committed adultery with the second defendant, and by reason of the wrongful acts of the said defendant plaintiff sustained damages to the extent of £100. The plaintiff claimed a decree of divorce, custody of the child, and forfeiture of all benefits under the ante-nuptial contract, against the first defendant, and £100 damages with costs against the second defendant.

Mr. Gardiner for the plaintiff. The first defendant in default. The second defendant in person.

Mr. Gardiner said that the plaintiff would not press for damages against the second defendant.

The second defendant said that that being so, he did not oppose the prayer of the declaration.

Charles William Henry Smith, clerk in the Colonial Office in charge of the marriage register, produced a copy of the certificate of marriage.

Harry Shoyer, a Government water borer, said he was married at St. John's Church, Cape Town, in 1897, under an ante-nuptial contract. There was one child of the marriage. Witness and his wife lived happily at first, but subsequently trouble arose, and they entered into a notarial deed of separation. Witness desired to have custody of the child.

Philip John van der Byl, farmer, Constantia, said the second defendant had been working on his farm. In February of this year he came to the farm, accompanied by a woman, who he said was Mrs. Theron, and by a little boy. They stayed on the farm about six months.

Decree of divorce granted, with custody of the child to the plaintiff, and forfeiture of the benefits of the marriage, the second defendant to pay the costs.

DE KOCK V. DE KOCK.

This was an action for restitution of conjugal rights, failing which a decree of divorce, on the ground of malicious desertion of the plaintiff by her husband. Mr. Buchanan appeared for the appli cant, and the suit was undefended.

Charles W. H. Smith, clerk at the Colonial Office, in charge of the marriage registers, produced a duplicate copy of the record of the marriage.

Maria Daisy Ermina de Kock, the plaintiff, said she was married to the defendant at Simon's Town, on the 17th March, 1897. They first lived a few months at Muizenberg, and afterwards went to Wynberg. Differences arose, and the defendant joined the Army Service Corps, and proceeded to Bloemfontein. He remained away for two years, and then returned in March, 1902. They had no home, and they did not live together. About two months afterwards he went away again with the Army Service Corps, and proceeded to Port Nolloth, where he stayed about three months. She saw him on his return at Green Point with the A.S.C. He gave her £2. She asked him to provide her with a small home, but he said he could not be bothered to do it now, and he told her he would get her a room for the month. She obtained an order against him in the Magistrate's Court for maintenance at the rate of £1 5s. per week. He had only made two contributions under that order.

Order granted, calling upon the defendant to restore conjugal rights to the plaintiff on or before the 14th November, or, failing that, to show cause on the 12th December why a decree of divorce should not be granted. As to the question of maintenance, the Court stated that plaintiff might make a subsequent application if the defendant failed to obey the order of the Magistrate's Court.

TOWNSEND V. TOWNSEND AND THOMAS.

This was an action for divorce brought by the husband against his wife on the ground of her adultery with one Andrew Thomas, of Woodstock. Mr. J. E. R. de Villiers appeared for the plaintiff, and the defendants were unrepresented.

The declaration set out that the plaintiff resided at Observatory-road, Cape Division, and the first and second defendant were living together at Woodstock. The plaintiff and the first defendant were married at Cape Town in March, 1900, and there had been issue of the marriage—one child. In March, 1902, the first defendant went and lived with the second defendant in Buitengracht-street, Cape Town, and she was still living with him in adultery at Woodstock. The plaintiff sought as against the first defendant a decree of divorce and custody of the child, and as against the second defendant, £100 damages and costs.

Chas. W. H. Smith, clerk in the Colonial Office, in charge of the Marriage Register, produced the record of the marriage.

Wm. Isaac Townsend, the plaintiff, said that after the marriage they lived together at Observatory-road about eighteen months. After that they entered into a notarial deed of separation, the reason being that he suspected his wife of keeping company with other men. He had contributed regularly £5 a month towards her maintenance. About three months ago, in consequence of certain information, which came to his knowledge, he employed an inquiry agent.

Henry Dickson, a private detective, spoke to finding two people living together in Plein-street, Woodstock, as Mr. and Mrs. Thomas. She referred to Mr. Thomas as her husband. The woman proved to be the plaintiff's wife. Witness went again, when Mr. Thomas was at home. Mrs. "Thomas" was in bed suffering from neuralgia. Witness took certain snapshots of Mrs. Thomas (produced).

By Maasdorp, J.: He did not think the woman was aware that he was taking her photograph. She thought he was taking a photo of the child simply.

James Platt, landlord of the house, said that he let the house to the defendants on the understanding that they were married. The rent had been paid by both of them at different times. The snapshot

photograph of Mrs. "Thomas" was a good one.

Plaintiff, recalled, said he was willing that the child should remain with its mother.

Decree of divorce granted, the second defendant being ordered to pay costs.

DORAN V. DORAN.

This was an action brought by Maud Elizabeth Doran against her husband, Charles Henry Doran, for divorce on the ground of his adultery with one Frances Stanley. Mr. Upington was for the plaintiff, and the defendant was not represented.

The declaration set forth that the parties resided in Cape Town, and were married in community of property there in October, 1900. On the 25th August, 1903, the Supreme Court granted a decree of restitution of conjugal rights against the plaintiff, cause to be shown by the 15th October why a decree of divorce should not be granted, the plaintiff to have custody of the child pending a further order of Court. About the 2nd September, 1903, and at Sir Lowry-road, the defendant committed adultery with one Frances Stanley, and the plaintiff now claimed a decree of divorce, forfeiture of all benefits accruing under the marriage in community, custody of the minor child, and any other child which might be born of the marriage.

Mr. Upington said that at the last trial the plaintiff sued the defendant for judicial separation on the grounds of cruelty, but the Court held that there was not sufficient evidence, and found for the defendant in his claim in reconvention for restitution of conjugal rights.

Maud Elizabeth Doran (the plaintiff) said that she sued her husband for judicial separation, and judgment was given for the defendant in his claim in reconvention for restitution of conjugal rights. Before the return day, however, she obtained certain information, and her father employed a certain Mr. Karie, a private detective. She claimed custody of the child and any child that might be born of the marriage.

Frances Stanley, a Colonial girl, said that last month she went to a shop in Sir Lowry-road, where she met the defendant in the present case. That was the first time she spoke to him, and subsequently the defendant came out of the shop and followed witness down a lane, where the defendant brought her to a house, and adultery took place. She was met by Mr. Karie, who said except she told him everything he would run her in. The photograph produced was that of the defendant.

Henry Ford Karie, private detective, said he was employed to watch the defendant, and for a week witness himself had been watching him. On the 3rd September he was outside the shop, and saw the last witness come out of a lane in the neighbourhood of the shop. Witness followed her and asked her what business she had there at that time of night, and she handed him over the five shillings paid to her by the defendant, and told him what had occurred.

Decree of divorce granted, plaintiff to have custody of the children of the marriage, forfeiture of benefits to be declared, and the defendant to pay costs.

OHLSON V. OHLSON.

This was an action for judicial separation brought by Sarah Ohlson against her husband, Henry William James Ohlson, on the ground of cruelty. Mr. J. E. R. de Villiers was for the plaintiff, and the defendant was not represented.

The declaration set forth that the parties were married in community of property at East London in September, 1882. Since 1885 they had resided at Claremont, and there were five minor children of the marriage. In August, 1903, the defendant cruelly treated the plaintiff by kicking her, and during the past four years he had only contributed £80 towards her maintenance. He was of very intemperate habits, and of late had been getting worse. Plaintiff claimed a decree of separation, custody of the children, and maintenance for herself and children, in lieu of which she should be declared sole owner of the household furniture, with costs of suit.

Sarah Ohlson (the plaintiff) said that there was no ante-nuptial contract executed between defendant and herself. The defendant first ill-treated her in 1896, when he beat her in a shop at Claremont. In August last he came home very noisy, and when the plaintiff remonstrated with him he threatened to put her through the window, and kicked her. During the past eight years the

defendant had been very intemperate, and latterly he had been getting worse. During the last four years he had contributed about £80 towards the maintenance of the family. She kept a boarding-house, and all the furniture and effects had been bought out of her money. The defendant would not leave the house.

[Maasdorp, J.: Where is he now?]

Witness: He is laid up with rheumatics at Claremont.

Is he sober?—He is sober this morning, but he was not yesterday.

Willie Ohlson, son of the last witness corroborated the plaintiff in regard to the ill-treatment in August last.

Frances Taylor said she remembered that on the 16th August last the defendant struck the plaintiff with his fist outside the house. He was of very intemperate habits.

Decree of separation granted, the community of property suspended, plaintiff to have custody of the children, and the furniture awarded to the plaintiff by way of maintenance, and defendant to pay costs of suit.

GENERAL MOTIONS.

JACOBSON V. COLONIAL GOVERNMENT.

This was an application on behalf of the defendants in the above action for an order compelling the respondent to furnish security for the costs.

The affidavit of the applicant's attorney set out that when an appearance had been entered by the defendant in the action a letter was sent to the plaintiff's attorney asking him to furnish satisfactory security for costs should the plaintiff lose the action. On June 2 plaintiff's attorney wrote, guaranteeing £40 and undertaking to arrange any further security, while the case was proceeding. It was found that this sum would be inadequate to cover the expenses entailed through bringing witnesses and collecting evidence from Port Elizabeth and De Aar, and the plaintiff's attorney was asked to guarantee an additional £100 towards the costs.

The affidavit of the plaintiff's attorney set out that he had written to their local agent in the Transvaal, but he had not yet received a reply. Owing to the short notice arrangement could not be made in time.

Mr. Schreiner, K.C. (for applicant): The defendants had no right to set down a case for trial unless they were prepared to give security.

Mr. Close (for respondent): I quite admit that security should be given; but we have not had sufficient notice of this application.

[Maasdorp, J.: As to costs: are you prepared to pay to-day's costs?]

Yes, we can arrange that.

Mr. Schreiner: I would suggest £100 as security.

Order granted, the respondent to give further security in the sum of £100 by the 23rd inst. to the satisfaction of the Registrar, failing which the setting down of the case for trial to be discharged, the respondent to pay costs.

DUMBLETON AND OTHERS V. BARNARD.

Mr. M. Bisset moved for an order joining Donald Arderne McIntyre in the motion of Dumbleton and Others v. Barnard and Another, for the delivery of certain deeds of transfer.

Order granted.

DUMBLETON AND OTHERS V. BARNARD AND ANOTHER.

Mr. M. Bisset moved for an order compelling the respondents to deliver up certain deeds of transfer in order that an amended title deed of a farm might be obtained. The parties resided in the district of George, and the applicants represented three-fourths of the aggregate property.

The matter was ordered to stand over for the production of evidence as to whether the documents were really necessary.

Subsequently Mr. Bisset produced a certificate from the Surveyor-General's Department to the effect that the title deeds would be necessary before the amended title could be drawn up.

An order was granted requiring respondents to produce and submit to the Surveyor-General their deeds of transfer of their shares of the farm before November 15, for the purpose of an amended title being granted, respondents to pay costs of the motion.

ESTATE LUCKE V. ANDERSON.

Mr. Rainsford moved for leave to sue by edictal citation, for the purchase price of certain land. The petitioner was George William Steytler, sole trustee in the estate of Edward Lucke, and the petition set forth that in November, 1901 certain plots of land in the estate were sold by public auction at D'Urban-road. A certain purchaser, named Anderson, who gave his address as Wynberg Station, had failed to pay the purchase money of sale, and all efforts to trace him had failed.

Leave to sue granted, returnable December 12, personal service to be effected, failing which one publication in the "Gazette" and "Cape Times."

AFRICAN BANKING CORPORATION V. HILLS AND OTHERS.

Mr. McGregor, for the applicants, moved for an order in terms of a petition, consented to on the part of the defendants' attorneys, setting forth that it had been found unnecessary to take certain evidence in London on the case, and praying that the trial might be set down for an earlier date than November 12.

Trial ordered to be set down for October 28.

Ex parte STUTTAFORD AND ANOTHER.

Mr. Schreiner, K.C., moved for an order, supplementing an ante-nuptial contract by a clause whereby the petitioner settled on his wife Ada Stuttaford (born Steele) the sum of £3,000, to be invested for her yearly income, the survivor to receive the capital on the death of either husband or wife.

Order granted, in terms of prayer, without prejudice to the rights of any creditors.

Ex parte FAGAN.

Mr. Buchanan moved as a matter of urgency for a temporary interdict restraining Jorgensen and Svendsen, of Somerset West, from removing any stone, sand, or other material, or making any excavations from a certain piece of land at Somerset West, sold by the petitioner to the said firm. The petitioner stated that he sold portion of a property to the firm for £400, that no part of the purchase money had been paid, that the said firm had made a deed of assignment to Mr. E. R. Syfret for the benefit of their creditors, that Mr. Syfret had consented to the cancellation of sale, that the sale had accordingly been provisionally cancelled, but that the said firm refused to quit the property, and had been busy removing stone, sand, and other materials from the property.

Rule *nisi* granted, calling upon the respondents to show cause why they should not be interdicted as prayed, on Thursday, the 22nd inst., rule to operate meanwhile as an interdict.

Postea (September 22).

The rule was made absolute.

THE MASTER V. CHAPMAN.

Mr. Howel Jones moved for an order requiring the respondent, as trustee in the insolvent estate of Richard Joff, to file a liquidation account and plan of distribution.

Order granted.

COLONIAL GOVERNMENT V. PADDON.

Mr. Howel Jones moved for the attachment of certain property *ad fundandam jurisdictionem*, and for leave to sue by edictal citation. The petitioner was the Assistant Treasurer of the Colony, and he sued the respondent in his capacity as trustee for and on behalf of the British Bechuanaland Syndicate for £39 7s. 6d., in respect of certain quitrent for land situate in Kuruman, which had not been paid since 1895. It appeared that the said Paddon resided in London, but his exact address was unknown. The company was stated to have a certain address in London.

Order granted for the attachment of the property, with leave to sue by edictal citation, citation to be made returnable on the 12th June, personal service to be effected, or at the address given in the petition.

JOHNSON V. VAN DER WALT. { 1903. Oct 16th. „ 19th.

Rebel—Booty—Spoliation—*Onus probandi.*

During the late war the Military had seized a certain horse, the property of J. No receipt

was given to show that the horse had been duly "requisitioned." After passing through various hands the horse was sold by one of the military to W. J. had joined the enemy before the horse was seized, but there was no evidence to show that the military were aware of this fact at the time of seizure. After peace had been proclaimed, J. had taken his horse out of W.'s custody, whereupon W. sued him in the Magistrate's Court for re-delivery of the horse (or its value) and damages. The Magistrate gave judgment for the plaintiff.

Held on appeal (*1*) *that the private property of alien enemies, or even of rebels, is not "booty."*

(*2*) *That the* onus *lay on W. to show a good title to the horse, and that as he had failed to discharge that* onus, *and the horse was therefore (to all appearance) illegally seized, J. was* spoliatus.

(*3*) *That the appeal must, therefore, be allowed with costs.*

This was an appeal from a judgment of the Acting Resident Magistrate of Colesberg, in an action brought by the present respondent against the appellant for delivery of a blue pony, or its value, £16, and, in addition, the sum of £4 damages for wrongful seizure. The Magistrate gave judgment for the plaintiff for £16, or the return of the horse, with costs.

From the evidence led in the Court below, it appeared that during the late hostilities the horse in question was taken by Colonel Crabbe's column from the farm of the defendant's father, in the district of Steynsburg. It subsequently passed through various hands, and was ultimately bought by the plaintiff from Sub-Inspector Powell, of the Cape Police, to whom it had been given by Mr. Hill, an intelligence officer, in consideration of services he had rendered to Mr. Hill. On the 29th April last the defendant appeared on the plaintiff's farm at Vlakfontein, and saw the pony, and claimed it as his own. Plaintiff protested that he had no right to take it away, but the defendant insisted that the animal was his property, and he removed it. The defendant, in his evidence, said the horse was presented to him by his father, and it was removed by the military while he was absent on commando. He was a Colonial, not a burgher, and he joined the Boers on the 15th January, 1901. The defendant's father said that the horse was his son's, that it was taken by Colonel Crabbe's column along with 22 other horses, and that he had got two horses back from the Protection Camp at Graham's Town. Witness had put in a claim for the horses; his claim at first included the defendant's horse, but when his son got back the animal he instructed his attorneys to amend the claim.

The Magistrate, in his reasons for his judgment, said there was some doubt whether the horse in question was taken for protection purposes. It was probable, he thought, under the circumstances, that the horse was taken for that purpose. The horse was subsequently placed in the Remount Camp by the military, and passed through the hands of others. If the horse had been taken for protection purposes, in view of the decisions in the cases of *Coetzee* v. *Prinz* and *Visser* v. *Van Zyl* (13 C.T.R., 284), he would have found accordingly. He did not, however, consider that the defendant should benefit by the falsehood told to the military authorities by the defendant's father, and accordingly he gave judgment for the plaintiff.

Mr Burton (for the appellant) said it was not apparently found that the claim for damages for seizure was established. As the case was brought the onus of proof lay, no doubt, on the defendant to defend his seizure of the horse, and he had to show that the horse was his in the first instance. But when once he established that, he did not think there could be the slightest question upon the evidence that this horse, to whomsoever it passed afterwards, was in the first instance his property. Then he submitted the onus was shifted upon

the plaintiff to show that his title to the horse was a good one. The Magistrate seemed to have taken rather a peculiar view of the circumstances. Their lordships would see that he found that the horse was taken by a military column from the farm of the defendant's father, and he also said clearly that there might have been some doubt as to the purposes for which the military authorities took the horse, but he was inclined to believe, seeing that two horses taken at the same time were recovered from the Protection Camp, that the lot were taken for the purposes of protection, and he said if that had been the issue in the case he would have found accordingly. He then said if the military had known that the defendant was admittedly a rebel at the time, actually away on commando, they would have had the right to take the horse belonging to him as booty. The Magistrate said that, whatever their evidence was, they must read that legal right into the action of the military. Counsel submitted that the Magistrate had erred in that finding. He quoted, in support of his contention, that appellant was entitled to the return of his horse, the case of *Coetzee* v. *Prinz*.

Mr. Upington said that in the case of *Coetzee* v. *Prinz* he appeared for the appellant, and that case turned on two very essential differences from the present case. In the first place, the appellant was not a rebel, and in the second place, alienation of the stock took place after the declaration of peace, and at a time when there were no hostilities. In the case now before the Court the appellant actually was on commando, he was an enemy, and he was not entitled to the privileges of a man who had sat still. The military seized the horse at a time when it was the property of an enemy.

[Maasdorp, J.: How does the present case differ from the case of *Visser* v. *Van Zyl*?]

In the case of *Visser* v. *Van Zyl* it was found that the horse belonged not to the rebel, but to his father.

[Maasdorp, J.: The question of whether the appellant was or was not a rebel should be left out entirely, and the case should be argued quite apart from that point.]

I submit that it did not matter what the military knew, or what they did not know when the horse was taken.

[Maasdorp, J.: Intention is everything.]

The military took possession of the animal and put their brand on it.

[Maasdorp, J.: But was it taken by requisition?]

It was not taken by requisition. I contend that the horse was taken from a rebel by way of capture or booty, and that any military officer could have taken the horse in question, without giving any receipt or any kind of acknowledgment. The point is, had the military the right to take the horse. I maintain that it was immaterial what their knowledge was at the time of capture; if circumstances came to their knowledge afterwards that justified their action that was sufficient. I submit that the respondent's predecessor-in-title had a good title to the horse, and that, apart altogether from the fact of whether the appellant was a rebel, the horse was properly the property of the respondent.

Mr. Burton was heard in reply.

Cur. Adv. Vult.

Postea (October 19).

Maasdorp, J.: In this case, which is an appeal from the Resident Magistrate of Colesberg, the plaintiff in the court below claimed from the defendant a horse, which he alleged was his property, or the sum of £16, the value thereof. It appears that the defendant deprived the plaintiff of the peaceful possession of the horse in a way which amounted to spoliation, but the question of spoliation is not now raised, except for the purpose of deciding upon whom the onus of proof rested. Under the circumstances, it is incumbent upon the defendant to prove that the horse was his, and he has succeeded in showing upon very clear evidence to the satisfaction of the Magistrate that in 1901 it was his property. Thereupon it became necessary for the plaintiff to prove that the defendant was legally divested of the ownership, and that it vested in him. He produced evidence to show that he bought the horse from Powell, who had obtained it from Hill, an intelligence officer, for services rendered by him. Hill in his turn had got the horse from Captain Beadle, a remount officer, in exchange for one of Hill's horses. The question now arises whether Captain Beadle had any legal right to dispose of the horse to Hill. At the

end of 1901 the animal was running on the farm of the defendant's father, and was removed from there by the military to a protection camp. The next time it was seen by the witnesses was when it was given as a remount by Captain Beadle to one of Hill's scouts. The case set up by the plaintiff was that the horse was properly and regularly requisitioned by the military authorities for military purposes, and that the defendant thereupon lost the ownership in it, while he became entitled to compensation in respect of such requisition. If the plaintiff had succeeded in proving this he would have been entitled to recover. There is, however, no direct evidence that such requisition ever took place. Hill says that this horse, being serviceable, would never have been taken to the protection camp, and would have been taken into remount at once. But the defendant's father says the horse was taken for protection into a protection camp by Col. Crabbe's column, and that he got a receipt to that effect. The Magistrate found it proved upon the evidence that it was taken into a protection camp. Hill also says that serviceable horses brought in by farmers used to be taken into remounts, and receipts given to the owners. No such receipt was given in this case. The question remained whether in the absence of direct evidence the Court could take the fact that the animal was in the possession of a remount officer, and bore the military brand, and was dealt with by him for military purposes, as proof that it had been requisitioned. The Magistrate does not find as a fact that the horse was requisitioned, and I do not think we can, upon the evidence, find that there is proof that it was. The defendant was consequently not divested of the ownership in it by way of requisition. The Magistrate has, however, given judgment for the plaintiff on another ground. It appears that the defendant was a rebel in active service with the enemy during the war, and the Magistrate held that if this fact had been known to the officer in command of the column, the horse would certainly have been commandeered, and on its arrival at Steynsburg, would have been placed in the remounts, as actually happened eventually. And I am of opinion the Magistrate was wrong in basing his judgment upon his opinion as to what the military would have done if they were aware of facts of which they happened to be ignorant. In dealing with the acquisiton of property, the question of intention is everything; and if it does not pass as the result of the actual dealings between the parties, it cannot be allowed to pass, because it would have done so if some other transactions had intervened. It is, therefore, not necessary ,now to consider the legal effect of the Magistrate's finding, and I shall only observe that it raises an important question. The private property, even of rebels or alien enemies, cannot be dealt with by a military officer in the cavalier manner which the Magistrate seems to regard as proper and regular. The disposal of such property depends on laws and principles which require careful consideration, but upon which we are not now called upon to decide. The plaintiff having failed to prove that the defendant was ever divested of his property in a manner recognised by the Court as effectual, the appeal must be allowed, and the Magistrate's judgment must be altered to one of absolution from the instance, with costs in this Court and in the Court below.

Kotzé, J., said he was of the same opinion. There was no satisfactory evidence of the requisition in the ordinary sense of the term by the military of the horse, and consequently of the change of ownership.

[Appellant's Attorneys: Syfret, Godlonton and Low; Respondent's Attorney: G. Trollip.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

REVIEW.

REX V. ABRAHAM CAROLUS. { 1903. Oct. 19th.

Magistrate's ordinary jurisdiction.

A Magistrate who convicts a prisoner of stock theft after trying such prisoner under his

ordinary jurisdiction cannot impose any term of imprisonment exceeding three months.

Kotzé, J.: This case came before me as judge of the week of the King against Abraham Carolus, in which the prisoner was charged before the Resident Magistrate of Prince Albert with the theft of two goats. The Magistrate, on a plea of guilty, and after taking some evidence, found him guilty, and sentenced him to a year's imprisonment with hard labour. The Magistrate, according to the record, tried this case under his ordinary jurisdiction, and in the charge the accused was not charged with having violated or committed a breach of the Act 35 of 1893, but simply with the theft of stock, and, consequently, this must be treated as a case entirely under the ordinary jurisdiction of the Magistrate. Under his ordinary jurisdiction, he could only award a sentence of three months' imprisonment with hard labour, and not a sentence of twelve months' imprisonment with hard labour, which he could, under the Act 35 of 1893. The sentence must, therefore, be reduced to three months' imprisonment with hard labour.

GENERAL MOTION.

Ex parte BRADLEY.

Mr. Buchanan moved for the appointment of a provisional trustee in the insolvent estate of W. K. Saunders and Co., pending the election of a trustee by the creditors. Petitioner, who represented the South African Trading Co., said that Saunders and Co.'s estate was sequestrated on the 15th October, that insolvent was a carriage and coach builder, that he had plenty of work on hand, and that it was in the interests of the creditors that the business should be continued until the unfinished orders were completed, and that Messrs. Harry Gibson and George Wm. Steytler might properly be appointed provisional trustees, with power to carry on the business until the election of a trustee by the creditors.

Order granted as prayed.

SOLOMONS V. ROSENBERG. { 1903 Oct. 19th.

Malicious prosecution — Reasonable and probable cause.

The plaintiff had given to the defendant a certain cheque, and had by so doing obtained money from him. It was admitted that the plaintiff had no funds at the Bank to meet this cheque, and the Court found, as a fact, that the plaintiff had not informed the defendant of this. The defendant, finding the cheque dishonoured, had the plaintiff arrested, as he was about to leave Table Bay. The plaintiff was charged before the Magistrate with fraud and was acquitted. Plaintiff now sued the defendant for malicious prosecution and false imprisonment.

Held, *that as the defendant had not acted without reasonable and probable cause, judgment must be given against the plaintiff with costs.*

This was an action brought by Samuel John Solomons, commercial traveller, of Johannesburg, against David Rosenberg, boarding-house keeper, of Long-street, Cape Town, for £250 damages, for false and malicious prosecution and false imprisonment.

The declaration set out that on the 11th March, 1903, the defendant wrongfully, unlawfully, falsely, and maliciously, and without reasonable and probable cause, made an affidavit before a Justice of the Peace charging the plaintiff with fraud. He accused the plaintiff of attempting to defraud him of £5 10s., by inducing him to give the plaintiff the said sum for a cheque drawn by the plaintiff for that amount, by representing it to be good and available for the said sum, although the plaintiff knew that he had no funds in the bank to meet it. He was arrested, and charged with fraud, and brought up in custody before the Resident Magistrate at Cape Town. The defendant gave evidence in support

of the said charge, but the Magistrate dismissed the case on the following day, the 12th March, and discharged the plaintiff, who was proved not guilty. The charge was made against the plaintiff falsely, maliciously, unlawfully, and without reasonable and probable cause, and plaintiff had, in consequence, been much inconvenienced in his business, his trade and reputation having been injured. He claimed damages in the sum of £250.

The defendant admitted who the parties were, and also the statement as to the charge, but he denied that this charge was made maliciously or unlawfully, or without reasonable and probable cause.

Upon the foregoing pleadings, issue was joined.

Mr. Burton (with him Mr. Rainsford) for plaintiff; Mr. Buchanan for defendant.

Evidence was then called by Mr. Burton.

The plaintiff, Samuel John Solomons, a commercial traveller, at present of Johannesburg, said he was the manager for Messrs. W. J. Luyt and Co., paper merchants, of Cape Town and Johannesburg. He was also traveller for the firm. He first met defendant in Johannesburg in 1897. Plaintiff was then living with his mother. Rosenberg boarded with witness's mother. When the war broke out they all came down to Cape Town as refugees. Rosenberg and witness's mother set up a restaurant in partnership in Long-street. This did not last long. There were disputes as to the carrying on of the business. After the dissolution of partnership in 1900, the defendant continued to live in the same building; he had a shop below and a room upstairs. The defendant remained there until August, 1901, when witness left for Port Elizabeth. In the early part of that year, witness was pressed for money, through being out of work. In March he applied to the defendant for money. He asked Rosenberg to post-date a cheque for him for £5 10s. The cheque was dated 20th March. He explained his position to the defendant. He told him that he had no money at that time, but he expected to have some money in a few days; he had £30 to £40 due to him from a friend in Port Elizabeth, which would enable him to meet the cheque. When the time came for the cheque to mature he had not the money. He saw the defendant, and asked him to hold payment of the cheque over for a few days. He promised to see that the cheque should not go through. The defendant afterwards told him that the cheque had been returned to him. He asked defendant to keep the cheque until he had money to redeem it. He told the defendant the day he was going away to Port Elizabeth that he was leaving, and that as soon as he had sufficient money he would send it round to him. He remained in Port Elizabeth until June, 1902. Then he left for Johannesburg, and in February of this year he returned to Cape Town. He met defendant at the house of his sister, Mrs. Bernstein, where a gathering was being held for circumcision. He told defendant he would pay the money before he went away. He stayed in Cape Town about a month. On the 11th March he was going to Port Elizabeth by steamer. He met the defendant, and told him that he was going. He asked the defendant to meet him at his sister's house at lunch, when he would pay him the money. He drew £20 for his travelling expenses. The defendant did not keep his appointment. He left the money with his sister with instructions to be paid over to Rosenberg, when he called. Witness went to the steamer at three o'clock. When aboard he was arrested by a detective, and taken to Wale-street, and was subsequently removed to Roeland-street Gaol, where he was detained until the following morning. He was charged before the Magistrate next morning, and although defendant gave evidence, witness was acquitted. He was, as a consequence, delayed in his business rounds. He lost his passage money, £3 10s. He had to go to Port Elizabeth by train, and was four days late in his arrival. He lost several orders on his rounds through being late. He lost an £180 order with Mr. Brewster, of the "Port Elizabeth Advertiser." He would have had 2½ per cent. commission and expenses on that order. He lost an order at Cradock for £68, and for a lot of stuff at Bloemfontein.

Cross-examined by Mr. Buchanan: He had not paid the debt. The money had been offered to Mr. Rosenberg, but he had refused to give up the cheque. He got a statement in February, 1901, from

the bank, showing that he had only 3s. 9d. to his credit there. He averred that the defendant told him in March that he had deposited the cheque with the bank. He could not send any money from Port Elizabeth, when he went there in August, 1902, because he was laid up with typhoid fever. On the day when he was to leave for Port Elizabeth in March last, he had money to pay the debt, but when he saw the defendant he had not the cash in his possession, and he arranged with the defendant that he should call at his sister's for it. His brother was in difficulties at the time when he borrowed the money, but he did not know that he used the money for the purpose of helping his brother. He was a compositor by occupation. He was not a bookmaker; he was not a "punter" on the racecourse. The money had been ready ever since last March if Rosenberg had only been willing to give up the cheque.

By the Court: The defendant did not appear to be displeased with him before witness was arrested. They were not on unfriendly terms.

Sarah Bernstein, sister of the plaintiff, said she knew the defendant well. Prior to her marriage, the plaintiff and the defendant saw one another frequently. On the day of her brother's arrest, he gave her £5 10s., but Mr. Rosenberg did not call for the money. She knew nothing of the offer her brother made to Rosenberg after his arrest, but plaintiff himself knew of that.

Cross-examined by Mr. Buchanan: Witness was not in London in March, 1901. The plaintiff did not want the £5 10s. to take his brother out of trouble. When her brother was arrested, she sent her husband down to the defendant to pay the money, but the latter would not give up the cheque.

Jacob Bernstein, husband to the last witness, said that prior to his brother-in-law's arrest, he remembered the defendant saying that he had to get £5 10s. for the plaintiff. This took place about a week before the arrest. When the plaintiff was arrested, his wife gave witness £5 10s. to take to Rosenberg. The defendant was willing to take the money, but he would not return the cheque. When the defendant was asked to withdraw the case, he replied, "Serve him right." The defendant further refused to give a receipt for the money. Rosenberg was informed that the money would be at witness's house any time he wanted it.

Cross-examined by Mr. Buchanan: He did not give any evidence before the Magistrate. At the ceremony, witness did not ask the defendant not to say anything about money matters, as it was against "religion."

Harris Trafford Moorhouse, bookkeeper to Messrs. Luyt, produced the books, showing two payments made to the plaintiff of £10 each for travelling expenses.

Mr. Burton closed his case.

Mr. Buchanan called

Henry Percy, ledger-keeper at the A.B.C. Bank, who identified the cheque, which was presented to the bank after the 26th March. The cheque was sent back to the Bank of Africa marked "Refer to drawer." The plaintiff opened an account in December 1900, and on February 13 his balance was 3s. 9d. The account was closed the following December.

David Rosenberg, defendant, said that previous to the war he met the plaintiff in Johannesburg. He never lent the plaintiff a shilling; in fact, he did not trust him. Witness was never in partnership with plaintiff's mother. Plaintiff came up to him and asked him to cash a cheque for £5 10s., telling him that he had plenty of money at the bank. That was about 3.30 p.m. on 26th March, and the plaintiff explained that he wanted the money, as his brother was in trouble. Next morning, when the cheque was presented, a clerk at the A.B.C. Bank said that there was no money. Shortly afterwards, when witness went up to the house, plaintiff's mother ordered him out. A couple of days later the plaintiff said that he had put money in the bank, and that if witness would call the next morning, the cheque would be honoured. The cheque was again presented, with the same result. Witness never saw the plaintiff between March and August, and at that time his sister was in England. When the "solemn ceremony" at Bernstein's house was over, the plaintiff again promised to pay the money next day, but he failed to keep the appointment next day. Later on witness saw him in Wale-street, and invited him to the Police-station to settle it, but the plaintiff persuaded him to wait until nine o'clock that night. When witness heard that the plaintiff

was leaving Cape Town, he lodged a complaint with the C.I.D. The affidavit was sworn to about one o'clock, and there was no arrangement that witness should be at his sister's house at that time to receive the money.

Cross-examined by Mr. Burton: Witness would not trust anybody. He wanted everything paid in advance. Witness would admit that he was very quick with his policeman. He presented the cheque at the A.B.C. Bank on the 1st April, and he went again on the 4th to see if there was any money to the plaintiff's credit. After he gave the plaintiff the money, he did not see him again until the evening before he presented the cheque. He would not have given the plaintiff a post-dated cheque. He was not on such friendly terms with the plaintiff as to have given him a post-dated cheque. His daughter looked at the almanack, and told him that he need not be frightened; he could go the following day and get the cheque cashed. The reason why he took the proceedings was that he wanted his money. He went to the police and lodged a complaint, and the Superintendent of Police said he would investigate. As a matter of fact, he wanted to run the plaintiff in two days after he received the cheque. No single relative of the plaintiff's ever came to him and offered him a sixpence. He did not take legal advice before he lodged the prisoner in gaol. He had not taken steps to enforce payment of the debt since the proceedings, because he had been unable to obtain the plaintiff's address.

Re-examined: He left the matter of the prosecution entirely in the hands of the police.

By the Court: He had never been in partnership in business with the plaintiff's mother. There was no appointment made for him to go to the plaintiff's sister for the money.

Rose Karlish, daughter of the defendant, said she lived with the plaintiff's mother in Johannesburg for about a fortnight, and she had no knowledge of any partnership with the latter. She remembered the plaintiff asking her father to change a cheque in order to release his brother, who was in trouble. The plaintiff said he had plenty of money in the bank. The cheque was given on the 26th March. She remembered her father running back from the bank, and saying "Oh, Rosie, there is no money in the bank!"

Cross-examined by Mr. Burton: The plaintiff's mother said when defendant called, "You have locked one son up, and now you want to lock another up." "Sam" (plaintiff) never took her to the Gaiety.

Joseph Rosenberg, son of the defendant, said he was with his father when they met the plaintiff in Wale-street on the day of his arrest. The defendant said, "We are outside Wale-street Police Station, and we had better go in." The plaintiff made no mention of his sister having the money.

Cross-examined by Mr. Burton: The plaintiff was not at the ceremony on the second occasion.

Hermon Karlish, son-in-law of the defendant, said that he remembered the defendant speaking to the plaintiff after the prayers were read at the ceremony. The plaintiff promised to put in an appearance at the postponed function, but failed to do so.

Charles Wm. Fisher, detective, produced the complaint laid by the defendant at the C.I.D. After the affidavit was sworn to, witness went down to the boat, and arrested the plaintiff. After arrest the plaintiff said he had left the money at his brother-in-law's house, and that the defendant knew the cheque was a post-dated one.

Cross-examined by Mr. Burton: Witness would read from the complaint that the defendant had not seen the plaintiff until shortly before the arrest.

Mr. Burton, having been heard in argument, the Court intimated that it would be unnecessary to hear Mr. Buchanan.

Maasdorp, J.: The plaintiff in this case sues the defendant for the recovery of £250 as damages sustained by him because of a malicious prosecution instituted against him by the defendant. The plaintiff complains that criminal proceedings were taken against him by the defendant maliciously and without reasonable and probable cause. It appears that the charge laid in the criminal proceedings was that the plaintiff had fraudulently given out that a cheque for the sum of £5 10s. upon the African Banking Corporation, which he then delivered to the defendant, was a good and available cheque, and of the value aforesaid

that there were funds in the bank to meet the said cheque, and that it would be paid by the bank on presentation, and by this means obtained from the defendant the sum of £5 10s.; whereas the plaintiff well knew that the said cheque was not a good and available cheque of the value aforesaid, and that there were no funds at the bank to meet the said cheque. Now, the plaintiff alleges that this charge was made against him without reasonable and probable cause. If the plaintiff succeeds in proving that the defendant had no reasonable and proper cause for making this charge, he ought to succeed. If, on the other hand, the defendant proves that he had reasonable cause, the defendant ought to succeed. Now, it seems to me, that the evidence upon which the Court has to decide that point is of the most conflicting character. The plaintiff and the defendant contradict each other on almost every little incident from the initial stages of the transactions that took place between them until the moment of the arrest. If we accept the evidence of the plaintiff then I think it is clearly established that at the time when he entered into those transactions with the defendant, he fully explained all his circumstances to him, told him what his pecuniary position was, and said he required help, because he was in difficulty. He told him that he had no money at the bank, but that he thought he would get a remittance from Port Elizabeth shortly, and would then be able to meet this cheque. If all that was explained by the plaintiff to the defendant, then it is quite clear that the defendant could not have been under the belief that there were funds in the bank to meet the cheque. The plaintiff further proceeds to say that he and the defendant had for a long time been on a friendly footing, and he believed that was the motive why the defendant assisted him in this matter; that after this transaction had gone through and the cheque delivered to the defendant they met on several occasions, on each of which the plaintiff again explained his difficulty, and every time he satisfied the defendant that his intentions were *bona fide*, and the defendant was prepared to wait. Now, it seems to me that if that case was made out by the plaintiff there could not have been the slightest grounds for believing he was guilty of any fraudulent intention, but, on every point, he is contradicted by the defendant. The defendant says that the relationship between them was that of the barest acquaintanceship, that he hardly ever spoke to the plaintiff at all, that the plaintiff came to him on the 26th March, and asked him for assistance, because he was pressed in consequence of some difficulty into which his brother had got, and he expressly told the defendant if he proceeded to the bank on the next morning he would find funds there to meet the cheque, and the only reason the plaintiff did not go himself was because it was after bank hours. There would seem to be a direct conflict of statements between the plaintiff and the defendant, and the Court has to decide which statement to accept as true. As to the circumstantial evidence in this case, there is very little to guide the Court in the documentary evidence. I thought at one time that the counterfoil being dated the 23rd March and the cheque 25th March was corroborative of the plaintiff's evidence that he gave the cheque on the 23rd, and then explained that it had been post-dated for the 26th, because there was no money in the bank. But that circumstance itself is not of sufficient importance to outweigh others which are unfavourable to the plaintiff, which I shall mention afterwards. Then there is some documentary evidence which is favourable to the defendant's case. The defendant says that he was disappointed in not obtaining the money on the 27th, that he met the plaintiff on 31st March, and then complained to him that he had deceived him, and that the cheque had been dishonoured, whereupon the plaintiff explained that there was no money at the time, but that there would be money on the following day. We find on that day the cheque was placed by the defendant in the hands of his bank for the purpose of presentation to the plaintiff's bank, and we find that, according to the deposit receipt, the presentation of the cheque took place on the 1st April. That circumstance, I think, corroborates the statement of the defendant that on the 31st March he did press the plaintiff, and that the plaintiff then told him that the money would be in the bank the following day. Now after observing the manner in which the

defendant gave his evidence, I think one cannot help coming to the conclusion that the defendant, if any money was due to him, would certainly be very anxious to obtain it, and that he is likely to press for the payment of that money, and if at any time he thought his disappointment arose from any dishonest action, that he would be doubly anxious to obtain his money. However, we have the plaintiff saying that, although he disappointed the defendant on four separate occasions, that on each occasion the defendant continued to be on friendly terms with him, and never expressed his displeasure. It am not prepared to accept that statement. I don't believe that on several occasions the plaintiff met the defendant and explained his difficulty, and on each of these occasions the defendant was satisfied to delay the settlement of this account; and if once upon that ground the evidence of the plaintiff is set aside as unreliable, then, I think, there will be little difficulty in arriving at a correct conclusion upon this case, because then we can turn to the evidence of certain other witnesses who directly corroborate the statement of the defendant. I particularly allude to the evidence of his daughter, which I am prepared to accept as true. The vivid description she gave of the events as they took place on the 26th March and the following day impressed me as a circumstance which established the truthfulness of her evidence. She says on the 26th March for the first time the plaintiff came to the defendant and obtained the money on the cheque, which was presented and dated the 26th March. She referred to the almanac to see if the money could be obtained at once, and then she told her father he could obtain his money the next morning, and then what happened the next morning seems to be strongly corroborative of the plaintiff's statement. She says he came back from the bank in a very excited condition, when he found out that the £5 10s., to which he seems to attach very great weight, was not forthcoming, and at once he proceeded to look for plaintiff in his mother's house, and that there was unpleasantness. If the statement of the daughter is accepted on that point, that upsets the evidence of the plaintiff on the most material point in the case, and I therefore come to the conclusion, on the whole, we must decide that at the time when defendant made the charge, he had good grounds for believing that the plaintiff intended to commit a fraud by giving out that there were funds in the bank to meet this cheque, and that he knew perfectly well there were none. Under the circumstances, judgment must be given for the defendant, with costs.

Kotzé, J., concurred.

[Plaintiff's Attorneys: W. G. Coulton; Defendant's Attorneys: Herold and Gie.]

LABUSCHANGE v. MULLIGAN. 1903. Oct. 19th. Nov. 23rd.

Costs—Appeal.

The plaintiff having suffered much inconvenience from the public trespassing on his land, gave public notice that a certain road over his land was not a public road, and he placed an obstruction of stones across the road. The defendant's son, however, drove the defendant's wagon and oxen over the road, and the plaintiff brought an action in a Magistrate's Court for trespass against the defendant, who pleaded several exceptions and the general issue. The Magistrate gave judgment for the plaintiff for one shilling damages, but ordered each party to pay his own costs.

Held on appeal, *that as the plaintiff had properly brought his action to assert a substantial right and had succeeded, the Court below ought to have awarded him his costs.*

This was an appeal from a judgment of the R.M. of Dordrecht in an action brought by the plaintiff for £5 damages for trespass over a certain road on his farm, the plaintiff being awarded nominal damages of 1s. The facts sufficiently appear from the Magistrate's reasons, and from the judgment on appeal.

The Magistrate, in his reasons for judgment, said that during the late war most of the fences around the farms in that district, where the military operations were carried on, were destroyed, and in many instances new roads were made across farms, and where fences had not yet been restored, were still being so used by the public. Across the farm in question, there was a public road, but it was in a bad state of repair until recently, when the Divisional Council was able to resume its work in this connection. The new road across the farm made during the course of military operations was generally used by the public. The plaintiff, desiring to put a stop to its being so used, put a notice in the local paper, warning persons against trespassing, as the farm was about to be fenced, although no mention was made of this particular road. The plaintiff informed his neighbours and others of the notice that he had caused to be published, and all such persons as he acquainted discontinued using the road. He (the magistrate) did not take the evidence of the plaintiff on the record. The fact was, however, recorded that young Mulligan was caught by plaintiff travelling on the road, that Mulligan's wagon was the only one that passed over that road after the notice had been inserted, and that he did not at any time invite the defendant's attention to the notice in the paper. He (the magistrate) felt satisfied that young Mulligan drove over the road, believing it to be a proper road. Under the circumstances, he awarded the plaintiff the nominal damage of 1s. As nearly a month had elapsed till the issue of the summons, and as the plaintiff had admitted that the fact of the defendant being stopped had had the desired effect, he regarded the case as trumpery, and with a view of discouraging actions of this kind, he refused to make an order as to costs.

Mr. Upington for the appellant, Mr. Buchanan for the respondent.

Postea (November 23rd).

Mr. Upington said that trespass was proved. That was a wrong for which the plaintiff was entitled to, and did recover damages. The parties were on fighting terms, there had been no misconduct on plaintiff's part, and the Magistrate was not justified in designating this as a trumpery case. The fact that the damages were merely nominal was no reason for depriving the plaintiff of his costs. He submitted that the Magistrate should in the ordinary course have awarded the plaintiff his costs.

Mr. Buchanan contended that the Magistrate was quite right in his judicial capacity in making this order. The boy was driving across an accustomed road, and he was not aware of the prohibition issued by the plaintiff. He submitted that this was not a matter of asserting a right. Nominal damages were awarded, and the Magistrate was quite justified in ordering each party to pay his own costs. The plaintiff really did not prove any damages.

De Villiers, C.J.: If this had been a trumpery case of defamation of character, in which the Magistrate had seen fit to award only a shilling damages, I should certainly never have disturbed the finding of the Magistrate when he ordered that each party should pay his own costs; but the action was brought for the substantial purpose of preventing trespasses that were going on upon the plaintiff's land. The plaintiff had inserted notices in the newspapers warning the public against trespassing on his land. In spite of this warning, the defendant's son went over a road during the night time, notwithstanding some obstructions of stones which were across the road. Thereupon an action was brought for trespass against the defendant. The defendant did not tender anything, he did not admit his liability, he did not admit his trespass at all, but instead of that he took a number of exceptions. His agent excepted that the summons was bad and embarrassing for the following reasons: "That the name of the defendant's son is not entered, that the summons does not say who had occupation of the farm on the 9th August last, the date of the alleged trespass, and thirdly, that no specific damages are alleged"—trivial exceptions all of them—"and in case the above exceptions are overruled and not otherwise, then the defendant pleads the general issue." Under the general issue he puts the plaintiff to the proof of the allegation that a trespass had been committed, and of all the other allegations in the summons. It was, therefore, a very material issue for the Magistrate to have tried, whether in this case there was trespass. The Court continually remarks that a person whose rights are infringed should not take the

law into his own hands, and should have his case tried before a proper tribunal, and if such a person does so assert his rights, it is hard that he should have to bear the costs, not for a frivolous action, but for asserting a substantial right. The Magistrate therefore, in my opinion, erred in treating this as a trivial matter. No doubt the amount awarded was small, but the principle declared was important. The appeal will therefore be allowed, with costs in this court, and judgment entered for the plaintiff in the Court below for one shilling damages, with costs.

Kotzé, J., concurred.

[Appellant's Attorneys: Van Zyl and Buissinné; Respondent's Attorneys: Innes and Hutton.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZÉ.]

HENNESSY v. CORTIS. { 1903. Oct. 20th.

Principal and agent — Agent's authority.

This was an action brought by Alfred Theodore Hennessy, broker and estate agent, Cape Town, against Antonio Cortis, building speculator, Woodstock, to recover £24 2s. 2d., interest alleged to have been paid for and on behalf of the defendant at his request.

The declaration set out that on or about the 8th June, 1903, the plaintiff paid for and on behalf of the defendant at his request, £24 2s. 2d. The said sum was interest due and payable by the defendant on a certain bond for £1,000, recently passed by one C. W. J. Petersen in favour of one Mrs. Inglesby, which defendant took over from the estate of the said Petersen upon the purchase by the defendant of a certain property. The defendant took over the said bond, subject to the conditions contained in a broker's note, which provided that the purchaser was to pay all arrears of interest which may become due and payable on the said bond up to the date of transfer. The said sum was portion of the said arrears of interest. The request of the defendant to the plaintiff to guarantee the sum to Mrs. Inglesby was implied by verbal authorisations on the part of the defendant, and also by the plaintiff being employed by him as his agent. The defendant refused to pay the said sum of £24 2s. 2d., or any portion thereof.

The defendant, in his plea, admitted the statement as to the parties, but denied paragraph 2. He denied that the said sum of £24 2s. 2d. was due and owing by him to the said Mrs. Inglesby. He said that the allegations as to his transactions in respect of the bond in favour of Mrs. Inglesby were wholly irrelevant to the present case, and prayed that the same be struck out. He denied that he expressly or impliedly authorised the plaintiff to pay the said sum of £24 2s. 2d. to the said Inglesby. He denies the allegations in paragraph 4, save that he admitted he refused to pay the said sum or any part thereof.

The replication was general.

Mr. Rainsford for the plaintiff; Mr. C. W. de Villiers for the defendant.

Mr. De Villiers submitted that the third paragraph should be struck out of the declaration as wholly irrelevant to the case. The plaintiff claimed as agent of the defendant, and he said he paid a certain sum as and on behalf of the defendant at the defendant's request, while in paragraph 4 he said the request was implied by the general course of business.

Mr. Rainsford said that before the money was paid by the plaintiff, he first gave a verbal guarantee to Mrs. Inglesby, and before doing that he had a conversation with the defendant. Mrs. Inglesby had agreed to pay the balance due on this bond of £54 odd. The defendant authorised the plaintiff to give this guarantee, and after this verbal guarantee was given, the balance was paid over by the plaintiff for and as the defendant's agent. The case was that the money was paid by the plaintiff for and on behalf of the defendant at his request, as his agent.

Evidence was then called in support of the claim.

Alfred Theodore Hennessy, the plaintiff, said he was a broker and estate agent, carrying on business in Cape Town. He had had various business re-

lations with the defendant, who was a building speculator. He had acted as defendant's agent in raising money on mortgage. and also in buying on his behalf. In July, 1902, the defendant, through witness, bought a certain property, the document produced being the duplicate original of the broker's note. The defendant, he took it, understood the condition as to the payment of interest, witness having carefully explained the matter. The interest referred to was the arrears of interest upon the bond in the estate of Petersen, which should become due and payable. He had a conversation with the defendant. The property was bought for £1,150. The bond was security for a building loan granted for £1,000, upon which £954 or so had been paid out to Petersen. The balance of £54 odd had to be paid by Mrs. Inglesby. He told the defendant that it would be necessary to be responsible to Mrs. Inglesby for the interest, and the defendant authorised him to guarantee the interest. He gave the guarantee to Mrs. Inglesby's accountant, Mr. Arthur Syfret. The sum of £54 19s. 9d. was paid by Mrs. Inglesby to witness, who put it to Cortis's credit. He paid to Mrs. Inglesby's attorneys, Messrs. Scanlen and Syfret, £24 2s. 2d. as interest. The period covered by the interest was from the 26th May, 1902, to the 20th October. Witness had a second bond on the property. The defendant paid five months' interest on the second bond to witness. It was a recognised custom to pay money in this way on behalf of a client.

Cross-examined by Mr. De Villiers: He was a joint trustee in the insolvent estate of Petersen. He acted for the defendant, who was also a joint trustee, and he signed the broker's note. The defendant read the broker's note. He explained to the defendant very carefully what was meant to be conveyed by the clause rates and taxes and interest. He was unable to tell the defendant at the time what amount would have to be paid. He explained to the defendant that the bond had been passed on a certain date, and that no interest had been paid. Defendant would have some means of knowing approximately how much he would be liable for. He paid the interest on the 9th June, and although he had returned the defendant's papers to him before that date, he was bound to pay this interest in accordance with an arrangement made with Mrs. Inglesby's representatives, and which had been sanctioned by the defendant. He denied that so far as this payment was concerned his authority had been revoked. He was called upon by Messrs. Scanlen and Syfret to pay the interest.

Alfred Hugo, clerk in the office of Messrs. Syfret, Godlonton and Low, said that the amount of £24 2s. 2d. was guaranteed to the firm by the plaintiff, and that he was subsequently called on several occasions to pay the amount. Witness received a letter (produced), from Mrs. Inglesby, on or about June 5, in which she told witness to get the interest from Mr. Hennessy. Witness understood Mr. Hennessy represented the defendant Cortis in giving the guarantee.

Cross-examined: Hennessy did not give the verbal guarantee to witness. Witness did not ask for the written guarantee.

John Carmichael, plaintiff's head clerk, said that before the sale he pointed out to defendant that he would have to pay arrears of rates and so on, as provided in the broker's note. Witness was quite sure defendant understood he had to pay the interest on the bond. Witness did not know the amount until January. Defendant always intimated that if Hennessy paid the amount he would refund it.

Mr. Rainsford closed his case.

Mr. De Villiers called,

Antonio Cortis, the defendant, who said the property was first offered to him for £1,200, but eventually the price was fixed at £1,150. The broker's note was made out by Hennessy, who read it to witness. Witness could not read English. Previous to this they had discussed the conditions of sale, and no mention was made of arrears of interest or of rates and taxes. Witness did not understand he was undertaking to pay arrears of interest. He was prepared to pay rates and taxes and interest from the date of the bond.

[Maasdorp, J., handed a document, type-written in English, to the witness, and asked him to read it.]

The witness perused it, and in answer to the Court said he had read it.

[Maasdorp, J.: How, then, can you say you can't read English?]

Continuing, witness said that in November he received an account for £40

odd, which he paid. No mention of interest was made in that account. On the day transfer was passed (November 19) witness ceased to have any dealings with Hennessy. No mention was made of interest until the letter of the 1st May, to which witness did not reply.

Cross-examined: Witness took away a duplicate of the broker's note after Mr. Hennessy read it to him. He did not afterwards read it. Witness had paid arrears of interest for five months on another bond to the estate of Petersen. He took Mr. Hennessy's word for the accuracy of the account in which this arrear interest was included. Witness did not get any loan of £1,000.

In reply to Kotzé, J., witness said he had been speculating and dealing in land in Cape Town for the last ten years.

[Kotzé, J.: So that you know the practice very well?]

Yes, more or less.

Mr. De Villiers closed his case.

After hearing Mr. De Villiers and without calling upon Mr. Rainsford, the Court gave judgment for plaintiff for the amount claimed with costs.

Maasdorp, J.: In this case the plaintiff claims from the defendant payment of the sum of £24 2s. 2d., said to be due by the defendant to the plaintiff for moneys paid by the plaintiff as the defendant's agent at the special request of the defendant. Now, in a case of this kind it is not necessary for an agent to prove that the moneys which he is instructed to pay on behalf of the defendant are actually due. If he receives instructions to pay, and he pays, and it ultimately turns out that the debt was not due, that might raise questions as between the creditor and debtor as to the refunding of the money, but the agent would be entitled to be repaid what he had paid at the request of his principal. Now in this case it appears that upon the broker's note there is a condition that certain moneys due as interest shall be paid by the defendant. The plaintiff and the defendant had an interview, at which they seemed to come to the conclusion that this interest was due and payable, and the defendant, being under the impression that the interest was payable, instructed the plaintiff to pay. I am satisfied upon the evidence that is put before the Court that there was the clearest instruction given by the defendant that, in the first place, the plaintiff should guarantee payment of this money, and that when the money became due he should pay upon such guarantee. It seems that the plaintiff went to the defendant and explained to him that he could not obtain certain further advances for the purposes of expenditure on building unless the payment of the interest which, it was said by the agent, was due was guaranteed, and I think it is proved that the defendant thereupon told him that under the circumstances he authorised him to guarantee the amount. The plaintiff was at the time the agent of the defendant for transacting his business in the matter of purchasing properties and raising mortgages, and the defendant gave him the instruction, under such general powers, to pay this amount when it fell due. Now, if that is once proved, then we need not go into the further question of whether the moneys were actually due; but at the same time, even upon that point, we must find against the defendant. It appears that he bought the property for £1,150, and also agreed to pay the interest which was then due upon a certain bond, under which the property was mortgaged. After the sale it was arranged privately between the parties that the whole sum of £1,150 should not be paid in cash, but that the liabilities under the bond should be taken over by the defendant, and that the balance should be paid in cash. That bond was taken over, and I am satisfied it was taken over with the interest which was then due. Not only so, but it appears that some of the interest actually fell due after he got possession of the property, because he got possession of the property in July, and interest was paid up to October. I am satisfied he took over the indebtedness for interest even before the time when the purchase took place under this clause in the broker's note. On the whole of the evidence, therefore, I come to the conclusion that this interest, amounting to £24 2s. 2d., was due by the defendant to Mrs. Inglesby, and I am further of opinion that there was express authority given to the plaintiff to pay it. Judgment must, therefore, be given for the plaintiff for the amount claimed, with costs.

Kotzé, J., concurred.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton; Defendant's Attorneys: Herold and Gie.]

GROENEWALD v. HOWE. { 1903. Oct. 20th.

Surety — Co-principal debtor — Excussion.

The plaintiff had supplied certain goods to the mother of the defendant with whom the defendant lived. The Court found on the evidence that the defendant had guaranteed payment for the goods already supplied, but had made no promise as to payment for future supplies.

Held on appeal, *that plaintiff's promise did not constitute him a co-principal debtor.*

Held further, *that as it had not been shown that he had received any consideration for such promise, he was not legally bound thereby.*

Semble: *Had he guaranteed payment for future supplies, and had the plaintiff in consideration of such promise continued to supply goods, he would have been liable as a surety, but would have been entitled to avail himself of the* beneficium excussionis.

This was an appeal from a judgment of the Resident Magistrate of Uniondale in an action brought by the present respondent for £36 19s. 2d., for goods sold and delivered, the Magistrate having given judgment for the plaintiff for the amount claimed, with costs.

The Magistrate, in his reasons for judgment, said that the plaintiff, the widow Howe, who was a storekeeper, sued for £36 19s. 2d., goods sold to the defendant and his mother (who died in July last), and for which the defendant made himself expressly liable. After plaintiff's agent had closed his case, the defendant's agent excepted, on the ground that the defendant was sued upon a verbal undertaking to pay for goods sold to his mother, and to the jurisdiction of the Court. He believed the defendant gave a verbal undertaking to be responsible for the goods sold and delivered, and as it appeared that the defendant had lived with his mother in the position of head of the family, and had actually purchased goods and paid instalments, and so reduced the account sued for, and for his assistance to and maintenance of the family he had received a *quid pro quo*, by having the erf of land transferred to him by his mother at a price equal to the amount advanced by the plaintiff for the building, the Court considered that the defendant could fairly be looked upon as the principal debtor, and not as a surety under promise. A portion of the goods was converted by the defendant to his personal use. The exception was overruled. The exception being overruled, the defendant declined to call evidence, and consequently, on the evidence before the Court, judgment was given for the plaintiff, with costs.

Sir H. Juta K.C., for the appellant. Mr. Burton for the respondent.

Sir H. Juta submitted that, although the summons said that the claim was for goods sold to the defendant and his mother, it appeared from the evidence that nearly the whole of the debt had been incurred by the mother. The plaintiff spoke to the defendant about the account, and he said that he would see if he could pay. That was the undertaking which the plaintiff relied upon. If it were an undertaking, it was by way of suretyship; and if so, the account was beyond the Magistrate's jurisdiction, and the principal debtor should have been summoned. Then there was the third ground, that if a man said he would pay a past debt if he could, then there must be consideration. Counsel submitted that the Magistrate's finding was incorrect. The evidence of the plaintiff was perfectly clear that the goods were sold to the mother. She herself said that she sued the defendant on a verbal promise to settle the account. Counsel contended that not only was the case beyond the Magistrate's jurisdiction, but he submitted that there was no undertaking on the part of the defendant that could be supported. The principal debtor ought to have been first sued. The plaintiff ought to have gone against the estate of the mother.

Mr. Burton said the summons was one for goods supplied to the defendant, and the Magistrate found, as a fact, that the summons had been borne out by the

facts: that these goods were supplied to the defendant. There was evidence that the erf belonging to his late mother was transferred to the appellant for one-third of its real value. Counsel referred to the evidence to the effect that defendant said he would sell the cow and calf, and with that would settle the debt. This, he contended, amounted to an admission that the goods were supplied to the establishment of which defendant was the head. Defendant took part in and enjoyed the benefits of the goods supplied, and he (Mr. Burton) submitted that the Magistrate was right in finding that he was the principal debtor.

[Maasdorp, J.: What is the evidence on which you say he was the head of the establishment, and had to support his mother?]

Towards the end of his examination-in-chief, when she is speaking about this erf, plaintiff says: "I asked him what he paid, and he said he gave a cow. I said: 'How is that, when the erf cost your mother £53?' and the defendant said it was because he had to support his mother. He lived with his mother in the house." Continuing, counsel said that if the Court held that defendant was not the principal debtor, then there would be an end to the case. He contended that on the facts the Magistrate was correct in saying that, looking at the evidence fairly as a whole, the defendant was liable.

Maasdorp, J.: If the appellant is successful in this case upon the merits, then it will be unnecessary to go into the question of whether this was a guarantee, and not a debt for goods sold and delivered. I shall, therefore, first consider how the case stands upon the merits. It seems that the plaintiff sued the defendant for goods sold and delivered by the plaintiff to the defendant and his mother, and supplied to his order, for which he made himself expressly responsible by specially undertaking to pay therefor. In the first place, the question arises as to whom these goods were supplied to. Referring to the evidence of the plaintiff herself, it appears that she says: "I sold these articles I sue for to the defendant's mother, on his promise that he would pay for them." Well, if we take that statement by itself, then there is clearly evidence by the plaintiff herself that she supplied the articles to the mother. But then I think that is supported by the evidence that follows. It was only when the account had reached £37 that the defendant first promised to assist in paying for the articles. Now, if it were necessary for the defendant to make a special promise, after the goods were supplied, that he would pay for the articles, then that is proof that the articles were not supplied to him; because if the articles were supplied to him and his mother, he would have been liable to pay, without an express promise afterwards made that he would so pay, and I think that it establishes the point that, in the mind of the plaintiff herself, was the belief that she had sold these goods to the defendant's mother. Further on, she says: "I think it was in December, 1902, when I first spoke to the defendant with a view of getting him to pay his mother's account." I should say that, upon reference to to the books, it is proved that the plaintiff herself regarded the account as the account of the mother, and not the account of the defendant. Then the question arises whether after these goods had been supplied to the mother there was a special promise made by the defendant to pay for them. Now, if that promise was simply confined to the debt which had been already contracted by the mother, then in the absence of any consideration passing to the defendant himself he would not have been liable upon such promise even if he had made it. If the evidence, therefore, ended there, then there would have been no liability upon the defendant even upon such promise. If, on the other hand, there was a promise on the part of the plaintiff to continue to supply goods upon his promising to undertake the liability for the past and future debts, then a consideration did exist, and if the promise were made the defendant would be liable. But I find upon the evidence of the plaintiff herself that the supply of future goods was not promised, and that it formed no consideration for the undertaking by the defendant. She says: "I did not say that I should supply further goods." There is some doubt as to the exact words upon the evidence taken, but whichever view is taken, either that which appears upon counsel's notes, or as it appears on the documents before the Court, which should be the original, the result is the

same—that there was no undertaking to supply goods in the future. In another part of her evidence the plaintiff says that the defendant gave an undertaking to pay for the goods already supplied, and she says, "I believed his promise, and so the account went on." She does not say that the account went on as a consideration for the promise made by the defendant, but she merely casually states that she believed that promise, and so the account went on. If she accepted the promise and afterwards on the strength of that promise supplied the goods, that does not make the supplying of the goods a consideration for that promise. On the evidence, therefore, as presented to the Magistrate by the plaintiff herself, and uncontradicted, I think it appears that the goods were supplied to the mother, and that there is no binding promise made by the defendant to pay for them. Referring to the reasons given by the Magistrate, it seems to me that he had introduced reasons for his judgment, which are not at all sound. He seems to have thought, because the defendant lived with the mother, and had the benefit of these goods, and that to some extent he had from time to time assisted the mother and paid part of that debt, that he could fairly be looked upon as the principal debtor, and be so made responsible for the amount of the account. That seems to be very unsound reasoning for making the defendant a principal debtor. He could only become principal debtor by his undertaking to be so, and not because he had enjoyed the benefit of the goods supplied to the mother. Under the circumstances, the appeal must be allowed, and the judgment will be altered to one of absolution from the instance, with costs, respondent to pay the costs of the appeal.

Kotzé, J., concurred.

[Appellant's Attorneys: Walker and Jacobsohn; Respondent's Attorneys: Herold and Gie.]

SMITH AND SON v. CAPE TOWN TOWN COUNCIL. { 1903. Oct. 20th.

Agency—Estoppel.

One D., a servant of the Colonial Government, had ordered certain goods from the plaintiffs for public purposes. The orders were made out on Town Council forms, and plaintiffs having sued the Council in the Magistrate's Court for the price of these goods, the Magistrate granted "absolution from the instance," with costs.

Held on appeal, *that as the goods had not been ordered by any official of the Town Council, the Council could not be held responsible, and that as no Town Council official had held out the Council as liable, the Council were not estopped from denying liability, and that the Magistrate's judgment must, therefore, be affirmed and the appeal dismissed, with costs.*

This was an appeal from the decision of the Acting Resident Magistrate of the Cape. The appellant brought an action in the Magistrate's Court for £75, for goods sold and delivered by the plaintiff to the defendant Council, and supplied to their order, at their request and for their use. The defence was that the Colonial Government was responsible, and not the Town Council, the goods not having been ordered by the Town Council nor used by them. The evidence in the Court below of the plaintiff, George Smith, was to the effect that he supplied the Corporation of the city with 100 disinfecting lamps and 50 lamps on the 12th and 15th March, 1901. He produced the orders for these goods, written on Town Council order forms. Appellant had first made application to the Government, but was referred to the Town Council for payment. The lamps were for use in bubonic plague work. The evidence for the defence was that the person who signed the orders (one McDonald), and the receipts were Government officials. The Town Council had given temporary accommodation to Government plague officials in the Mutual Hall (the offices of the Town Council Health Department), where the goods were ordered to be sent. It was not known how the Government officials

came into possession of the Town Council forms. The Council did not order these goods or receive them. It was arranged between the Government and the Town Council in February, 1901, that money on account of plague expenses should be paid on behalf of the Government on the certificate of McDonald by the City Treasurer, whose services were lent by the Council. The Government paid money into a special account, called "City of Cape Town plague account," which money was supplied to reimburse the Council for out-of-pocket expenses. The Council disbursed money on the certificate of McDonald for about six months until the Government Plague Department was properly organised. There were no Government funds in hand now to meet disbursements of this sort.

In his reasons the Magistrate said it appeared from the evidence that, though the orders were made out on Corporation forms, why this was done did not appear. The orders were signed by one McDonald, a Government official from the Colonial Office, who was in charge of the expenditure of the Plague Department, which department was apparently at the time under the control of the Government. The receipts were not signed by Town House officials. Other goods supplied to the Plague Department had been paid for by the Corporation out of the special fund into which the Government paid money, and cheques thereon were drawn by Mr. De Villiers, not in his capacity as City Treasurer, but in his private capacity. Under the circumstances, the Magistrate did not see his way to give judgment against the Corporation, and therefore granted absolution from the instance with costs.

Mr. Alexander for the appellants. Mr. Schreiner, K.C., for the respondents.

Mr. Alexander submitted that McDonald was constituted an agent of the Town Council, and that even if he were not their agent, if, in fact, he were a Government official, the Town Council were now estopped from setting up that case by reason of their conduct in setting up McDonald as their agent. He argued that the Town Council had by their conduct led the appellants to believe that McDonald was their (the Council's) agent.

Maasdorp, J., asked Mr. Schreiner if he could give any reason for the action of the Government in the matter in refusing to pay the amount.

Mr. Schreiner said that while one must sympathise with the appellants, one could not give away the money of the ratepayers, as the Town Council were asked to do.

Maasdorp, J.: The plaintiff in this case sued the defendant for moneys due for goods sold and delivered, and the magistrate has found that it was not proved that the goods were sold and delivered by the plaintiff to the defendants. I think I need hardly add anything to the reasons given by the Magistrate in his judgment; he seems to have taken a correct view of the case, and has stated very clearly upon what grounds he founded his judgment, and upon the evidence I think the conclusions he arrived at are correct. It is necessary for the plaintiff to prove that the goods were ordered by the defendants and supplied to the defendants, and we have the very clear evidence of the secretary of the Corporation that the goods were ordered by persons who were not in the employ of the Corporation at all, and were also supplied and delivered to persons who were not in the service of the Corporation. If that is taken to be true, then the plaintiff must fail. and if we refer to the evidence of one of the plaintiff firm, Mr. Smith, then it seems quite clear that he is not in a position to contradict the evidence given by Mr. Finch, because he never came into personal contact with the persons who ordered the goods or to whom they were delivered. Consequently, Mr. Finch's evidence stands uncontradicted, and we must take it that the goods were ordered by and delivered to persons who were not in the employ of the Corporation, and for whom the Corporation were not responsible, and consequently the goods were not sold and delivered to the defendants. It is said that even if it is not proved that the goods were sold and delivered to the defendants, still the defendants ought to be held liable on the principle that they made representations which led the plaintiff into the belief that he was dealing with them and giving them credit, but even that has not been proved, because there were no representations made by any official in the Corporation's service at all. The only representations that were made were made by Mr. MacDonold, who was in the service of the Government, and the representation referred

to is in the form of the orders that were sent, upon which it would appear that the orders were in the name of the Corporation. But those order forms were used, not by an official in the employ of the defendants, but by a person with whom they had no connection at all. Consequently the representation of that person could in no way bind the defendant, and the representations of Mr. McDonald cannot now be used as an estoppel to prevent the defendants from setting up the defence that the things were not ordered by them or supplied to them. Under the circumstances, I think the judgment of the Magistrate was correct, and the appeal must be disallowed, with costs.

Kotzé, J., concurred.

[Appellants' Attorneys: Price Hughes; Respondents' Attorneys: Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

WORCESTER MUNICIPALITY AND OTHERS v. COLONIAL GOVERNMENT.

1903. Oct. 21st. „ 22nd. 1904. Mar. 14th.

Municipality — Powers — Ordinance 9 of 1836—Agreement as to water.

In 1874, the Commissioners of the Municipality of W., which was constituted under Ordinance 9 of 1836, agreed with the Government that water from a stream, to which the inhabitants had a common right, should be allowed, free of charge, for temporary and permanent railway service. The requirements of the Government were for about 9,000 gallons a day, but in consequence of the extension of the Railway system, the requirements increased in 1904 to over 60,000 gallons a day. No regulation existed authorizing the Municipality to supply water to others than inhabitants.

Held, *in an action brought by the Municipality against the Government for a declaration of rights, that the Municipality had no power under the Ordinance to enter into the agreement.*

This was an action instituted by the Municipality of Worcester, together with George Joseph Roos, an erf holder, Jacobus Franeman, and Adam October, two residents of the location in the said Municipality, against the Commissioner of Public Works administering the Railway Department of the Colonial Government, for a declaration of rights, an interdict, and damages.

The declaration was in the following terms:

1. The first-named plaintiff is the Municipal Council of Worcester, which is a Municipality brought in 1895 under the operation of the Municipal Act No. 45 of 1882, but theretofore constituted under the provisions of the Municipal Ordinance No. 9 of 1836.

2. The second-named plaintiff is the registered owner of an erf in the town or Municipality of Worcester, and is as such owner legally entitled not only for domestic use, but also for irrigation, to the use of water from the supply hereinafter mentioned.

3. The third and fourth-named plaintiffs are residents lawfully occupying houses and plots of ground in the duly-constituted native location, forming part of the town and Municipality of Worcester, and as such resident occupiers they are legally entitled to a certain use of the said water for domestic purposes and for irrigation.

4. The first-named plaintiff more directly represents the ratepayers within the Municipality, and the second, third, and fourth-named plaintiffs join in this action for the enforcement of their rights in so far as they may for that purpose be inadequately represented by the first-named plaintiff.

5. Before, in, and since the year 1874 there has been and is a supply of water collected and distributed by Municipal and other works for the supply of the town and Municipality of Worcester, and of the inhabitants thereof, including householders, ratepayers, erf-holders, and resident occupiers of the native location, and the said supply was in 1874, and subsequently until 1895, under the control of the Commissioners of the said Municipality within the limits of the law existing in regard to supplies of water to which the inhabitants of a Municipality are entitled, and thereafter within similar limits has been and is under the control of the Municipal Council of Worcester, duly constituted under the provisions of Act No. 45 of 1882.

6. In the same year, 1874, and continuously thereafter, the defendant and his predecessors in office administering the Railway Department of, and representing the Government of this colony, has diverted, taken, and used, free of charge and without payment, large and varying, but from time to time, increasing quantities of water from the said supply of water to which the town, Municipality, and inhabitants of Worcester were and are entitled.

7. The said diversion, taking, and using, of water by the defendant's predecessor in office commenced under leave and licence given or granted to the defendant's predecessor by the then Commissioners of the said Municipality, who in that year resolved "That water for temporary and permanent railway service be allowed free of charge, but water leadings by pipes from the eastern reservoir shall have to be paid for at the same charges as paid by resident householders," and the defendant and his predecessor have thereafter continued to claim under the said gift or grant a right to divert, take, and use water as aforesaid.

8. The said Commissioners, and thereafter the Municipal Council of the said Municipality, had and have no legal right or power either to give or grant as aforesaid, or in any manner to sell or concede to the defendant or his predecessors in office, the right either temporarily or in perpetuity to divert, take, or use the said water as aforesaid, but they did submit to and acquiesce in the temporary taking, diversion, and use, which the defendant and his predecessors in title accordingly enjoyed free of charge or payment.

9. The defendant and his predecessors in office have taken and used, and continue to take and use, large quantities of water for purposes not included in the original grant of leave and licence, and not being for Government railway service, to wit, for domestic use in connection with the residences of workmen, for irrigations of land and plantations, and for the railway service of the Cape Central Railways, whose railway undertaking is connected at Worcester with the Government Railways, all which was not contemplated by the said commissioners. The defendant and his predecessors in office have moreover taken and used, and continue to take and use quantities of water largely increased beyond what was contemplated by the said commissioners in the year 1874.

10. All the aforesaid diversions, taking, and use of the said water, specified in the last preceding paragraph, have been *ab initio* wrongful and unlawful on the part of the defendant and his predecessors in office.

11. On or about the 4th September, 1900, the firstnamed plaintiff lawfully gave notice to the General Manager of Railways, who properly represented the defendant to receive such notice, that the arrangement under which the said diversion, taking, and use of water was made by the defendant, must terminate after the 31st December, 1900, and it became and was the duty of the defendant to comply with the said notice and to cease to divert, take, and use water, as aforesaid on and after the 1st January, 1901.

12. From time to time, especially during the dry season of the year, the inhabitants, and more especially the owners of erven, including the second plaintiff, in regard to irrigating, and the resident occupiers of the native location, including the third and fourth named plaintiffs, in regard to domestic use and irrigation, have suffered and suffer loss and damage through scarcity of water caused by the aforesaid diversion, taking, and use, done and made by the defendant and his predecessors in title in regard to the said supply of water.

13. The defendant by the said General Manager of Railways wrongfully and unlawfully refused to accept the said notice, or any notice whatsoever from

the first-named plaintiff terminating the said arrangement and wrongfully and unlawfully refused to cease upon the said 1st January or thereafter, or at any time the said diversion, taking, and use of water, and wrongfully and unlawfully contends and claims that he and his successors in office are entitled in perpetuity to divert, take, and use water from the said supply in unlimited quantities for the railway service and also for the purposes referred to in paragraph 9 hereof, and wrongfully and unlawfully continues accordingly to divert, take and use such water for the said purposes, to the great detriment and damage of the plaintiffs.

14. The plaintiffs claim damages in the sums of £500, £15, £10, and £10 respectivly.

Wherefore the plaintiffs pray:

(a) For a declaration that the original granting of water by the aforesaid commissioners was *ultra vires* and illegal, and that the defendant is not entitled thereunder either temporarily or in perpetuity to continue to divert, take, and use water for all or any of the purposes aforesaid.

(b) A perpetual interdict restraining the defendant and his successors in title from diverting, taking, or using any of the said water as aforesaid either for railway service or for any other purpose or in the manner set forth in section 9 hereof.

(c) Judgment for the sum of £500, £15, £10, and £10 respectively; or

(d) That they may respectively have in the premises such further and other relief, or, as this Honourable Court may deem fit, together with costs of suit.

The defendants admitted paragraphs 1 to 7, with certain minor reservations. They denied paragraphs 8 and 9, and said that all the purposes for which the water was used were purposes within the meaning of the agreement. They denied paragraph 10. They denied paragraphs 12, 13, and 14, and said that the plaintiff had sustained no damages whatsoever. They prayed that the claim of the plaintiffs should be dismissed, with costs.

Mr. Schreiner, K.C. (with him Sir H. Juta, K.C.), for plaintiffs. Mr. H. Jones (with him Mr. Nightingale) for the defendants.

Mr. Schreiner read correspondence which had passed between the Municipality and the Railway Department, dating back to the '60's, relating to the water used for railway purposes.

John Brown Ellis said he was a civil engineer for many years in the service of the C.G.R. He produced a plan for the purposes of the case. In Worcester they had two reservoirs and a tank, with a capacity of fifty-nine thousand gallons, and the engines and railway cottages were supplied from these sources. The total consumption of the railways—the C.G.R. and the C.C.R.—including engines and domestic purposes, amounted to seventy thousand gallons per day. There was a considerable flood of water down through the railway yard drainage, and a large quantity of Municipal water was used for flushing purposes. The railway premises had grown enormously since 1878.

Cross-examined by Mr. Howel Jones: The few cottages that existed in 1878 were railway cottages. His calculation was an approximate estimate. Between forty and forty-five trains passed Worcester daily, and he put the trains down for two thousand gallons per day. The furrow was a diversion from the main stream. He had seen the water flowing into railway premises, but he would not say that the railway made the diversion.

Mr. Schreiner put in plans supplied by the Government, showing the piping of the water within the station area, and the drain from the station yard.

Frederick Lindenberg, attorney, said he had been for 20 years past Municipal secretary and clerk at Worcester. The correspondence put in during the past twenty years had gone through his hands. It had not been possible to bring any of the town commissioners to court. There were two living still, but neither was fit to give evidence. He knew the station, and the surroundings. The cottages stood on the hillside opposite the station. There were flower gardens, fruit trees, and vegetables around the cottages. The only water used for this cultivation was drawn from the reservoir. There was a new railway reservoir immediately adjoining the old, but the water was not taken from this new reservoir. He had only recently seen the new reservoir. The water sent down in the pipes was used for the railway engines, for flushing the urinals, for watering the station platform, also for the refreshment-room, the stationmaster's quarters, the locomotive shed, and the workshops. The water from the tank at the station was also supplied to the

New Cape Central Railway. There had been no approach from the Government to the Municipality to recognise their claim to payment. This water came from the railway reservoir, and was carried down in a 9 in. main. He had not seen water thus obtained conveyed in tanks on the Cape Central Railway. The dry season usually lasted from October almost to the end of April. There was a good deal of irrigation in the town, and there was also the location below the town, where irrigation was also in existence that required water. They had summer rains between October and April, but it was the exception rather than the rule to have rains. During the last three seasons there had been a good deal of summer rains. When they had no summer rains they had got into severe straits for a supply of water, and they had been compelled to divide the water used for irrigation between the lower and the upper town. It had also been necessary to give up watering the streets. The main pipe from the Eastern reservoir went through the town. That reservoir was constructed under the Act of 1863. It was the only service reservoir that the Municipality had. For the rest the water came in an open furrow after it had gone past the mill. For water from this open furrow no charge was made. Erf holders led water from the furrow, according to a recognised system of distribution. Erf holders had always had this right as far as memory went. The Municipality's right was founded upon a half share of the Hex River. The open furrow passed down Tulbagh-street, and was then divided, running down the cross streets. From that course the water was taken that flowed down the drain in the station yard. The Municipality had never directed that its water should be diverted as far as the records disclosed. The embankment of the main furrow had been cut open, and there had been a continual flow into the drain at the station yard. He did not know that this had been done until recently. It was quite impossible for the water so diverted to come back to the town supply. Really speaking, the drain was a ditch. The water finally ran off in the direction of the Government plantation. The erf-holders and the people in the location had constantly complained to the Council about the scarcity of water. The Council had never taken any steps against the Railway Department hitherto. He remembered the case brought by Mr. Joubert against the Council and the Government. It was then stated that 37,000 gallons of water per diem were used by the department. Since 1895 the Government had made a largely-increased use of water. Witness did not produce any figures. A return had been furnished by the Government as to their use of the water. In 1876 the quantity used was 9,000 gallons per diem. In the present year their user was admitted to be 54,000 gallons, independently of the consumption at the cottages. Witness spoke to the considerable growth and expansion of railway property during that period involving an immensely increased consumption of water by the department at Worcester. The diversion of water by the Railway Department was of some moment to the Municipality. A considerable quantity was taken by the cottages. A charge of 1s. 6d. per 1,000 gallons ought to have been paid by the department for the water supplied to the Cape Central Railway.

Cross-examined by Mr. Jones: He would say that the gardens were watered from the kitchen taps. Up to recently the Cape Central Railway's engines were under the control of the Government when they came on the Government lines. The quantity of water was getting less since 1885, with the exception of the last few years, but that was due to exceptional summer rains. It was certainly kind of the Government to put a weir in the Hex River.

By Maasdorp, J.: The increase during the last few years was not due to the weir.

Cross-examination continued: The bags and bushes that had been placed in the Hex River formerly were serviceable enough, and the stone weir did not increase the supply on account of the washaway. Worcester was entitled to take about half the Hex River. The town would be much better off if they were allowed to irrigate with the water below the mill. It was possible to find a volume of seven and a quarter million early in December, but in January it dropped to two millions. The sole object of the action was not the fact that the Government had not paid for the water. There was no consideration given by the railway for hav-

ing put their premises where they did. The station was on a commonage. The Municipality first took up the matter in April, 1881, but no steps were taken to have the agreement cancelled. Witness, in 1887, drew attention to the fact that the C.G.R. was selling water to the C.C.R. He had never changed his mind about the validity of the agreement. Worcester itself had made a considerable increase in population, but he pointed out that the requirements of the Railway Department had increased in a greater proportion, there having been a considerable growth in through traffic. He was not aware of any water regulations in existence within the Municipality in 1874. The distribution would probably have been by blocks. Before the reservoir was constructed, the rate was a general one, though it was known to the old inhabitants as a water rate, because, he supposed, it was the only benefit they could see for what they had to pay. He believed it would be impossible to take water from the Eastern Reservoir to the Railway Reservoir to feed the engines. By the authority of the Governor's Proclamation, the certificates of occupancy, with rights as regards water, were given to one of the plaintiffs in the suit. The lower furrow was not a stormwater drain at the station yard, and it was never dry. He could not say that the Government had diverted the water.

Re-examined by Mr. Schreiner: The water had not been diverted from the furrow to the station yard by the Municipality, and there was no record that any correspondence took place between the Government and the Municipality. It was many years before 1900 that the Municipality decided to take some action. The flow of the Hex River he had known to be as low at two million and a half gallons. All the railway cottages were on commonage, and they had never paid for that. Three hundred thousand gallons was the limit they could take above the mill. The Government constructed the weir to relieve the Municipality, but in the dry summer months it would not divert any more water than that of the old system.

By the Court: The water diverted from the furrow would be sufficient for irrigation. The loss of the water had a material effect on the whole town.

Jacobus Petrus Malan, Mayor of the Worcester Municipality, said he had been resident thirteen years in the town. He was a member of the firm of Malan and Van der Westhuysen, who carried on business as millers, and were lessees under Joubert. During the last few years they had had good summer rains. The supply of water had been well maintained. Previously there had been a diminution of water in the mill race during the summer season. The Government computation that 7½ million gallons ran down the furrow during the dry season was incorrect. That quantity would be more than the total flow. Only about 2½ million gallons was available to the town. If they had a better supply in the summer season, the Municipality could give more satisfaction to the consumers in the lower village. They could also water their streets, and they could go on planting trees. One of the causes of the diminution at the mill race was, in his opinion, the quantity taken away by the Government above the intake. He had seen water taken out of the furrow for the drain at the station yard, and he had spoken upon this matter to the overseer, Mr. Roux. The ratepayers were constantly complaining that the Council did not see that their rights were enforced against the Government, and that they were not given the benefit of the water they were entitled to. The Government supplied the Cape Central Railway with water. He had seen water taken away in tanks for twenty miles out of Worcester, on the Cape Central Railway.

Cross-examined by Mr. Jones: He had seen this happen several times on the Cape Central Railway. There was no scarcity of drinking water in the town during the summer. The shortage was really in water required for irrigation purposes. The erf holders got less water than they used to do, except during the past three summers, when they had had a comparatively good rainfall. It seemed to him that each year the Railway Department's consumption had increased at the rate of 60,000 gallons per diem. The Municipality really did not know where the department were going to stop. They started with a 3-in. pipe, and now they had a 5-in. pipe. The shortage of water caused a depreciation of property. The gardens were getting smaller each year, because of this lack of water. The Municipality wanted to

beautify the town as much as possible. About five years ago readings were taken in the Hex River in February, when the flow was five million gallons. He was formerly co-partner at the mill with the late Mr. Joubert. He had not seen the water diverted by any Government employee from the sluit to the station yard. He would not say that it was stormwater that went down the furrow.

Re-examined by Mr. Schreiner: He had seen water running down the drain at the station yard in the summer season, when the question of stormwater would not arise. The reading about five years ago was taken by Mr. Stewart, and referred to the total flow. The gauge was taken on behalf of the firm with which witness was connected.

By the Court: The water belonged to the Municipality, but only 340,000 gallons could be taken out before it reached the mill. The mill was now run by a turbine.

John Leach, of Worcester, said that three years ago he lived at the cottage, near what was known as the old wool washing. He knew the drain that went through the station yard. The drain passed in front of the house witness formerly occupied, and the Municipal irrigation sluit went behind. He had noticed water flowing in the drain in the summer, when there was no water in the Municipal irrigation sluit. He had also noticed more water running in the drain than in the irrigation sluit.

Cross-examined by Mr. Jones: The wool-washing was close to the Government plantation. The irrigation sluit came from Tulbagh-street. For three years he was unable to water his garden regularly. He used to have to water his garden in the night, when other people were not drawing on the sluit.

By the Court: There was never any shortage of water in the drain during the six years when he occupied the cottage.

Andries Hendrick du Toit, of Worcester, said he was in the employ of the Western Wine and Brandy Co., and had lived in the cottage, formerly occupied by the last witness, during the last three years. He had seen water running in the drain all the time, even when the irrigation furrow was empty. He had been compelled to stop the distillery machinery through the shortage in the irrigation furrow. He had followed the course of the furrow right above the station to the dam, and he found that the trouble was due to there being very little in the furrow at any point. He had lived in Worcester since 1892. Since 1895 he should say that the water supply at Worcester had been diminishing. The town had been increasing, and the requirements for irrigation were greater.

Cross-examined by Mr. Jones: He should not say that the supply was actually less than in 1895. The demand was greater owing to the increase of the town. He had on several occasions traced the irrigation sluit beyond the station. The supply was not strong enough to reach his place. He had been much inconvenienced by the stoppage of his machinery through the shortage of water in the irrigation sluit. He made complaints to the secretary of the company. The distillery had been in existence about three years. The water in the drain was too dirty to use for the machinery.

By the Court: He had not seen water from the Municipal furrow flowing into the drain. If the water in the drain had been clean, it would have been sufficient to drive the machinery. If the water had been collected for a night they would have been able to irrigate a plot of ground next day.

Henry Klauff, of Worcester, a former employee of the C.G.R., said he knew the drain that ran through the station yard. There were a number of cottages around, which emptied into the drain. Witness had to flush the drain. He got the water for that purpose from the Municipal watercourse. He opened the watercourse under orders, and flushed the drain. The Municipality's employees closed the sluit after it had been opened, and witness afterwards opened it again.

Cross-examined by Mr. Jones: He received his instructions from the inspector, Mr. Reeks, as to opening the sluit. Mr. Reeks was not now at Worcester. Witness was not now in the employ of the C.G.R. He had only opened the sluit about three times in the course of three years. Mr. Lindenberg complained in August about the water running from the sluit.

Re-examined by Sir H. Juta: During the three years he was there the water flowed through the drain. On three occasions he opened the drain. It was closed with an embankment of soil.

Daneel Jacobus Johannes Roux said he had been overseer to the Worcester Municipality for the last 13 years. He had known the Municipality for the last 40 years. When he first took over the work there was no division between the upper and the lower town for water purposes. The division took place about two or three years afterwards. They had to divide the upper and lower parts on account of the scarcity. The water had become scarcer until the last few years, when they had had summer rains. There were about 20 cottages on the railway property at Worcester. There was a drain just by which was fed by water from the Municipal furrow flowing down Tulbagh-street. He had found the water flowing from the furrow into the drain. He had himself closed the connection, but he had afterwards found it opened again. The water from the drain ran through the culvert to the Government plantation. The water that went down the drain could not be used for irrigation purposes in the lower part of the town. Even if it were possible to divert the water from the drain back to the furrow, it would not be fit for drinking. Witness also spoke to the increase of railway property at Worcester. The water was much scarcer now than it was 30 years ago. All the water for irrigation purposes was taken from the main furrow. Less land was irrigated now than formerly. There was less water now in the sluit. He knew that the location erven and the lower part of the town suffered considerably from shortage of water; in fact, there was sometimes not a drop.

Cross-examined by Mr. Jones: He had not seen Government employees making a connection between the Municipal furrow and the drain on the railway property. He had stopped the diversion, and had found that the work had been undone again. Witness could not swear positively where the station water went to He thought the station water also went there, because the pipe went in that direction. He had never seen anything coming out of the pipe. The building in Worcester had increased during the last two or three years; but there had been no scarcity of water. There were fewer gardens to irrigate, but there was not enough water for irrigation. The water was getting less every day. He considered the people at the location suffered through want of water. Witness had told Mr. Lindenberg that the railway people were wasting the water.

Mr. Jones: Did you ever make any complaint to Mr. Lindenberg that the railway people were taking water out of this furrow?

Witness: No; I never made a direct complaint about it.

In further cross-examination, the witness said that it was usually the people farthest from the main course who complained about not having sufficient water. Witness had a boy, who distributed the water into blocks. After it got into the blocks, the consumers divided it.

Re-examined: When witness was first overseer, the water was not divided between the upper and lower parts of the town. The people then divided the water. The people could then irrigate every day if they wished. With regard to the drain, witness never allowed any Municipal water to run into the drain in summer. There was no water to flush the station drain, except what was taken from the Municipal furrow, unless the tanks were opened. Witness had never seen this done. The drain was constantly being flushed.

George Joseph Rous, one of the plaintiffs, said he was the owner of an erf, which he had occupied since 1887. He had a garden and fruit trees, which he irrigated with the water from the Municipal furrow. He first found water getting scarce in 1895. He then employed one boy to irrigate the garden. Once witness had to employ another boy to keep the water on. That was in 1898. Since then matters had been getting worse and worse. Two trees belonging to witness had died through want of water. Up to within the last two years, witness had not been able to do much with his trees. During the last two or three years, there had been late and summer rains. The water was getting more scarce, though there was less irrigation, there having been a good deal of building. Witness had suffered damage to the amount of about £15.

Cross-examined by Mr. Jones: Witness's property was in Napier-street. There had been no scarcity of water during the last three years, there having been late rains. There was a larger

population now, and more drinking water was used than formerly. There was less ground to irrigate. Witness generally employed one boy to irrigate.

Wm. Henry Horne, of the Surveyor-General's office, said he had not been able to find in the records the conditions of sale referred to in the grant of the erven. Search had been made for the conditions in the Surveyor-General's office and the Colonial Secretary's office. Witness produced the original grant of No. 2 erf to Jan E. de Waal, who memoralised the Government in respect of the erf. He also produced the correspondence in connection with the grant.

Adam October, another of the plaintiffs, said he lived in the new location. Witness got waste water from the town. In the location they experienced a lack of water in the summer. Witness's garden had suffered frequently During the last three years it was better, but before that it had been getting worse and worse. All the people in the location suffered similarly. He had been in the location for over twenty years. They had their drinking water from the same source. The water from the station could only be turned off into the location course above the station. When the station water got below the station it was lost to the town, running to waste into the plantation. Trees and vegetables had died belonging to witness owing to the want of water, and the vegetables and fruit which he grew and sold had suffered in quality and in market value. Witness estimated that he had suffered damage to the amount of £10.

Mr. Schreiner closed his case.

Frederick Liesching Rubidge, Engineer of the C.G.R., said he had had charge of the Touw's River district, which included Worcester, since April. He was frequently at Worcester, and had a general knowledge of the water system in operation there. The only water used by the C.G.R. from the furrow which came out above Joubert's Mill was taken to the new reservoir. There were two reservoirs, and there was only one supply pipe from the furrow. That pipe was called a 5-inch pipe, but the water passed through a 3-inch meter, and it passed into a bottle neck of 4-inch diameter. The meter valve could be shut off for repairs, and the water then went through a 4-inch byeway. The meter had not been used for some time. Acting upon instructions, he gauged the water running into the reservoirs on Thursday of last week. It was then flowing at the rate of 53,000 gallons per 24 hours. He then came to town, and read certain evidence given in the case of *Joubert* v. *Worcester Municipality, and Colonial Government*; in consequence, he went back to Worcester on the 18th, and flushed the pipes at the scour valve in order to clear the silt. During the Saturday there had been rain. He went to the intake and had it cleared of silt. He took a gauge on Sunday, and found that 37,999 gallons passed into the reservoir in 24 hours. He made a note at the time in these words: "Evidently air in valves and pipes." On the following day, the 19th inst., he made a further test, which showed that 60,500 gallons passed through in 24 hours. In his opinion, that would be the greatest possible flow of water through the pipes with the present arrangements. The maximum capacity of the reservoir was 45,000 gallons, but with the present ball-valve arrangement it was impossible to fill the reservoir to the top. The water in the reservoir was used for locomotive purposes, station purposes, and household purposes for the employees' cottages on the hillside. The first use of the water was by the locomotives. He had had complaints from Worcester that the cottages could not obtain water at times. The engines were always supplied. He had formed an estimate of the quantity supplied to the locomotives and cottages. This was based on information given to him by individuals on the spot.

Mr. Schreiner objected that this evidence should be given by the "individuals on the spot."

Witness said it was impossible for him to ascertain all the details personally, but the information was gathered by people acting directly under his instructions.

Mr. Jones said that his learned friend could cross-examine the witness on the evidence.

Mr. Schreiner said that that was precisely what he could not do.

Maasdorp, J., held that the evidence might be given and taken for what it was worth.

Witness, continuing, said that his estimate of the water used by locomotives of the C.G.R., allowing for all booked

trains as per working time book, was 52,257 gallons per day for locomotives of the Cape Central Railways, allowing for all booked trains as per working time book 4,785 gallons per day; for station and cottage purposes, 10,000 gallons. The total quantity required by the railway at full working pressure was thus 67,042 gallons. Under the present arrangements, it was not possible to pass more than 60,500 gallons per day through the pipes. The full working of the time book was not being adhered to at present. There were many trains that were booked "to run when required." They had to make provision for those trains whether they ran or not. The traffic did not demand the full working at present. The actual water used was considerably less than his estimate, but it fluctuated so much that he could not possibly give an estimate of the actual average consumption. He gauged 24 hours' consumption from 6 a.m. on Saturday last, and found that the engines actually took 38,000 gallons. The number of engines watered was 24. The engines in their journeys replenished their supplies as between two points at Worcester.

[Maasdorp, J.: Could you dispense altogether with Worcester as a watering station?]

Witness: I would rather not answer that question. The question would be better answered by a locomotive man than myself, as I have not sufficient knowledge of the working of trains. Continuing, witness gave details as to the use of water by the cottages. He had seen what he should roughly estimate at two million gallons per day running through the railway drain. He had always regarded that water as the overflow from the Municipal furrow. The railway had not used that water. He had not authorised anyone to make a connection between the furrow and drain. He knew the Municipal reservoir. It was possible to use water from there for the station, but not for satisfactorily watering the engines. He knew of the existence of the weir in the Hex River, and knew from correspondence in his office that it was built by the Government during the last four years. That was as far as his knowledge of the weir went.

Cross-examined by Mr. Schreiner: His headquarters were at Touw's River. His knowledge of this matter was confined to incidential visits to Worcester since April last. He had no knowledge of a summer experience at Worcester. His attention had been drawn to the water question about four times on the spot. The tank would probably have a capacity of about 6,000 to 7,000 gallons. As to the reservoir, he had never tested the quantity with the ball valve removed. He had made a test of the flow from all the pipes going fully, to ascertain the flow of water from the Municipal furrow. He had not made a test without the ball valve in operation. The ball valve presented a free flow of water. He did not agree with Mr. Stewart's estimate that 85,000 gallons would pass through the pipes. Mr. Stewart estimated upon a free flow. Mr. Stewart stated in his evidence in 1895 that a 5-inch pipe would pass 85,000 gallons; but in this case the pipe was reduced to a 4-inch. The 4-inch pipe was a bye-pipe. He could not speak as to the traffic over the line when it was used by the military. He would prefer that that evidence should be given by the "man on the spot." He did not know whether the traffic between Cape Town and Johannesburg was larger in the old days than it was now. He did not know whether a large portion of that traffic had been diverted to the coast routes. He could not say what was the matter with Mr. Reecks (who was mentioned by a witness on Wednesday) to prevent him from coming to the Court to give evidence. A medical man would be best able to answer the question. Mr. Reecks was deaf, and he told witness that he was "poorly." He was satisfied from the observations he had made on the ground that water from the Municipal reservoir could not be satisfactorily passed into the engines. He did not think the water could be flooded into the engines, because of the levels; he thought it would not be more than a trickle.

By the Court: He had seen water flowing down the open drain in a huge stream constantly. It had never occurred to any railway man that it was other than the surplus overflow from the Municipal furrow. If none of this water flowed down there in the summer, the drain might become a little offensive. He had no knowledge as to who opened or closed the furrow. He knew they had no right to touch the furrow.

Henry Robert Hopper, District Locomotive Superintendent at Worcester, said he had been in that position about thirteen years. He was well acquainted with the water system at Worcester Station. They did not use the water in the drain for railway purposes. He had never given any instructions as to making a connection between the railway drain and the Municipal furrow. There was no water as a rule in the furrow during the summer season. There was a large quantity running down the drain at present. They had been very much annoyed by the Municipal furrow at Worcester. Their yard had been frequently flooded in the winter time, and their turn-table had been placed under water. They would have been very glad if the Worcester Council had removed the furrow, as it had been a source of great annoyance to the Railway Department. It was of no use whatever to the station, and had been neglected by the Council. No complaints had been made to them about water having been taken by the railway from the Municipal furrow. He should say about 23 or 24 engines watered at Worcester each day on the average. He allowed 1,000 gallons for the up-trains, and 1,500 gallons for the down-trains, as the quantity taken up. It was impossible to form an exact estimate. He should say about 42,000 gallons was used at present by the engines of the C.G.R. and the Cape Central Railways. The trains were not running at full strength, according to the present time-book. He should say that the traffic during the war was about the same as in the present time-book. The Cape Central took about 4,000 gallons a day for their engines, and about 875 gallons a day was required for the wash-out of boilers and the cottages on the line. He took a reading of the meter in 1895. The result was 28,000 or 29,000 gallons in 24 hours.

Cross-examined by Sir H. Juta: The cottage drainage emptied into the ditch. He should not say that there were 20 drains emptying into the ditch. He had known the drain to be flushed in the summer. It would be possible to live on the hill if the drain were not flushed in the summer. He reckoned summer to last from December to April. He knew the drain became very disagreeable if it was not flushed in summer. In that case he went to the permanent way inspector, and asked him to send water down through the scour valve. He wished that the drain was filled in. The drainage could then be taken away in earthenware pipes, to be flushed with water from the reservoir. When they were at full pressure, the engines would take about 52,000 to 54,000 gallons of water per day at Worcester. He did not suppose, with the present arrangement, they could run at full pressure without cutting down the supply to the camp. There were fewer trains running now than during the war and before the war. During the war the traffic was much greater than now. The working time-books showed more trains scheduled than ever previously, but it was not unusual to have three trains cancelled each way per day. The present trains were running according to the time-book issued in August. The Cape Central was entirely under Government control, so far as the Worcester yard was concerned. As soon as trains passed the Cape Central points, they went into the control of the Government. He supplied certain figures upon which the report of Mr. Beattie, the Chief Locomotive Superintendent, was based.

Re-examined: He sent the figures to Mr. Beattie by wire, in response to an inquiry.

Mr. Schreiner said he wished formally to call for the production of this document.

Mr. Jones said that it would be produced if they could find it, only he would remind the Court that the document had been called for without any notice having been given.

James Hermanus Mays, permanent way inspector at Worcester, and Karl Frederick Kussatz, ganger, in the employ of the C.G.R., having given evidence,

Mr. Jones said that, subject to the evidence of Charles Reecks, of Salt River, ex-permanent way inspector, being obtained, he would now close the defendant's case. Reecks appeared to be suffering from eczema.

It was directed that the evidence of Reecks should be taken on commission, Mr. Pyemont being appointed commissioner.

The case was then adjourned, for the hearing of argument on a date to be fixed.

Postea (March 14, 1904):

Mr. Schreiner (for the plaintiffs) said that this was an action brought by the Municipality of Worcester and others against the Commissioner of Public Works, as representing the Colonial Government. The first plaintiff was the Municipal Council, the second was the registered owner of an erf in the town, and the third and fourth occupied houses and ground in the duly-constituted native location in the town. The action was for a declaration of rights in regard to a certain grant by the Commissioners of Worcester in the year 1874, embodied in a letter of October 10, for an interdict perpetually restraining the defendant from using any of the said water either for railway or for other purposes in the manner set out in the declaration; and for judgment for damages, the first plaintiff in the sum of £500, the second in £15, and the third and fourth in £10 each. The supply was granted to the defendants by the Commissioners under Ordinance No. 9 of 1836, and was under the control of the Commission until 1896, when the Municipality took it over, and had since continued to have control. The contention of the plaintiffs was, broadly, that leave and licence was granted to the Railway Department to divert and use water for the railway service in terms of the letter in 1874, while the Government contended that they had a perpetual right by virtue of the agreement to take such water for the railway service as they may reasonably require. The first broad issue was that the Government said they diverted, and took what they reasonably required for railway purposes; the Municipality said the department had taken as much as they wanted. The next point was whether the agreement was *ultra vires* so far as the Municipality was concerned. The whole case could be disposed of upon those two points. Then, if the case were not disposed of on those two points, a third point arose as to the way and extent in and to which the Government used the water. The Municipality said that the department had taken water for other than the purposes set out in the agreement, viz.: (1) for domestic use in connection with a number of cottages erected near the station; (2) irrigation of land and plantations, and (3) the railway service of the Cape Central Railway. The Municipality, further, said that the department had taken larger quantities of water than were contemplated in the agreement. The third point in the case, then, was this: had the Government made use of water within the scope of the agreement as construed by the Court: If the scope had been exceeded, then arose the fourth point, viz., what was the measure of damages sustained by the plaintiffs? The Municipality's contention was that they were entitled to give reasonable notice terminating this arrangement of 1874, and in September, 1900, the first-named plaintiff gave notice accordingly. This the Government declined to recognise, and had continued since that time to take and use water. It had been admitted that the uses of the Government amounted to at least 50,000 gallons a day. Counsel called the Court's attention to the interdict obtained by Mr. Joubert, mill owner, Worcester, limiting the diversion from the stream by the Municipality to 300,000 gallons per diem, and by the Government to 40,000 gallons per diem.

[The Chief Justice (to Mr. Schreiner): You don't admit Government's right to 40,000 gallons?]

Mr. Schreiner: We say they must stop using.

[The Chief Justice: What do you say was granted in 1874?]

Our contention is that we only granted leave and license to the Government, which we were at liberty to withdraw at any time.

[De Villiers, C.J.: Did you not get consideration?]

Certainly not. We do not say that they could have placed the station in any other position, and quite admit that the inhabitants wished it to be where it now is. The evidence shows that the Eastern Reservoir was under construction when the agreement of March 15th was entered into, and could supply engines, etc., at a rather slow flow. This is important, because now the Railway Department take water to wash sheds, flush drains, etc., and to supply railway cottages, water gardens, etc. On the 14th of April, 1877, a meeting was held at which it was agreed that the railway might take water subject to their paying a reasonable price for it. A water meter has been put in, but its use is merely nominal, and it is merely a matter of guesswork to say how much they use.

[De Villiers, C.J. : I would suggest that the Railway Department be allowed to take 25,000 gallons a day free, and that they should pay for any surplus just like other people.]

[Mr. H. Jones: I am not instructed to consent to any such arrangement.]

I would suggest that my learned friend should consult his clients to see if some such arrangement cannot be arrived at.

[Mr. H. Jones: I will see my attorneys; we will have a consultation, and then I shall be in a position to give a definite answer.]

The Municipality take up the position that they cannot dispose of the town's water without Parliamentary sanction: though we can consent to a compromise. As to the question of construction of our agreement with the department. This Municipality was constituted under Ordinance 9 of 1836, and Section 35 of that Ordinance prescribes the duties and powers of the Commisioners relative to supplying water to the inhabitants. We deny that we have granted any really permanent right to the railway; for the words "temporary" and "permanent" used in the agreement refer only to the time the railway was being constructed and thereafter, but no use of water for all time was ever granted. The Government contend that they are entitled to water for all time *ad libitum*. That clearly was not in the contemplation of either party. The Commissioners of the Municipality were willing to give water gratis until the eastern reservoir should have been completed, and after that the railway was to pay like anybody else for all over 10,000 gallons a day. The clause in the agreement is not worded very clearly, but the Commissioners cannot be presumed to have meant to act *ultra vires* by giving away the town's water for all time, no matter how great the needs of the town might be Then the Cape Central Railway (not a Government railway) took water, and the ratepayers authorised them to do so on a payment of 1s. 6d. per 1,000 gallons. Either the Government must admit our construction of the terms "temporary" and "permanent," or they must confess that they have been acting *ultra vires* all along. I must admit that "perpetual" implies continuance. Here it only meant that the use of water would be granted to the railway after the temporary work of construction was finished, and that it would not be withdrawn without reasonable notice, but not that such leave and licence should be continued for ever, no matter to what extent the railway might develop. The evidence shows that the railway people have been taking about 54,000 gallons a day, and in addition to this they have been taking water for cottages, etc., by a side-pipe, in all about 65,000 gallons a day. The meter is broken; that is admitted. And then they send down a man who estimates the quantity of water used by gaugings. The very fact that the Government put up the meter shows that they were limited as to the quantity they might take. All the agreement says is that "they shall be *allowed*, etc.." and on the strength of this permission they claim, *as of right*, to take what they please. As to *ultra vires*, section 35 of Ord. 9, of 1836 (under which this Municipality was constituted), authorised the Council to give away water to the inhabitants; but not to an outside body. See also on this subject of *ultra vires, re Staffordshire and Worcester Canal Co.* (1, H.L., 254). This case shows that even 70 years user does not give prescription unless sanctioned by statutory authority. See also *Kimberley Water Works Co.* v. *Kimberley Borough Council* (12, C.T.R., 758). See especially the judgment of De Villiers, C.J. (at p. 764). The principles there enunciated show that the powers of a Municipality must be strictly limited to the terms of their Act—*Encyclopædia of Laws of England* (Vol. 9, p. 21); *Ashbury Railway Carriage Co.* v. *Rich* (7, H.L., 653). The powers of a public body must be construed more strictly than those of a Board of Directors—*Rochdale Canal Co.* v. *Ratcliff* (18, Q.B., 287); *Joubert* v. *Worcester Municipality* (5, C.T.R., 303). Then as to the Native Location. The people living there have a right to the waste water, but owing to the action of the Government, there is often no waste water, and this is a most serious matter. Then, again, the Cape Central Railways are taking no less than 5,000 gallons every day, not only for engines, but to supply cottages and tanks up the line.

[De Villiers, C.J.: Ought you not to have come into court earlier and objected?]

That might have been better, but the case of *Bower* v. *Colonial Government* (6,

C.T.R., 163), shows how disinclined people are to litigate in such cases as this.

[De Villiers, C.J.: Can you show the original conditions under which the town was allowed to take this water from the Hex River?]

I can find nothing save a notice in the *Government Gazette* of November 20, 1819.

[De Villiers, C.J.: I do not refer to that; but under what conditions were these farms sold?]

That I am not prepared to say.

Mr. H. Jones (for the Colonial Government): As to the application for an interdict, we rely upon the contract of October 13, 1874. This was a perfectly valid agreement, and the Municipality have received the benefit of it. This being so, they must establish a very strong case, and show whose rights would be infringed by giving effect to this agreement.

[De Villiers, C.J.: But the Municipality cannot do what is *ultra vires*.]

If any of their acts are *ultra vires*, they must be *ultra vires* with respect to the rights of private people, and therefore it was not for the Municipality, but for these injured people to come forward. It would seem that the inhabitants had a common right to the use of this water, and they, by the Municipality acting as their representatives, granted certain privileges to the Railway Department for consideration.

[Hopley, J.: But could the inhabitants grant rights beyond the term of their own lives?]

Yes; and the Municipality, in making this grant, distinctly said that they acted on behalf of the inhabitants. There is nothing in the Municipal Act to prevent either the inhabitants or the Municipality from selling the water.

[Hopley, J.: Common law would not allow the Municipality to sell the water.]

The inhabitants have since sold water to the Cape Central Railways. There is nothing to show what right the inhabitants had in the water, but it is for the plaintiffs to show this, if they object to the water being disposed of. The Colonial Secretary's letter of October 31 states that the inhabitants were willing to sell their water in consideration of the station being placed in a position which would best suit their convenience. See also sub-section 6 of section 109 of the Municipalities Act. All authorities go to show that Municipalities have the power to sell water, and in point of fact, this Municipality has sold water for money to the Cape Central Railways. On this point it is impossible to lay down any general rules. There is no evidence as to whether a vote of the inhabitants was taken before this arrangement was entered into with the department or not, and therefore the onus is on the Municipality to disprove the agreement which we allege. As to the case of *Joubert* v. *Worcester Municipality* (5, C.T.R., 303), it is by no means on all fours with the present case. There an interdict was granted because rights acquired by purchase had been violated. It is true that in 1847 the Government allowed the railway to take 40,000 gallons, but now they require more. I cannot say that the Government is entitled to give water to the Cape Central Railways. As to the question of *ultra vires*, the onus is on the plaintiffs to show that the Municipality has acted *ultra vires*, and this onus they have not discharged. We do not say that the Government is entitled to take as much water as they require, but only what they require for *bona fide* railway purposes. As to the meaning of "permanent," a permanent station means one which is always ready to receive goods. We are not bound to use at Worcester all the water we take there. In any case, the acquiescence of the inhabitants for so many years amounts to a ratification of what the Council had done.

Mr. Schreiner was not heard in reply.

De Villiers, C.J.: The plaintiffs, in paragraph 5 of their declaration, say: "Before, in, and since the year 1874, there has been and is a supply of water collected and distributed by Municipal and other works for the supply of the town and Municipality of Worcester and of the inhabitants thereof, including householders, ratepayers, erfholders, and resident occupiers of the Native Location, and the said supply was in 1874, and subsequently until 1895, under the control of the Commissioners of the said Municipality, within the limits of the law existing in regard to supplies of water, to which the inhabitants of a municipality are entitled: and thereafter, within similar limits, has been and is under the control of the Municipal Council

of Worcester, duly constituted under the provisions of Act No. 45 of 1882." This paragraph, which I have just read, is admitted by the defendant, and the admission of this paragraph removes any difficulty which might otherwise have stood in the way of granting the relief applied for. The plaintiff further alleges that since the year 1874 the defendant and his predecessors in office administering the Railway Department of and representing the Government of this colony has diverted, taken, and used free of charge, large quantities of water, and that the diversion is taking place by virtue of a licence granted in 1874 in the following terms: "That water for temporary and permanent railway service be allowed free of charge, but water leadings by pipes from the eastern reservoir shall have to be paid for at the same charges as paid by resident householders." The defendant has left no doubt whatever as to the position taken up by the Government in regard to this case by the sixth paragraph of the plea. The defendant admits that he refused to accept a notice given to him by the plaintiff, and he further admits that water is still being taken by him, and that the Colonial Government claims it is entitled in perpetuity, under the agreement arrived at as aforesaid, to take and use such quantity of water for railway purposes as may from time to time be required. At the time the agreement of 1874 was entered into, the railway system was a small affair indeed, and it is quite clear that none of the parties to this agreement anticipated what the future requirements of the railway would become. The quantity of water taken out immediately after this agreement and for some years after this agreement was not more than nine or ten thousand gallons a day. In consequence of the extension of the railway system and the enormous increase of traffic, the requirements of the railway in regard to the Worcester water now amount to something like fifty or sixty thousand gallons a day, and the question now to be determined is whether under the agreement of 1874 the Government is entitled to use this enormous quantity of water without any payment whatsoever to the Municipality. It is said on behalf of the defendant that the Municipality at the time acted as the agent of the ratepayers, and that the ratepayers acquiesced, and that consequently the plaintiffs are not now entitled to succeed. But the agency of the Commissioners did not confer on them powers beyond those given to them by the Ordinance then in force. The Ordinance 9 of 1836 defines the powers and the duties of the Municipality. The 35th section enacts: "It shall be lawful for the said Commissioners acting in pursuance of any such regulations as aforesaid to provide from time to time, and to carry out and lay any pipe or pipes for the conveyance of water to which the inhabitants of the Municipality shall at any time have or acquire a common right from any reservoir, river, or spring to any house, building, or other place within the limits of the Municipality, and the said Commissioners, acting in pursuance of any such regulations as aforesaid., are hereby authorised from time to time to make such regulations touching the quantity of water to be supplied to the inhabitants, and the time or times at which such supply is to be received as shall be proper and necessary." The 43rd section mentions what contracts may be entered into by the Commissioners. It refers to contracts for any work to be done or performed, or any materials to be furnished, and it shows the extreme care with which the powers of the Municipality have been limited. We find that in 1874 the Commissioners took upon themselves to enter into a contract with the Government, the effect of which, literally construed, is to place no limit whatever upon the quantity of water belonging to the inhabitants not belonging to the Commissioners, in which the inhabitants have a common right. That water is to be diverted for railway purposes without any payment. At present the number of gallons per diem is said to be fifty or sixty thousand, and were it to go on at the present rate, it would soon be a hundred thousand gallons per diem, and in the end there might be nothing left for the inhabitants. There surely must be some limit. There appears to be no proof whatever of any acquiescence in the present case on the part of the inhabitants. The best proof of acquiescence would be a regulation to the effect that the Commissioners should have power to convey this water to the Government for railway purposes, but no such regulation has been proved to be in existence. In the present case I am clearly of opinion that if the agreement has the

wide meaning which is attributed to it by the Government, and I am inclined to think it has, it is wholly beyond the powers of the Municipality, which had no power to bind the ratepayers to grant this unlimited quantity of water to the Government; and I think the plaintiffs are entitled to an order in terms of the first prayer of the declaration, omitting the words "either temporarily, or." With the omission of these words, I think the declaration should be made, especially in view of the further order which the Court will make. The Court will declare that the original granting of water by the Commissioners was *ultra vires* and illegal, and that the defendant is not entitled in perpetuity to continue to divert, take, and use water for all or any of the purposes aforesaid. In regard to the interdict, the Court is not prepared to grant an interdict taking effect immediately. It will probably take a considerable time for the Government to make the necessary provision for the supply of water. I am inclined to think it will take until the 1st January, 1905, before the requisite arrangements can be made. In granting an order in terms of prayer (b), it shall be as follows: "Provided that such interdict shall not take effect until the 1st January, 1905, and that in the meantime the defendant be allowed to use the Municipal water upon payment to the plaintiffs of £2 per annum for every hundred gallons used per diem, with leave to the defendant to apply for an extension of time beyond the 1st January, 1905; the defendant to pay costs of the action." Of course, this order will not debar the Municipality from trying to make a more liberal arrangement with the Government, and getting its ratepayers to consent to it. In regard to damages, I am of opinion that the plaintiffs should not succeed, because the Government took the water with the consent of the Municipality. There was nothing in the nature of trespass. I think the Municipality, in addition to giving notice that the contract was to expire, ought to have brought this action sooner. In regard to the water taken hereafter, the Government should pay at the same rate as the inhabitants.

[Plaintiffs' Attorneys: Van Zyl and Buissinne; Defendant's Attorneys: Reid and Nephew.]

SUPREME COURT

FIRST DIVISION.

[Before the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1903. Oct. 22nd.

Mr. Van Zyl moved for the admission of Petrus Johannes Schoevers as an attorney and notary. Counsel asked that the oath might be taken before the R.M. of Cradock.

Application granted, oath to be taken before the R.M. of Cradock.

Mr. Van Zyl moved for the admission of Robert Pullar Maxton as an attorney.

Application granted and oath administered.

PROVISIONAL ROLL.

MALCOMESS AND CO. V. GRAHAM AND LENG.

Mr. Gardiner moved for provisional sentence for the sum of £8,546 15s. 6d., owing on certain two notarial bonds, covering certain advances, for interest at the rate of 8 per cent. in terms of the bond, and for costs of suit.

Order granted.

MORSER AND CO. V. KAHN.

Mr. Pyemont moved for the provisional order for the sequestration of the defendant's estate to be made final.

Order granted.

At a later stage Mr. Pyemont stated that subsequent to the foregoing application an arrangement was entered into between the defendant and his creditors and the petitioning creditor would now like to withdraw his proceedings. He asked that the final order be cancelled, and the provisional order discharged.

His Lordship made an order accordingly.

MORSER AND CO. V. YOUNG.

Mr. Pyemont moved for the provisional order of sequestration to be made final.

Order granted.

SCHUTZ AND DE JAGER V. FOWRIE.

Mr. Pymont moved for provisional sentence for £714 14s. 6d., on a certain

promissory note, with interest and costs of suit.

Order granted.

VAN DER SPUY V. VAN DER SPUY.

Mr. Buchanan moved for provisional sentence on a promissory note for £200, with interest and costs of suit.

Order granted.

KOTZE V. MCGREGOR.

Mr. Russell moved for provisional sentence on certain conditions of sale for £625, with interest at 6 per cent., plaintiff offering to give transfer, and for costs.

Order granted.

ARGUS PRINTING CO. V. MADDOCK.

Mr. Buchanan moved for provisional sentence on a promissory note for £73 5s. 7d., and for judgment, under rule 329d, for £73 15s., for work done, with interest *a tempore morae* and costs of suit.

Judgment and provisional sentence granted as prayed.

GOURLAY, CAVANAGH AND CO. V. GROMER.

Mr. Gardiner moved for the final adjudication of the defendant's estate as insolvent.

The defendant appeared, and opposed the application, stating that it was proposed by one Mr. Herman that he should assign his estate for the benefit of his creditors, and that all then signed the agreement except this very Herman, who withdrew. Herman had told him that if he would give him some guarantee of preference he would sign the deed.

Maasdorp, J., advised the defendant to put these statements on affidavit and serve the applicants with a copy thereof.

Defendant said he would like time to earn money in order to engage counsel.

The matter was ordered to stand over until the 5th November, affidavit to be filed before the 29th inst.

WILSON, SON AND CO. AND OTHERS V. WAKELING.

Mr. M. Bisset moved to make final a provisional order of sequestration.

Order granted.

HAUPT V. VINK.

Mr. C. W.de Villiers moved for provisional sentence on a dishonoured cheque for £97.

Order granted.

HERMAN V. SMITH.

Mr. Russell moved for provisional sentence for £18 15s. on a promissory note, with interest and costs, and for judgment under Rule 329d for £10, for money lent by plaintiff to defendant, with costs of suit. Counsel said the parties lived in different districts.

Judgment and provisional sentence granted as prayed.

BROOKE V. MUSTAPHA.

Mr. Sutton moved for provisional sentence on a mortgage bond for £500, together with interest at the rate of 6 per cent. per annum from the 1st January, 1903, and costs, also for the property hypothecated to be declared executable, the bond having become due by reason of non-payment of interest

Order granted.

ABRAHAMS V. SCHWARZER.

Mr. Close moved for provisional order for the sequestration of the defendant's estate to be made final.

Order granted.

ILLIQUID ROLL.

FRANCIS BROS. V. GLASS. { 1903. Oct. 22nd.

Mr. M Bisset moved for judgment under rule 329 d for delivery of certain six head of cattle remaining over from sale, plaintiff tendering fulfilment of all the conditions specified in the conditions of sale.

Order granted.

ACKERMAN AND ADAMSON V. FORD.

Mr. Burton moved for judgment under rule 319 upon plaintiff's declaration, which claimed £257 11s. for work done. Defendant had been barred. There was an agreement to accept £200, for which amount judgment was now asked, with costs.

Judgment granted.

E. K. GREEN AND CO. V. COLE.

Mr. Gardiner moved under Rule 329d for judgment for £45 for rent, with interest and costs

Order granted.

S.A. BRICKFIELDS V. HENDRICKS BROS.

Mr. Gardiner moved for judgment under Rule 329d for £195 11s. 10d. for bricks sold and delivered, with interest and costs.

Order granted.

ROBINSON BANK V. HART.

Mr. Smith moved for judgment under Rule 319 for £49 4s. 5d., unpaid balance on an overdraft, with interest and costs. less £3 10s. paid.

Order granted.

VAN DER BYL AND CO. V. ROUS.

Mr. Smith moved for judgment under Rule 329d for £40 5s. 11d., goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Order granted.

SOUTHERN LIFE ASSURANCE CO. V. DAY.

Mr. Buchanan moved for judgment under rule 329d for rent of certain offices situate in Good Hope Chambers at the rate of £16 per month from the 1st August to the date of giving possession by the defendant to the plaintiffs, the defendant holding unjust possession. Counsel also applied for the rule *nisi* granted against the defendant, restraining him from removing certain furniture from the said offices pending the action for rent to be made absolute. He asked further for an order for ejectment.

Maasdorp, J., said plaintiffs would be entitled to two months' rent. Judgment would be given for £32 rent, defendant being ordered to give up possession, the rule *nisi* to be made absolute, with costs.

STEER AND CO. V. IOUW.

Mr. Russell moved for judgment under Rule 329d for £68 15s., commission for raising a loan, and for £1 1s. for professional services rendered, with costs of suit.

Order granted.

MARAIS V. ESTATE DU PLESSIS.

Mr. Gardiner moved for judgment, under Rule 319, in default of plea, for £95, on a certain promissory note, with interest at the rate of 5 per cent. and costs.

Order granted.

ESTATE YOUNG V. MEYERS.

Mr. Buchanan moved under Rule 329d for judgment for £68 4s. 6d., for quit-rent and taxes, with costs.

Order granted.

MANSON V. MADDOCKS.

Mr. Van Zyl moved for judgment, under Rule 329d, for £288 8s. 11d., balance of account due and rendered by the plaintiff to the defendant, and costs of suit.

Order granted.

PURCELL AND OTHERS V. WEST INDIAN BUILDING ASSOCIATION.

Mr. Close moved for judgment, under Rule 329d, for £239 6s., balance of account for goods sold and delivered, less £200 paid on account.

Order granted.

PURCELL AND CO. V. BOYCE.

Mr. Close moved for judgment, under Rule 329d, for £119 5s. 4d., for goods sold and delivered, less £100 paid on account.

Order granted.

GENERAL MOTIONS.

SYME V. COLONIAL GOVERNMENT. { 1903, Oct. 22nd.

Mr. De Villiers appeared for the applicant, Ann Elizabeth Syme, and moved for a rule *nisi*, operating as an interdict, restraining the Government from proceeding with the erection of a certain wall on the boundary of plaintiff's property, and from proceeding with other work. The work was being done in connection with the construction of an overhead railway bridge at Claremont, and applicant alleged that if it were proceeded with, her property would be damaged.

Maasdorp, J., said there was no urgency in the matter, and notice of the application must be served on the Government. The matter would therefore stand over.

BANGEE V. BOOSTAY.

Mr. Burton moved for a rule, interdicting the respondent, and certain of his creditors, from selling certain property alleged to belong to the partnership existing between applicant and respondent, pending the determination of an action set down for hearing this term, by which plaintiff sought to establish the partnership, and sued for damages.

A rule *nisi* was granted as prayed, returnable on the 5th November, the rule to operate as an interdict in the meantime.

SECOND DIVISION.

[Before the Hon. Mr. Justice KOTZE and a Special Jury.]

REYNOLDS V. NEW CAPE CENTRAL RAILWAYS, LTD. { 1903. Oct. 22nd.

Injury to person—Negligence—Damages.

This was an action brought by George Reynolds, a stonemason and contractor, residing at Riversdale, against the New Cape Central Railways, Limited, to recover £1,500 for damages for injuries received through the wilful negligence of the defendant company.

The declaration set forth that the plaintiff resided at Riversdale, and that the defendants were a railway company connecting Riversdale with the C.G.R. system at Worcester. On the night of April 20, 1903, the plaintiff was leaving his kitchen door in order to reach the back yard, and it was necessary to pass along a certain lane at the back of the house. The plaintiff, in stepping off the doorstep, put his foot into an excavation made by the defendant company, and suffered severe injuries. The excavation was made by the defendants for the purpose of laying pipes to the station, but there was no warning light or protection to wayfarers. The plaintiff had sustained damages to the amount of £1,500, which the company refused to pay, or any part thereof.

The plea admitted the formal allegations, but denied that the company had any knowledge of the plaintiff stepping into the furrow, or that it was one or two feet below the level of the lane. The defendants denied that the plaintiff was suffering from rupture, or that he received other injuries rendering him unfit for his work, and even if true, the alleged cause was denied. The defendants denied that the furrow was made by them, but said that it was constructed by the contractors or other persons not directly under their control.

Mr. Upington (with him Mr. J. E. R. de Villiers) for plaintiff; Mr. Benjamin for defendants.

Mr. Upington said that the case was set down for September 8, and during the August term the defendants applied for a postponement, and to take evidence on commission of a certain witness. The Court refused the commission, but allowed the case to be postponed. Again the defendants made application for the commission, and on the second occasion the Court granted it. Shortly after that Dr. Raeburn, the doctor who attended the plaintiff at Riversdale, died, and thereafter some correspondence ensued between the parties. The defendants offered £100 with costs, in full settlement, which was refused. Subsequently they tendered £150, but the plaintiff refused to accept that sum. As a result of the correspondence, it would only be necessary to take evidence as to the damage, the denial of the liability having been abandoned.

Evidence was then called for the plaintiff.

George Reynolds, plaintiff in the case, said that prior to the accident he was a strong, healthy man. On the night of the 20th April he went out of his back door for the purpose of entering the back yard. When he stepped out of the door he fell into a drain in the lane. The excavation was about three feet from the door. He had no knowledge that the sluit was there, and there was no light. He called for a light, and his brother-in-law helped him into the house. At first he did not think he was seriously injured, although he felt a good deal of pain. Medical assistance was called for, and he was examined by Dr. Raeburn, who attended him for over four months.

Witness was ordered to bed, and remained there eleven days. The doctor ordered him to wear a truss. In June he was seen by Dr. De la Bat, and in August by Dr. De Vos. On both occasions Dr. Raeburn was with him. Occasionally he was free from pain. He was unable to do any work. In addition to the leg he had other pain, and he had lost his nerves. Prior to the accident he earned £500 by contracts between March of last year and May of this year. His average earning was £30 a month. Since the accident, he had to forego a contract for a school at Heidelberg. He had to pay for three doctors. Yesterday he was examined by three doctors in consultation.

Cross-examined by Mr. Benjamin: He had worked as a stonemason at the station Buildings at Riversdale. His principal work was taking contracts. He was always able to do his work prior to the accident, but it was possible he had a complaint in the right lung. Previous to the accident he had never complained of pains in the back. He did not tell Dr. Fuller that morning that he had pains in the back prior to the accident. He could not say whether he suffered from miners' lung complaint in Johannesburg. He had had a cough, and consulted a doctor about it. He could not really say the distance of the trench from the outer edge of the step. If it were said that the excavation was three feet six from the door step he would not deny it. He had one foot on the step, and then he put the other foot into the trench. He knew nothing about the depth of the trench. He had a swelling in the left groin after the accident. Hot water and turpentine were applied that night. The rupture was slightly rubbed at the time. He had been examined by four doctors. Dr. Biggs examined him in conjunction with Dr. Raeburn shortly after the accident. He had played billiards after the accident, but he was not anxious to take part in a competition. He did not know what a rupture was.

Re-examined by Mr. Upington: He had suffered from pains in the back since the accident, and he did not know what the cause was. He wore a truss as a result of a consultation with Dr. Raeburn. Dr. Andrew said nothing about the truss when he was examined. In consequence of what Dr. White told him, he left off the truss, and then he suffered pain again.

By Kotzé, J.: £30 would be about the average amount he earned per month.

Dr. Petersen stated that yesterday, in company with Dr. De Vos and Dr. De la Bat, he examined the plaintiff. He would say that the plaintiff at present was not in a good state of health. There were traces of shock to the spinal chord. The left lung was affected, and, in addition, the muscles of the calf of the left leg were slightly atrophied. The injuries were probably caused through the accident. He could find no trace of a rupture, but as he had been quiet for six months the parts might have assumed their normal condition.

Cross-examined by Mr. Benjamin: If the rupture was a small one it was possible that he might recover, and there would be no trace of it.

Re-examined by Mr. Upington: It was perfectly possible there might have been a rupture.

Dr. De Vos, of Riversdale, said he knew the plaintiff as a strong and healthy man for some time. In conjunction with Dr. Raeburn he examined the plaintiff in August, 1903, and he was astonished to see his poor condition of health. He took it that the plaintiff was suffering from shock to the spinal cord. It would be some time before he would be able to work.

Cross-examined by Mr. Benjamin: He might get quite well again. The accident might have caused the damage.

By Kotzé, J.: The plaintiff was a hard-working man. He would say that it was possible that the plaintiff's present condition was due to the accident.

Dr. De la Bat, practising at Heidelberg, said that he examined the plaintiff in the early part of June in consultation with Dr. Raeburn. His nervous condition was low, and he believed he was suffering from shock to the spinal cord. It was probable the symptoms were the result of the accident. He was again examined yesterday by three doctors, and in witness's opinion his general health was not good.

Cross-examined by Mr. Benjamin: The lung trouble would partly account for his condition.

By Kotzé, J.: It would be difficult to say what his condition would be in three months.

Mrs. Reynolds, wife of the plaintiff, said that when her husband came into the kitchen after the accident he was in considerable pain. Dr. Raeburn was sent for, her husband was ordered to bed, and remained there eleven days. He was strong and healthy previous to the accident.

Mr. Upington closed his case.

Mr. Benjamin called,

Dr. White, of Swellendam, who said that he examined the plaintiff about the 24th June. He examined him principally for rupture, and witness found no trace of it. He did not think it possible that the rupture could be concealed from him. Witness recommended him to wear a suspensory bandage. The plaintiff told witness he had had inflammation of the lungs on two different occasions. He did not think it likely that the accident was the cause of the state of his general health. Again in September he was examined for a trace of rupture, but nothing could be found. On the first occasion he complained of pain in the groin, but on the second he said the pain in the groin was better, but that he was suffering from pain in the inside of the thigh. He could not see what caused the limp.

Cross-examined by Mr. Upington: He did not agree with Dr. Petersen that the plaintiff was suffering from shock. Witness was the railway company's doctor. The company sent him to examine the plaintiff for rupture, and his general condition. He advised him to remove the truss, although he knew the plaintiff was in Dr. Raeburn's hands. He had never seen him previous to the accident, and knew nothing of his state of health.

Re-examined by Mr. Benjamin: There were no physical signs of pain when witness recommended him not to wear the truss.

Dr. Biggs said that the plaintiff himself asked to be examined. A spinal affection would exhibit itself in other parts of the body. He found no spinal affection. After leaving Heidelberg the plaintiff was not in good health.

Cross-examined by Mr. Upington: He did not look for spinal injury, and he was just as confident as Dr. Petersen, who had looked for it and found it. The plaintiff was not suffering from shock. He saw the plaintiff in court, and there was not the slightest sign of shock. He thought the plaintiff would limp for a long time. The plaintiff had just an ordinary cough, but witness did not examine his lungs. He thought the plaintiff's present condition was due to worry. The plaintiff, he would not mind saying, was worse now than before the accident. Witness had been doctor for the contractors.

By Kotzé, J.: He would not advise the plaintiff to do blacksmith's work tomorrow, but in a few weeks he might be able to do so.

Dr. Andrew, formerly of Swellendam, said that he examined the plaintiff on the 2nd July last, in company with Dr. Raeburn. There was no trace of rupture. There were no external signs to indicate why the plaintiff should limp. A strain on the muscles of the leg might cause the plaintiff to limp. If there had been proper treatment at the time the plaintiff would have been all right in six weeks. Rubbing with liniment would do rupture a deal of harm.

Cross-examined by Mr. Upington: Witness found no trace of spinal injury. He would not say there was considerable injury.

By Kotzé, J.: He did not think the swelling could be caused by a fall. When he saw him on the 2nd July, witness thought he would be all right in a few weeks.

William Rogers, of Pauling and Co., said he was engaged in constructing the trench in question. The trench was eleven inches broad and nine or ten inches deep. From the doorstep to the inner edge of the trench was three feet six inches.

William Witham, contractor for Pauling and Co., corroborated the measurements of the trench given by the last witness. The plaintiff he had known for twenty-two months, and he was not in very good health. Witness never saw the plaintiff doing manual labour.

Arthur Cook, traffic superintendent of the New Cape Central Railway, said that he saw the plaintiff on two or three occasions prior to February 18, and after that continually. In February and March the plaintiff was in poor health, and said that he thought he was going to die. Witness saw the plaintiff in bed two days after the accident, when he was lying in bed with a pad on his loin. On the 12th May witness saw the plaintiff play skittle pool. After a dispute about

a billiard table, the plaintiff threatened to fight witness and two barmen.

Cross-examined by Mr. Upington: He would ask the jury to believe that the plaintiff was very violent, threw his stick down, and threatened to fight witness and two barmen.

Fredk. Dawson, General Manager of the Cape Central Railways, said, as far as the company was concerned, they had nothing to do with the accident, as the work was being done by Messrs. Pauling and Co. The plaintiff looked better to-day than he did previous to the accident

Dr. Fuller said that, in conjunction with Dr. White, he examined the plaintiff that morning. He found no signs of recent rupture. It was very doubtful if a rupture was ever cured without an operation. The plaintiff told witness that he had had three attacks of inflammation of the lungs. Witness found one of the lungs diseased. The plaintiff told witness that he had pains in the back prior to the accident. Witness discovered nothing wrong with the spine.

Cross-examined by Mr. Upington: The plaintiff was not suffering from shock.

Mr. Upington closed his case, and counsel then addressed the jury on the facts.

Kotzé, J., after dealing with the contradictory nature of the medical evidence, advised the jury to look at the case from a common sense point of view. The jury would have to accept either the evidence of the doctors with regard to the plaintiff's state of health prior to the accident, or that of the railway officials. Even accepting the statement that he did suffer from lung trouble previous to the accident they would have to consider whether his lung might not have got worse after the accident. The plaintiff had always been willing to submit himself to a medical examination by the doctors representing the company, and that was hardly in keeping with the actions of a man who was supposed to be shamming. They would also have to look at prospective damages and weigh up the opinions of the different medical experts.

The jury retired, and, after about 15 minutes' consultation, returned with a verdict for the plaintiff for £500 damages, with costs.

Judgment was entered accordingly.

[Plaintiff's Attorneys: Walker and Jacobsohn; Defendants' Attorneys: Syfret, Godlonton and Low.]

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SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

BLENCK V. REYNOLDS. { 1903. Oct. 23rd.

Mr. Buchanan said that he appeared for the defendant in the action. The case was set down by the defendant in consequence of the plaintiff not having proceeded with the action. The action was for slander, and the defendant pleaded privilege. The case had been set down by the defendant for the purpose of obtaining judgment with costs.

The plaintiff did not enter appearance.

Some question having been raised as to notice, the case was ordered to stand over till later.

At a later stage, Mr. Buchanan put in an affidavit of service of notice, and the Court granted absolution from the instance with costs.

REHABILITATION.

Mr. Buchanan moved for the rehabilitation of Andries Kinder Mans, in whose insolvent estate the assets realised £2,132 and the debts proved £3,402, thus showing a deficiency of £1,370.

Application granted.

GENERAL MOTIONS.

ASHMAN V. ASHMAN.

Mr. Buchanan said that he appeared for the plaintiff (the wife) to ask for the rule *nisi* calling on the defendant to show cause why a decree of divorce should not be granted to be made absolute. This matter was before the Court a few days ago, when their lordships asked for an intimation in some shape or form by the defendant that he was willing to acquiesce in an alternative order asked for by the plaintiff in lieu of the division of the estate and maintenance of the children and costs. The defendant had written letters consenting to an order in the terms proposed by the plaintiff.

An order was made in the following terms: Decree of divorce granted, plaintiff to have custody of the children; division of the estate to be effected in the following manner—defendant to pay to

the plaintiff £500, and to cede to her a policy of life insurance and furniture and piano now in her possession, the defendant to retain the rest of the estate, plaintiff abandoning her claim for maintenance and costs of suit.

Ex parte ROSE.

Mr. C. W. de Villiers moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Order granted as prayed.

Ex parte VILJOEN.

Mr. Buchanan moved for an order confirming the sale of certain property in the Division of Uitenhage to the petitioner, who is executor dative in the estate of the late John Willem Viljoen. Petitioner said that he bought certain property in the estate at public auction for £300, and that the Divisional Council valuation for same was £285. The auctioneer had since died. The registrar declined to register the deed of transfer.

Order granted as prayed.

Ex parte LAMPRECHTS.

Mr. C. W. de Villiers moved for an order authorising the registration of certain property in the district of Hope Town, purchased by the applicant from an estate of which she was executor testamentary. The purchase price was £275.

Order granted as prayed.

Ex parte SCHOEMAN.

Mr. Van Zyl moved for an order authorising the disposal of certain property in the estate of the late Henry Pieter Schoeman and his surviving spouse. Petitioner was one of the minor sons, and he said that the immovable property was bequeathed to himself and his brothers and one sister. Their shares, however, were very small, and the proceeds of the sale of the farm were proposed to be invested in a farm in the division of Burghersdorp, which petitioner's brother had purchased for £3,000. Petitioner asked for an order authorising him to dispose of the land in the will aforesaid of his parents and to invest the proceeds in the other property. The surviving spouse approved of the application.

Maasdorp, J., said it appeared from the affidavit that the mother had renounced the benefit of her usufruct.

Mr. Van Zyl said that that was so.

Maasdorp, J., said that the affidavit seemed to be very vague, and it was a point as to whether the mother understood that she was really renouncing the benefits. It should be quite clear that that was her intention.

The matter was ordered to stand over for further inquiries on this point.

Ex parte MABUYA.

Mr. Close said that this matter came before the Court on the 15th April last for the confirmation of a certain order granted under the Derelict Lands Act in respect of certain fifteen pieces of land that were in the possession of the petitioner, and for which he wished to obtain title deeds. Subsequently when transfer was effected under the order, the Registrar of Deeds at King William's Town found that certain lots had the prescriptive or registered owner and the date incorrectly stated in the petition, on which the rule *nisi* was granted, and on which the order of the Court was granted, so that the Registrar of Deeds refused to pass transfer without a further order amending the preceding order. The property was situate in Stutterheim. The Registrar at King William's Town had forwarded a letter to the Registrar at Cape Town setting forth the discrepancies in the petition. Council submitted that all that was required was a formal alteration of the rule *nisi*. He moved for an order authorising the amendment of the previous order of the Court.

A rule was granted with respect to lots 19 and 24, returnable on the 12th December, rule to be published once in the "Gazette" and once in "Imvo." Order granted in respect to Lots 32, 33, and 106, order to be amended in accordance with the directions of the Registrar of Deeds, King William's Town.

SMITH V. MENGEL.

Mr. Van Zyl moved for an order for the attachment of certain two erven of land belonging to the defendant at Elliott, so as to found jurisdiction, and

for leave to sue the defendant by ediotal citation for a certain debt.

Order granted for attachment, and leave granted to sue by edictal citation, rule to be returnable on the 1st February, personal service to be effected.

Ex parte DU PLESSIS AND OTHERS. { 1903. Oct. 23rd.

De communi dividundo.

This was an application for the direction of the Court as to the division and distribution of certain immovable property.

The petition of Sarah Elizabeth du Plessis (born Weyers), widow of David Jacobus du Plessis, of Zuurfontein, in the Division of Middelburg. Rodolph Andries Jansen, as secretary to the Board of Executors of Graaff-Reinet in their capacity as the executors testamentary of the said David Jacobus du Plessis, humbly showeth:

1. That by the last will of the said D. J. du Plessis, and his wife, the said S. E. du Plessis, executed on the 16th November, 1891 (copy of which is hereunto annexed), it is specially provided, *inter alia*—that the farm Zuurfontein, situate in the Middelburg district, is bequeathed to their children, Daniel Johannes du Plessis, Stephanus Jansen du Plessis, Anna Christian du Plessis, Salomon Terblanche du Plessis, and Sarah Elizabeth du Plessis, subject to certain conditions, *inter alia*, that they shall have nothing to say, nor can they obtain transfer until the death of the survivor.

2. That the said D. J. du Plessis is dead.

3. That after his death the bondholder, in consequence of the non-payment of interest for several years, called up the bond, and the said farm was sold in execution.

4. That thereafter the executors were duly paid the balance of the purchase money amounting to the sum of £7,456 18s. 1d.

5. That it is further provided by the said will that in the event of the death of any of the children before the survivor, his, her, or their shares will devolve upon the surviving children, or upon their descendants by representation, but should they leave any descendants, his or her share shall devolve upon his or her descendants by representation.

6. That the said children shall only be entitled to possession of their farms after the death of the survivor, who shall have and enjoy the usufruct thereof as long as she lives.

7. That according to the codicil attached to the said last will of the above parties, dated 20th March, 1895, hereto annexed, it is provided that a certain piece of Government ground, lately purchased from the Government, shall be subject to the above-named conditions of the will.

8. That the said piece of land adjoins the above-named farm, and is lying vacant, there are no lands or buildings thereon, and it is altogether useless to the owners, and measures 899 morgen and 366 square roods, and was purchased from the Government for £180.

9. That, as the said piece of ground was not included in the bond, the same was not sold in execution.

10. That the said widow, Sarah Elizabeth du Plessis (born Weyers) has entered into and executed a deed of renunciation, dated July 13, 1903, hereunto annexed, relinquishing her life interest under the said last will and testament.

11. That there is one child, Sarah Elizabeth du Plessis, a minor, aged 12 years, the remaining children being majors.

Wherefore your petitioners humbly pray:

1. For an order that your executors may be entitled to forthwith pay out the children the balance of the purchase amount, realised by the farm sold in execution, viz., to the major heirs, and to pay into the hands of the Master of the Supreme Court the said minor's portion.

2. That the piece of Government ground referred to in the said codicil be sold by public auction, and the proceeds dealt with as above, viz., by paying out the major heirs and by paying the minor's portion in the hands of the Master of the Supreme Court.

The usual verifying affidavit was annexed.

The portions of the will referred to, which are material to the above petition, read as follows:

1. We prelegate and bequeath to our children, Daniel J. du Plessis, Stephanus J. du Plessis, Anna C. du Plessis, Solo-

mon T. B. du Plessis, Sarah E. du Plessis, our farm now occupied by us, and known as Zuurfontein, situate in the district of Middleburg . . . . subject to the following conditions: (a) They shall not be allowed to make any claim whatever or obtain transfer of the farm until after the decease of the survivor of us. . . . . (b) We desire that the survivor shall remain in the full and undisturbed possession of our joint estate during his or her lifetime, and shall be entitled to the full income and usufruct thereof. After the death of the survivor, the residue of our joint estate shall be equally divided among our children raised, or still to be raised, and in the event of one or more of them predeceasing the survivor, then their lawful descendants by representation. . . The material part of the deed of renunciation referred to in the petition was as follows. . . I, Sarah Elizabeth du Plessis (born Weyers), widow of the said late David Jacob du Plessis, do hereby expressly renounce and disclaim all my right, title, and interest and claim in and to all usufruct and income devolving upon me out of the joint estate of myself and my said deceased husband, relinquishing the same in favour of my said children, so procreated in marriage with my said late husband. . . . . ."

The Acting Master's report, after setting out clause 1 of the will (as above) proceeds: "The said farm Zuurfontein was sold in execution at the instance of the bond-holder by reason of non-payment of interest. The purchase price obtained was an exceptionally high one; for after satisfying the bond-holder's claim, sheriff's and other costs, a surplus of £7,551 resulted, which sum has been paid over by the High Sheriff to the petitioners. The survivor has now executed a deed of renunciation, relinquishing her life interest with the view of making an immediate distribution of the surplus referred to, but the question naturally arises whether such distribution can now take place, in view of the terms and conditions of the will above set forth. Should your Lordships be of opinion that the fact of the said farm having been sold in execution nullifies the said terms and conditions of the said will, then such distribution could, of course, be effected, but if, on the other hand, your Lordships should hold that such distribution could only be determined at the death of the survivor, then I beg to recommend that the said balance of proceeds (viz., £7.551) be deposited with a trust company, subject to the life usufruct of the survivor and the terms of the will. I have no objection to offer to the proposed sale of the piece of Government ground now that the farm Zuurfontein has been sold, but I would suggest that the proceeds thereof be dealt with in a similar manner as your Lordships may decide upon in regard to the sum of £7,551.

Mr. Burton (for the applicants): The will left Zuurfontein to the children, subject to a life usufruct to their mother The only difficulty seems to be that should any one of the children predecease the mother, his or her share of the property must go to his or her heirs. There is a minor child among the heirs, and her share might be affected by an immediate distribution. The widow has renounced her rights under the will, and is prepared to distribute the estate at once. If, then, the majors agree to take their shares now, would your Lordships sanction a distribution in the interests of the minor?

[Maasdorp, J.: But if we do that, and one of the heirs should predecease the mother, his descendants would forfeit their share.]

[Kotzé, J.: Should one of the sons get his share now, and then die before the mother, he may first spend his share.]

He might do that in any case; the rights of the immediate heirs have already vested.

[Maasdorp, J.: Hardly. There is a contingent vesting, subject to the condition, should the children survive their mother. The minor should be represented.]

I quite admit that.

[Kotzé, J.: The will directs that in the event of the death of an heir before that of the mother his share shall go to his heirs, surely those further heirs will be prejudiced if you now distribute the capital?]

There is no entail, and the further heirs would be bound by the consent of the immediate heirs. Would your Lordships allow this matter to stand over?

[Maasdorp, J.: Yes, in order that notice may be given to the major heirs

and their consent obtained, and that the minor may be represented by counsel.

[Applicant's Attorneys: Dempers and Van Ryneveld.]

Ex parte BOTHA.

Mr. Buchanan moved for an order directing the transfer of certain property. It appeared the applicant, formerly of Colesberg and now of Jaggersfontein, on the 14th February, 1903, sold to a certain syndicate known as the R.B. and B. Syndicate his farm of 2,386 morgen for £3,639 8s. 3d. When the petitioner sold the farm he was aware that the syndicate were the purchasers, and he looked to them for the purchase price. The transfer duty was duly paid, and thereafter the Registrar refused to pass transfer when the company was formed. It was really a question of whether two transfer duties should be paid. Counsel read an affidavit from Mr. Abe Bailey and other members of the syndicate setting forth that owing to certain circumstances the registration of the company was delayed until June 26th, 1903. The same syndicate was formed prior to the registration, and the farms were purchased for the purpose of irrigation.

Mr. Buchanan (for applicant): The Registrar objected to the transfer on the ground that it was sought to be passed before the company was registered.

[Maasdorp, J.: A company is not formed till it is registered.]

The syndicate was formed, and it consisted of the same persons as those which formed the company. Botha looked to the company when he sold. I do not know that any deed of sale was entered into, but that only shows that the vendors would deal only with the company. The only difference was that the syndicate was not registered and the company was. If that fact of registration makes an essential difference, of course I am out of court. The whole point of the case is, "were there two sales—the first to the syndicate and the second to the company." If so, two transfers would be necessary.

[Kotzé, J.: When was the syndicate formed?]

On February 14, 1903, and then all preliminary proceedings for the formation of the company had already been taken, save registration. See the recent case of the *Blauwklip Garden Company* (13, C.T.R.), where land was sold to a company before registration; also *Re Union-Castle Company* (12, C.T.R., 126), where certain property had become consolidated. See also *Re Evening Star Lodge, Berry ex parte* (13, C.T.R., 277). On the whole, I would submit that this case should stand over.

The matter was ordered to stand over for further information.

Ex parte P. J. TERBLANCHE.

Mr. M. Bisset moved for the appointment of a *curator ad litem* to represent the minor children in the partition of certain undivided land, and for leave to raise a mortgage on the estate to provide the necessary funds to defray the costs in the matter Johannes Hendrick Spies had been suggested as curator.

An order was granted, subject to the Master's approval of the curator as a fit and proper person. The question of mortgage was ordered to stand over for an approximate estimate of the amount.

Ex parte G. D. TERBLANCHE.

Mr. M. Bisset moved for the appointment of a *curator ad litem* to represent the minor children in the division of certain undivided land, and for leave to raise the necessary funds to defray the cost of transfer. Counsel asked that Willem Johannes van der Veen be appointed as curator.

An order was granted, subject to the Master's approval, appointing Willem Johannes van der Veen as curator, but the question of a mortgage was ordered to stand over for further information as to the approximate amount.

Ex parte NEL.

Mr. M. Bisset moved for the appointment of a *curator ad litem* to represent the vested rights of the minor children in an arbitration which had been agreed upon to avoid expensive litigation.

The matter was ordered to stand over for information as to whether the proposed curator was a fit and proper person to look after the interests of the minor children.

SIPIKA V. NONKOMAINST AND OTHERS.

Mr. Russell moved for an order calling on the respondents to show cause why an order should not be issued declaring the applicant, David Sipika, heir to his father's property and consequently entitled to transfer. The property was registered in the father's name, and applicant being the eldest son of the chief wife, was entitled under native customs to the property. An affidavit by the Resident Magistrate of Kokstad was put in to the effect that notice had been served on the wives and children of the applicant's father.

A rule *nisi* was granted calling on all persons to show cause why the property shall not be transferred to David Sipika, to be returnable on December 12. The notice to be published once in the "Kokstad Advertiser."

Ex parte HUTT.

Mr. Russell moved for leave to raise money on mortgage. The petitioner was the sole heiress in the estate of her late husband, Vincent Hutt, who had had a joint transaction with one Johnson in connection with certain property situate at the corner of Chiappini-street. A claim had been filed against the estate, and it was proposed to raise money in order to meet this.

The Court granted an order as prayed.

Ex parte ARNOLD.

Mr. C. W. de Villiers moved for leave to sell portion of a farm in the joint estate of the petitioner and his deceased wife, situate in the district of East London, to his son, James Weston Arnold. Petitioner, who was executor testamentary, enjoyed usufruct of the farm, and at his death the said usufruct appertained to his daughters. The usufructuary heirs had consented to the proposed sale. The purchase price was proposed to be fixed by two independent sworn appraisers, who placed the value at £30 per acre. The extent of the section proposed to be sold was twelve acres. Another son of the petitioner, Charles Robert Arnold, held a bond for £1,000 on the farm, and it was proposed to reduce the capital of the bond by the amount raised by the sale.

Order granted in terms of the trustee's report, and subject to the consent of the bond-holder.

Ex parte ROBINSON (BORN RAYNOR).

Mr. Buchanan moved for an order authorising the amendment of a certain ante-nuptial contract. The petitioner was married in 1886. The ante-nuptial contract showed her name to be Maria Raynor, instead of Maria Sophia Raynor, The difficulty had arisen in connection with the transfer of certain property, the Registrar of Deeds having declined to register the property in consequence of the error in the ante-nuptial contract.

Order granted authorising the Registrar to amend the ante-nuptial contract as prayed.

Ex parte METELERKAMP.

Mr. Buchanan moved on behalf of the petitioner, the sole trustee and the only creditor in the insolvent estate of Hendrick Jacobus van der Walt, for leave to take transfer of certain property in the estate, situate at Oudekraal, in the division of Knysna. Petitioner had duly advertised the property for sale by public auction, and it had been so submitted more than once, but the highest bid received was £400, and petitioner had bought the property for £425. The matter had been standing over for production of proof of advertising the sale. Counsel read an affidavit as to the publication of advertisements.

Order granted as prayed.

REYNOLDS V. GOODMANSON.

Mr. J. E. R. de Villiers, for the applicant, moved for the attachment of certain movables and immovables at Claremont, and for leave to sue by edictal citation. In November, 1902, the petitioner sold to Goodmanson a certain piece of ground for £150, and advanced £400 for the purpose of erecting a building on the said piece of ground. Goodmanson had not taken transfer of the property, had left the Colony, and had only paid £50, leaving £500 still due.

Order for attachment and leave to sue by edictal citation granted, citation to be returnable on February 1 next, personal service to be effected, failing which, one publication each in the "Gazette" and the "Cape Times."

Ex parte THE EXECUTORS IN THE ESTATE OF THE LATE JAN BARDIEN.

Mr. M. Bisset moved for leave to sell certain property, with buildings thereon, measuring 20 square roods and 20 square feet, situate at Port Elizabeth. The petitioners were the executors dative in the estate of Jan Bardien, who died in 1868, bequeathing the said property to his four children. At the death of the legatees, the property was to pass to their descendants. A further condition in the will was that there should be paid to certain parties certain sums of money out of the rents of the property. The property was at present leased to one Antoine Fisher. The petitioners thought that, in view of the numerous heirs, it would be the best course to sell the property and distribute the proceeds. The Master reported in favour of the application, and recommended that the property should be sold by public auction, and from the proceeds thereof, after deducting the costs of the present application, their shares should be distributed among the major heirs, and that there should be paid into the Guardians' Fund of this colony the shares of the minors and the heirs whose whereabouts were unknown.

Order granted in terms of the Master's report.

TIEN SON V. ASSIGNEE ESTATE FARROW. { 1903. Oct. 23rd.

Exception to summons—R. M. Court practice—Specific performance.

The same precision is not necessary in drawing a R. M. Court summons which would be required by the Supreme Court. A magistrate does not exceed his jurisdiction by ordering a litigant specifically to deliver up certain articles if he orders him in the alternative to pay their value.

This was an appeal from a judgment of the Acting A.R.M. of Port Elizabeth.

The plaintiffs (now respondents) sued the defendant in the Court below for the return of certain empty aerated mineral water bottles, or their full value, £4 15s. The Magistrate gave judgment for the plaintiff for the return of the bottles within thirty days, failing which, the defendant to pay the value. The summons called upon the defendant, at the suit of the plaintiff, in his capacity as assignee in the estate of A. E. Farrow, to deliver up twenty-three and three-quarter dozen bottles, the property of the estate, which were delivered to the defendant at his special request, and which the defendant unlawfully retained, although they had been demanded. An objection was taken to that part of the summons as vague, embarrassing, misleading, and bad in law, in that it failed to set out the exact manner in which the debt arose.

The Magistrate, in his reasons for judgment, said that the plaintiff sued for a return of 23¾ dozen empty aerated water bottles, or the value thereof, 4s. per dozen. It appeared that the plaintiffs were aerated water manufacturers, and in the ordinary course of business sold to the defendant, who was a general dealer, certain quantities of aerated water, which were delivered to defendant in bottles. Farrow and his party swore that when the aerated water was sold and the goods delivered to the defendant, they told him that he was only buying the contents of the bottles, and not the bottles themselves, and that the bottles had to be returned when empty; in fact, that the bottles were only lent to him. The defendant made three different statements—firstly, that he was never told that the bottles must be returned; secondly, that he bought the bottles in question; and, thirdly, that they told him that he had to return them. In face of these conflicting statements, he (the Magistrate) could put no credence in the defendant's evidence, and he accepted the plaintiffs' positive statement that they told the defendant that the bottles were to be returned. This story was borne out by the fact that the aerated water was sold at 2s. per dozen for large, and 1s. a dozen for small bottles to the defendant, while the bottles themselves cost plaintiffs 4s. a dozen Some question was raised as to the number of bottles that the plaintiffs were entitled to from the defendant. He (the Magistrate) examined the books kept by Farrow, and he had no hesitation in accepting

them as correct, in preference to defendant's contradictory statement. He therefore gave judgment for the plaintiffs for the return of the bottles or their value.

Mr. Benjamin (for appellant): We say that this exception ought not to have been dismissed.

[Maasdorp, J.: You bought only soda water; you did not buy bottles?]

Surely that ought to have appeared on the summons. The evidence shows that the Chinese go about selling bottles.

[Kotzé, J.: The same precision is not required in a Lower Court which is insisted upon here.]

But a man may not vary his plaint, and sit between custom and contract. To vary these is to set up quite a new case.

[Mr. Benjamin here read defendant's evidence.]

[Maasdorp, J.: Do you say that he bought the bottles?]

He used to take empties when he could get them. The summons is very vague and embarrassing, and the defendant is prejudiced thereby. The Magistrate also ordered the return of the empty bottles or payment of their value. The Magistrate had no jurisdiction to order specific performance. He erred in that part of his judgment at all events, and also in overruling the exception.

Mr. Buchanan (for respondent) was not heard.

Maasdorp, J.: In this case the plaintiffs in the Court below sued the defendant for the delivery of certain mineral water bottles, the property of the plaintiffs, which were delivered to the defendant at his request. The plaintiffs allege that they have demanded delivery of the bottles, and the defendant has refused to give them up. These are mainly the allegations in the summons. An exception was taken to the summons, that it was vague and embarrassing, and did not set forth any cause of action, but it seems to me to be quite clear that there is a cause of action. If a plaintiff alleges that his property was placed in the possession of the defendant, then he is entitled to demand its recovery, unless the defendant sets up some defence to show that he is entitled to retain it. In the absence of such a defence, and merely taking the summons as it stands, a cause of action is given, because a person is entitled to recover his property from anyone who holds it, unless some reason for retention is given by the person in possession thereof. This exception was overruled by the Magistrate, and evidence was taken upon which it appears that there were certain transactions for the sale of soda water by Farrow, whose estate has been assigned, to the plaintiffs, in which Farrow sold soda water to the defendant, but expressly retained the property in the bottles. He says that in selling soda water he did not sell the bottles, and defendant admits that when the soda water was sold to him it was upon condition that he should return the bottles to the plaintiffs. The appeal has now been brought before the Court on the ground that the exception should have been allowed. In my opinion, as I have said already, the summons clearly sets forth what the claim of the plaintiffs is, but even if the summons was not so artistically drawn as would have been necessary in the Supreme Court, it now appears that there was a good ground of action upon the evidence, and if the summons was at all vague that the defendant was in no way prejudiced by that vagueness. Mr. Benjamin now raises another point, which does not seem to have been one of the grounds of appeal. He says that the form of the Magistrate's judgment is not exactly such as it ought to be, because he gave an order for the return of these bottles. But considering that he has given an order for the return of these bottles, or, in the alternative, that the value thereof should be paid, I think that the objection that he made an order for the specific performance of a certain act does not arise. I don't think it is necessary for the Court to interfere with the form of the judgment as it stands. The appeal will be dismissed with costs.

Kotzé, J, concurred.

[Appellants' Attorneys: Michau and De Villiers; Respondent's Attorneys, Van Zyl and Buissinné.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP.]

TRIAL CAUSES.

DE VILLE V. DE VILLE. { 1903. Oct. 26th.

This was an action brought by Pieter Bernhardus de Ville, of Graaff-Reinet, against his wife, now living at Calitzdorp, for restitution of conjugal rights, failing which a decree of divorce, with forfeiture of the benefits of the marriage in community. Mr. Russell appeared for the plaintiff, and the suit was undefended.

Evidence was called in support of the action.

Charles Wm. Henry Smith, clerk in the Colonial Office, in charge of the Marriage Register, produced the duplicate original register of the marriage of the parties.

Pieter Bernhardus de Ville said he was married to the defendant in September, 1898, at Graaff-Reinet. After marriage they resided at Graaff-Reinet. There had been one child of the marriage. They lived together until August, 1899, when his wife told him she was going away for a couple of months to a farm. He reluctantly consented to her leaving, but his impression was that she would return. She had not, however, come back. He had a letter from her a little time ago, from which it appeared that she was teaching at Calitzdorp. He had asked her more than once to return to him, but she had refused to do so. He did not know any good reason why she should have left him. He understood that his wife had said in a letter that it was impossible to live with him, and that she would like to retain the child. Witness was willing that she should have custody of the child.

By the Court: He did not know why defendant should say that it was impossible to live with him. There might have been differences of opinion and quarrels, but nothing of such an extraordinary nature as to justify her in deserting him.

An order was granted calling on the defendant to restore conjugal rights to the plaintiff on or before the 14th November, failing which, to show cause on the 12th December why a decree of divorce should not be granted against her, with forfeiture of the benefits of the marriage.

LIQUIDATOR OF THE LIFE BRANCH OF THE S.A. FIRE AND LIFE ASSURANCE CO. V. THE BOARD OF EXECUTORS. { 1903. Oct. 26th. „ 27th.

Liquidator—Investment of Trust Funds—*Ultra vires*—Pleading—Exceptions.

On a certain Life Assurance Co. going into liquidation, one H. was appointed as administering liquidator, and in that capacity arranged with a certain Trust Co. to deposit with them such funds of the Assurance Co. as should come into his hands; the said funds to bear interest at 5 per cent., to be reckoned half-yearly. This interest was afterwards reduced to 4 per cent. The Trust Company, on being called upon, rendered an account of these funds, but brought up no interest for 1897 to 1899, and thereafter brought up interest yearly. The plaintiff now claimed that this account should be amended and the Company directed to bring up interest half-yearly from 1897, and also to account for certain unclaimed dividends remaining in their hands which had been merged in their funds. The defendant Company pleaded that H. had agreed that no interest should be allowed on moneys deposited by him with the said Company after 1896. That at his request they agreed to allow yearly interest on the said moneys after 1899. They denied that they were bound to open an account for unclaimed dividends or were responsible for the same, but they tendered

to pay them whensoever they might be claimed. To this plea the plaintiff excepted as bad and insufficient in law.
Held, *that as a liquidator may require certain funds, which come into his hands, at any moment he is not acting* ultra vires *by not investing these at interest, and further, that as the allegations in the plea, in respect of unclaimed dividends, would (if proved) constitute a good defence, the exception must be disallowed with costs.*

This was an argument on an exception filed by the plaintiff to the plea of the defendants on the ground that it was bad and insufficient in law, and that no cause was shown therein why the plaintiff should not obtain judgment as prayed.

The declaration was in the following terms:

1. The plaintiff (Charles Christian de Villiers) is the sole surviving liquidator of the life branch (in liquidation) of the South African Fire and Life Assurance Company.

2. The defendant (Johannes Henoch Neethling Roos) is the secretary of the Board of Executors, of Cape Town, and is the proper person to be sued as representing the said Board.

3. The said company was constituted under unlimited liability in the year 1831, and thereafter carried on in Cape Town the business of a Fire and Life Insurance Office.

4. On the 31st March, 1881, the said company was dissolved by a unanimous resolution passed at a duly convened meeting of shareholders then held, and in conformity with resolutions passed at previous meetings of shareholders, duly convened and held, for the purpose of taking into consideration the starting of a new Fire Insurance Company in the stead of the fire branch of the then existing company, the liquidation of the life branch thereof and the dissolution of the said existing company.

5. The shareholders at the said meeting unanimously appointed a committee for certain purposes consisting of its chairman, Jan Hendrik Hofmeyr, William Mortimer Maynard Farmer, and Charles Christian de Villiers (the now sole surviving liquidator).

6. At a meeting of shareholders held on 31st May, 1881, the shareholders present unanimously resolved, amongst other things, that the liquidation and working out of the life branch should be left in the hands of the committee before mentioned, that all transfers of lands, cessions of bonds, and other assets should be signed by not less than two of their number, and that all moneys received by them should be invested on deposits bearing interest half-yearly, and that the general management and control should be left in their hands.

7. Shortly after the last mentioned date it was agreed between the liquidators, so appointed, that Jan Hendrik Hofmeyr should act as administering liquidator, and he undertook so to act.

8. Thereafter in or about the month of July, in the year 1883, the administering liquidator of the life branch, aforesaid, agreed with the said Board of Executors to place the administration of the life branch (in liquidation) in the hands of the said Board, and to invest the funds of the said life branch (in liquidation) still remaining in his hands, in his capacity as such administering liquidator, and all further sums accruing to the said funds by way of interest, or otherwise in deposit with the said Board of Executors, to bear interest at the rate of five per cent. (afterwards reduced to four per cent.) per annum, payable half-yearly from the first day of August, 1883, and that the said Board should keep and render from time to time, half-yearly accounts of all moneys received and disbursed by them in that behalf.

9. The said Board of Executors undertook the matters as agreed upon in the manner agreed upon, and received the premiums as they fell due of certain life policies then still existing in the life branch aforesaid, paid out of such funds such of these policies as fell in through death of policy-holders, disbursed necessary expenses in connection therewith, and kept books and accounts of their administration.

10. The said Board of Executors, during the period beginning with the 20th July, 1883, and ending with the 31st December, 1896, paid at the end of each half-year interest on the balance stand-

ing to the credit of the said life branch at the beginning of the half-year, according to the true intent and meaning of the agreement entered into as aforesaid, and they brought up such interest and other receipts and the disbursements made by them on behalf of the life branch in their accounts rendered from time to time during that period. At the beginning of that period, for several years, the rate of interest paid was five per cent. per annum, and at the latter part of that period, for several years, it was four per cent. per annum.

11. William Mortimer Maynard Farmer died in August, 1899, or thereabouts, and Jan Hendrik Hofmeyr died in March, 1900.

12. In the year, 1901, the plaintiff requested the secretary of the Board of Executors to frame a statement showing the position of the said life branch (in liquidation) in account with the said Board, and to supply him therewith, and this, after the lapse of more than a year's time, not having been done, he again made a similar request.

13. Thereafter, on or about the 18th July, 1903, the secretary of the Board of Executors furnished him with certain accounts purporting to state the position of the said life branch (in liquidation) in account with the said Board of Executors.

14. From these accounts it appears that the Board of Executors had, on 1st January, 1897, a balance in hand and standing to the credit of the said life branch (in liquidation), the sum of £5,258 13s. 2d., and that (a) for a period of three years, beginning 1st January, 1897, and ending 31st December, 1899, they brought up no interest whatever, such as they were bound to bring up in the manner above stated in paragraph 10, on that sum or any other further sums in their hands on account of the said life branch (in liquidation); (b) for the period of three years, beginning 1st January, 1900, and ending 31st December, 1902, they brought up interest yearly at the rate of 4 per cent. per annum on the balance purporting to stand to the credit of the said life branch (in liquidation) at the beginning of the year, and they did not bring up interest every half-year in the proper manner before mentioned; and (c) for the period of a half-year, beginning 1st January and ending 30th June, 1903, they brought up interest at the rate of 4 per cent. per annum half-yearly on the balance purporting to stand to the credit of the said life branch (in liquidation) at the beginning of the half-year.

15. The account thus rendered showed a balance to the credit of, and an acknowledged indebtedness so far as it went, to the life branch (in liquidation) of £4,336 15s. 9d. sterling, but owing to the action of the Board of Executors in not bringing up interest in the manner they ought to have done, this amount did and does not represent the full liabilities of the Board to the said life branch (in liquidation), and the account rendered by the defendant is in this manner insufficient and incomplete.

16. The plaintiff thereafter, in his capacity aforesaid, requested the defendant, in his capacity aforesaid, to render him a just and true account from the 1st day of January, 1897, to the 30th day of June, 1903 (both days inclusive) of all moneys received and expended by the said Board of Executors for and on behalf of the said life branch (in liquidation) as before mentioned, showing the true balance standing to its credit, and bringing up interest in the manner hereinbefore mentioned in paragraph 10, but this he has refused and failed to do.

17. Further, from time to time in the course of the said administration of the Board of Executors of the said life branch (in liquidation), dividends by way of refunds became payable by the said Board to shareholders.

18. A number of shareholders did not claim and did not receive such dividends due to them.

19. Such unclaimed dividends remained in the hands of the Board of Executors, and were not placed by them to a separate account in any bank, but were merged in the funds of the said Board. The cheques of the Board of Executors for such unclaimed dividends, signed by the said Jan Hendrik Hofmeyr as director (he being also chairman of the Board) or by some other director, also remained in their hands.

20. By reason of the premises interest at the rate of 6 per cent. per annum became payable by the said Board on the said unclaimed dividends from the time they became so payable.

21. The defendant, at the plaintiff's request, furnished the plaintiff with a

list of such shareholders, with the amounts claimable by them, and the dates upon which such amounts became claimable.

22. It appears from the said list that no interest has been allowed on such unclaimed dividends, and the defendant in his capacity having been duly requested by the plaintiff to render him an account of such unclaimed dividends due to various shareholders, bringing up interest thereon at 6 per cent. per annum, has refused and neglects so to do.

23. The plaintiff in his aforesaid capacity prays: (a) That the defendant in his aforesaid capacity may be condemned to render unto him a just and true account setting forth all moneys had and received, and all moneys expended and disbursements made for and on behalf of the life branch (in liquidation) of the South African Fire and Life Assurance Company from the 1st day of January, 1897, to the 30th day of June, 1903 (both days inclusive), and the true balance standing to the credit of the said life branch on the last-mentioned date, and that he bring up in such accounts interest at the rate of 4 per cent. per annum, at the end of every half-year, on the balance in hand on the first day of such half-year, during the period beginning with the first-mentioned and ending with the last-mentioned date. (b) That the defendant be condemned to render to him an account showing the names of the shareholders to whom dividends by way of refunds have from time to time become due, to whom they were paid, if paid, and what amount of dividend remained in the hands of the defendant unclaimed or unpaid, with proper vouchers and documents, and bringing up interest at 6 per cent. per annum on such unclaimed dividends from the time when they became payable; (c) debate of such accounts, and that the defendant be condemned to pay to the plaintiff, in his aforesaid capacity, such amounts as may after debate be found to be due; (d) such alternative relief as to the Court may seem meet; and (e) the costs of this suit.

Defendant's plea was in the following terms:

1. Defendant admits paragraphs 1 and 2 of the declaration.

2. As to paragraphs 3, 4, 5, and 6, he admits that on the 31st March, 1881, and the 31st May, 1881, the shareholders of the company appointed the persons named in paragraph 5 to be a committee to work out the liquidation of the life branch of the company's business; but as to the other allegations in those paragraphs, he has no special knowledge, and begs to refer to such proof as the plaintiff may adduce in support thereof.

3. He admits paragraph 7, and says that, with the knowledge and approval of all persons interested, Jan Hendrik Hofmeyr acted thereafter till his death in 1900 as administrator liquidator.

4. He admits paragraph 8, but says that it was specially understood and agreed that payments for life losses and for reassurance of capital for distribution or part thereof should be done under directions of the liquidators, who were acknowledged to be the owners or representatives of the funds deposited with the Board of Executors, and it was specially understood and agreed that the administrating executor, the said Hofmeyr, should represent the liquidators in respect of all such payments and all matters relating to the administration of the funds, and he did so represent the liquidators thereafter until his death, and act on their behalf.

5. As to paragraph 9, the Board of Executors from time to time provided the liquidators with moneys to be paid out of the said funds or policies, which fell in through the death of policyholders, and acted therein and in disbursing expenses under the directions of the said administrating liquidator.

6. The defendant admits paragraphs 10 to 11 of the declaration.

7. On or about the 18th September, 1896, it was agreed between the Board and the administrating liquidator that interest should not be allowed on the capital funds in the hands of the Board after the 31st December, 1896, and accounts were thereafter duly stated and rendered by the Board to the liquidators, and accepted as correct by the administrating liquidator for the liquidators as correct accounts during the years 1897, 1898, 1899, to which accounts no interest on the capital was allowed, and the plaintiff, amongst others, received a dividend from the administrating liquidator after the 31st December, 1899, on

the basis of the accounts showing no interest allowed upon the capital funds.

8. Thereafter the administrating liquidator died in 1900, and thereafter the plaintiff, as surviving liquidator, applied for information and a statement of account, which were duly supplied and rendered to him.

9. In the accounts rendered for 1900, 1901, and 1902, the Board specially resolved, at the request of the plaintiff, to allow interest to be included on the capital funds in their hands, but the Board did not agree to allow interest to be stated half-yearly, nor at any time agreed to reopen the question of interest for the years 1897, 1898, 1899, which had been, by agreement as aforesaid, excluded from the stated and accepted accounts after the 31st December, 1896.

10. He admits that the balance on hand on 1st January, 1897, was the sum of £5,258 13s. 2d., and admits the allegations in paragraph 14, save that he denies that the Board was bound for the period since the 1st January, 1900, to allow interest half-yearly or at all. The said allowance was made voluntarily on the part of the Board at the request of the plaintiff, but the Board was not bound to allow such interest after the agreement referred to in paragraph 7 of this plea.

11. The defendant denies that there was a lapse of a year's time or any long time after the plaintiff requested a statement of the position of the funds of the life branch of the company before full information was supplied him, and says that the plaintiff has had rendered to him full and correct accounts of the funds from time to time in the hands of the Board for and on behalf of the liquidators.

12. The balance on hand at the 30th June, 1903, was £4,336 15s. 9d., as alleged in paragraph 15, but the defendant denies the other allegations in that paragraph.

13. As to paragraph 16 he repeats that he has rendered a true and correct account to the 30th June, 1903, including interest allowed the Board after the 1st January, 1900, and denies the other allegations in that paragraph.

14. As to paragraphs 17, 18, and 19, he says that cheques were drawn and signed under the directions of the administrating liquidator from time to time for the payment of sundry dividends by way of refunds by the liquidators to shareholders, and there were at all times funds ready to honour such cheques if presented; but the Board did not undertake and was not appointed to pay shareholders, but such cheques were held by the administrating liquidator awaiting the claims of shareholders under his control.

15. The Board did not and was not bound to open any separate account in any bank for unclaimed dividends as to which it had no control, nor was any such separate account ever asked for by the administrating liquidator.

16. Save as aforesaid the Board denies the allegations in paragraphs 17, 18, and 19, and all the allegations in paragraph 20, specially denying that it has been *in mora* in regard to any unclaimed dividend, for the non-payment of which the Board is not in any way responsible.

17. The list of shareholders referred to in paragraph 21 is drawn from the receipt book.

18. As to paragraph 22, he admits that the Board has not allowed and refuses to allow interest on unclaimed dividends, and says that such refusal is lawful, but otherwise denies that paragraph, and says that the Board is ready and willing on return by the plaintiff of any cheques drawn and signed, but not issued, for dividends to draw and sign a cheque or cheques for the capital sum or sums of such returned cheques.

Wherefore the defendant prays that the plaintiff's claim may be dismissed, with costs.

To the plea the plaintiff filed the following exception: "The plaintiff excepts thereto as being bad and insufficient in law, and says that no case is shown therein why the plaintiff should not obtain judgment as prayed." Plaintiff also filed certain paragraphs by way of replication.

Mr. M de Villiers (with him Mr. McGregor) for the exceptor; Mr. Schreiner, K.C. (with him Mr. Searle, K.C.), for the respondents.

Mr. De Villiers, in narrating the principal facts of the case, said that the administrating liquidator (Mr. Hofmeyr), on account of some difficulties that he had with the secretary of the old Board, who was appointed to assist him, made an arrangement with the Board of Executors, of which he was the chairman, to

deposit the funds that he had in his hands and which might thereafter accrue, so as to bear interest with the Board of Executors, they at the same time to have administration in their hands. The true intent and meaning of the agreement entered into was acknowledged by the defendants to have been that at the end of each half-year interest on the balance standing to the credit o the life branch at the beginning of the half-year should be paid. For thirteen years the interest was duly paid, first at the rate of 5 per cent. and afterwards at the rate of 4 per cent. The Board, however, ceased to pay any interest at all, and their allegation was that they entered into an agreement with the administrating liquidator that no interest should thereafter be paid. The plaintiff submitted that this agreement was unlawful, that the administrating liquidator had no power to enter into an agreement of that nature, inasmuch as he surrendered the liquid and undisputed right founded upon the agreement on which they had acted for thirteen years, and moreover the law required that a person in the position of the liquidator should deposit all moneys that he had in his hands at interest, and that he had instructions given him by the shareholders of the association to deposit money at interest, and that these rights could not be abandoned. Moreover, unclaimed dividends were payable to shareholders. The Board of Executors, instead of opening an unclaimed dividend account, and depositing all money there or handing over the money in a lump sum to the administrating liquidator in order that he might do so, wrote out cheques in favour of the shareholders who were entitled to these unclaimed dividends, these cheques being signed by the secretary and by the directors, either Mr. Hofmeyr himself or some other director. In many instances these dividends were not claimed, and in these cases the funds merged with the funds of the Board, instead of being deposited with the separate account. On that account these unclaimed dividends ought to have borne interest, which they had not done, and therefore the liquidator, as representing the shareholders, who were entitled to these refunds, was now entitled to institute an action for such interest.

Our case is founded on the illegality of the agreement between the plaintiffs and the defendants, and we claim that interest should be paid to us at the rate of 4 per cent. This is a very liberal offer, as we could get 6 per cent. for the money.

[Maasdorp, J.: Do you allege *mala fides*?]

No, only breach of trust in the legal sense. We represent the creditors, and I submit that everything done to their prejudice is null and void.

Paragraph 2 of the plea is excepted to as bad and insufficient in law. My points are: (1) *Nemo protest lucrifieri cum detrimento alterius.* Here the shareholders seem to think that they are at liberty to take the property of other people. (2) A trustee has no power to make over to the Board the property of shareholders. *Voet* (2-15-2). If there is a demand in respect of an unliquidated claim the trustee may compromise, but he cannot abandon liquid rights. As to the word "ambitiose," *Voet* (2-15-2, line 5). See also *Voet* (50-9-1).

[Maasdorp, J.: What is the right given up?]

A right founded on the agreement that the money in the estate should be invested in funds bearing interest. Mr. Hofmeyr, as liquidator, entered into an agreement with himself as chairman of the Board of Executors.

[Maasdorp, J.: Yes, but what vested right was given up?]

The right to the interest on this money. It was a breach of trust to give up the interest, and we say that this was done *ambitiose*, and that the rights of the shareholders were thereby defeated. A trustee is obliged to put out money at interest. *Voet* (2-15-2), *Van der Linden* (1-5-3), *Van der Keessel* (Thes. p. 155). Technically, the respondents were here guilty of breach of trust.

[Mr. Schreiner: I object to that phrase.]

Then I will say that the respondents acted illegally, to the detriment of the trustees. There may be breach of trust without fraud. *Collector of Customs* v. *Cape Central Railway* (6 Juta, 402).

[Maasdorp, J.: There the money due was given up.]

In that case there was merely a right to the money; but in this case the re-

spondents were deriving their 6 per cent. from the money.

[Mr. Schreiner: That does not appear on the pleadings.]

It is the presumption.

[Maasdorp, J.: No, they said, "We cannot pay interest, and you may take your money away."]

That does not touch the question. Mr. Hofmeyr, as chairman of the Board of Executors, had no right to enter into such an agreement with himself in his capacity as liquidator.

[Maasdorp, J.: You were not legally obliged to leave money there.]

But in point of fact it was there.

[Maasdorp, J.: I do not see what the agreement was. If I leave money with a man, all he undertakes to do is to keep the money safely. Here the agreement was that the capital sum should remain in the possession of the respondents, but that they should pay no interest.]

Then we say that the administrating liquidator should have taken the money from the Board and invested it.

[Maasdorp, J.: It does not appear on the pleadings that the trustees were bound to obtain interest.]

They were bound to do their best for the estate. See section 8 of the Declaration and section 4 of the Plea.

[Maasdorp, J.: You say that there is something fraudulent on the part of the trustee; that is your exception?]

We do not say that the trustee was guilty of moral fraud or of conscious breaches of trust, but we do say that he committed legal breaches. Further, if the administrator abandoned certain rights, his principal can vindicate such rights as have been illegally abandoned. *Voet* (6-1-19), *Godefroi on Trusts* (p. 67, line 3). Shareholders have the same rights, and here it is really the shareholders who have instituted this action. Principals are not estopped from claiming their rights should an agent abandon a liquid claim. *Phillips* v. *Phillips' Trustee* (2 Buchanan, 321). *Forbes, Still and Co.* v. *Sutherland* (2 Searle, 231). It has been argued that Mr. Hofmeyr ratified what had been done, but if a man cannot do a thing, how can he ratify it? *Omnis ratihabitio retrotrahitur et mandato aequiparatur.* *Tudor's Equity Cases* (Vol. 2, 5th Edition, paragraph on the liability of agent as trustee). So here we have a right to sue the Board of Executors as trustees. *Burdrick* v. *Garrick* (39 L.J., Ch. 369), *Soar* v. *Ashwell* (69 L.T., 585). It is not necessary to allege fraud in order to prove breach of trust—*Lee* v. *Sankey* (15 Eq., 204)—where an agent put the money of his principals into the funds of a board of which he was a director. Apart, however, from any technical breach of trust, Mr. Hofmeyr's principals had a right to interest. If a man deals with an agent, he is supposed to know what are the powers of that agent, and this is the position we take up on our plea (section 7 of plea).

[Maasdorp, J.: There is nothing to show what were the powers of the liquidator.]

The defendants are bound either to admit or to deny our allegation on this point.

[Maasdorp, J.: Suppose money is required from day to day out of an estate, could the funds be invested at interest?]

The Court cannot assume that the money was so acquired.

[Maasdorp, J.: Your exception seems only to apply to the fact that Mr. Hofmeyr had not claimed interest for three years?]

Yes, in a sense; but our exception meets the whole case raised on the plea.

Mr. Schreiner (for respondents): This matter should be argued on the pleadings, and there we find nothing about breach of trust. Mr. Hofmeyr's memory has been attacked; but all we have now to do with is the declaration (see par. 7). The act of the liquidators was either lawful or unlawful. If they acted unlawfully the exceptors should say so. We know Mr. Hofmeyr only as administrating liquidator. The exceptors admit that they agreed to deposit funds with the Board of Executors. They admit that Mr. Hofmeyr was appointed administering liquidator, and when we say what on their own showing he did, exceptions are taken. If the allegations in paragraph 7 of the declaration are true, how can it be said that the plea discloses no defence? Their position is that shareholders who neglect to draw their cheques can claim interest on them. How could we invest this money if we might be called upon at any moment to pay it out? Why should we be held responsible for the shareholders' negligence if they do not think fit to draw their money. As to these deposits,

the Board was in the same position as a bank. There if a man first leaves money on a fixed deposit, and afterwards transfers it to a floating deposit, surely he cannot claim interest? This money had been left with the Board for some 13 years, and then they gave notice that after December 31 they would not continue to pay interest. The Board had not undertaken any permanent function, nor had they any reason to suppose that the liquidation of this estate would extend over a period of nearly 20 years. They admit that they first of all reduced the interest from 5 per cent. to 4 per cent., and subsequently refused to pay any interest whatever. I submit that the exception cannot be maintained.

[Maasdorp, J.: Suppose Mr. Hofmeyr had said: "We will take care of this money, but we will pay no interest on it"?]

That would be a perfectly tenable position, because they are not bound to keep the money at all: *a fortiori*, they could refuse to pay interest.

Mr. M. de Villiers (in reply): Trustees who allow trust funds to be merged are liable for interest. We object to the plea because it amounts to a confession of a tort. The accounts rendered by the plaintiffs themselves show that they had entire administration of the estate.

Cur. Adv. Vult.

Postea (October 27th).

Maasdorp, J.: The plaintiff alleges in his declaration that on the 31st May, 1881, the shareholders of the South African Fire and Life Assurance Company placed the liquidation of the life branch of the company in the hands of a committee of three, consisting of Jan Hofmeyr, the chairman of the company, William Farmer, and the plaintiff, who is now the sole surviving liquidator. In carrying out the liquidation, Jan Hofmeyr acted as administering liquidator, and in that capacity he entered into an agreement with the Board of Executors, of which the defendant is the secretary, whereby it was agreed that the board should administer the liquidation, and that the funds of the life branch should be invested in deposit with the Board at 5 per cent. interest, which interest was afterwards reduced to 4 per cent. The Board, when called upon to render an account, did so, but brought up no interest on the funds in their hands for the years 1897, 1898, and 1899, and after that they brought up the interest yearly and not every half-year, as they should have done. The plaintiff claims that the account shall be amended by the Board bringing up interest at 4 per cent. half-yearly from the beginning of 1897. It is further alleged in the declaration that unclaimed dividends due to shareholders remained in the hands of the Board and were merged in their funds. Of these the plaintiff claims an account, together with interest at the rate of 6 per cent. The defendant pleads that the Board acted in its administration of the liquidation under the direction of the liquidators, who were represented by Jan Hofmeyr as the administering liquidator, that on the 18th of September, 1896, it was agreed between the Board and the administering liquidator that interest should not be allowed on the capital funds in the hands of the Board after the 31st day of December, 1896, and upon that basis accounts were rendered and accepted during the years 1897, 1898, and 1899. And, as to the half-yearly interest, the defendant says that after 1899 the Board resolved, at the request of the plaintiff, to allow interest on the funds in their hands, but did not agree to allow interest to be stated half-yearly. Defendant says the Board was not bound to open an account for unclaimed dividends, but were always ready to pay the same upon the presentment of cheques, which were under the control of the liquidators. The defendant denies that the Board were *in mora* in regard to any unclaimed dividend, for the non-payment of which the Board is not in any way responsible. The plaintiff excepts to this plea as being bad and insufficient in law, and says that no cause is shown why the plaintiff should not obtain judgment as prayed. The exception does not point out in what respects the plea is bad and insufficient, and the grounds of the exception have to be gathered from the argument of counsel at the Bar. The main defence of the defendant on the more important branch of the case is the alleged agreement set forth in the 7th paragraph of his plea. The principal issue between the parties is with respect to interest on the funds in the hands of the Board for the years 1897, 1898, 1899. Defendant alleges that it was agreed between the administering liquidator

and the Board that after December, 1896, interest should not be allowed. It is contended for the plaintiff that that agreement was *ultra vires* of Jan Hofmeyr as administering liquidator. But that contention is based upon an assumption of facts which are not admitted on the pleadings. It is impossible, without evidence, to decide whether the liquidator was or was not clothed with the power to deposit money with whomever he pleased, without entering into stipulation for the payment of interest. I can only say that it may, under certain circumstances, be quite proper for a liquidator, and he may, in fact, be obliged, during a liquidation in which he may be engaged, to deposit moneys which he may momentarily require, or for which he may have no investment, in some safe custody, without deriving any interest. It was further contended that the contract was *ultra vires*, because, as stated in the declaration, all moneys received by the liquidators should be invested in deposits, bearing interest half-yearly; but this allegation not being admitted, requires to be proved. It was also argued that it was a breach of trust on the part of the liquidator to give away the rights of the company. To decide whether any act is a breach of trust, it is necessary to know the conditions of the trust, and moreover, the alleged contract of September, 1896, did not involve the abandonment of any vested rights of the company. The contract in question, if valid, would be a defence to the claim for interest for the three years in dispute, and it is impossible to decide upon exception whether it is valid or not. The same observations hold good with reference to the agreement set up by the defendant, whereby it was agreed that interest should be allowed after 1899, but should not be allowed half-yearly upon the accounts. As to the issues between the parties respecting the interest on unclaimed dividends, it seems to me that the allegations contained in the plea would constitute, if proved, a good defence to the claim. The exception must, therefore, be disallowed, with costs.

Kotzé, J., concurred.

[Exceptor's Attorneys: Van der Byl and Van der Horst; Respondent's Attorneys: Van Zyl and Buissinné.]

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SUPREME COURT

[Before the Chief Justice (the Right Honourable Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice MAASDORP.]

VAN NIEROP v. KIDNEY. { 1903. Oct. 27th.

Power of attorney—Revocation of agency.

The plaintiff ceded her boarding-house business to M., and gave him a power of attorney, authorizing him to dispose of the business and pay her debts. M. employed the defendant to sell the business and pay his creditors out of the proceeds. The defendant, who knew that the plaintiff was the real principal, sold the business and proceeded to pay the plaintiff's creditors, and was about to pay a debt claimed by one R. from the plaintiff, when the plaintiff informed him that she denied the debt and warned him not to pay it. In spite of the warning he paid the debt.

Held, *that the plaintiff was entitled to claim an account from the defendant of his dealings with the proceeds, and that the defendant was liable to pay the amount of the claim which he had paid to R.*

This was an action brought by Maria Christina van Nierop, lately a boarding-house keeper, of the Linda Vista, Rondebosch, against Wm. Lambert Kidney, a broker, of Cape Town, for a statement of account as to the sale of the business at the Linda Vista, payment of such sum as may be found due, and delivery of a certain promissory note for £333 6s. 8d.

The plaintiff's declaration was as follows:

1. The plaintiff is married out of community of property to Pieter Francois van Nierop, but has lived apart from him

for several years, and has carried on business as a public trader on her own account. She resides at Rondebosch.

2. The defendant is a broker, carrying on business as such in Cape Town.

3. For some time until January last the plaintiff carried on the business of a boarding-house in premises known as Linda Vista, at Rondebosch. Thereafter a certain Caspar Henry May, acting on her instructions, authorised the defendant in his capacity as broker to sell the said business, that is to say, the goodwill, furniture, and other contents of the said boarding-house, and also to receive all money due to the said business, to make the necessary disbursements, and pay all creditors in respect of the said business.

4. The defendant undertook the matters so entrusted to him on plaintiff's behalf, and in or about the month of May last sold the said business to a certain Miss E. O'Sullivan for £1,900, and it was agreed that the purchaser should pay £900 in cash and the balance of £1,000 in three bills, each of £333 6s. 8d., bearing date June 19, 1903, and maturing, one on October 1, 1903, one on February 1, 1904, and one on June 1, 1904.

5. The said amount of £900 was duly paid, and the said three bills were handed over to the last defendant by the purchaser. The two last mentioned of the said bills have, at plaintiff's request, been delivered to her by the defendant.

6. The plaintiff has requested the defendant to furnish her with a true and proper account of his transactions, as above stated, but he had failed to do so, and has not handed over to her the first mentioned of the said three bills as he was to do.

Wherefore the plaintiff claims:

(a) A proper statement of account duly supported by vouchers, books, and other documents, showing all moneys received, expended, and disbursed by the defendant, for and in respect of the sale by him of the goodwill, furniture, and other contents of the said boarding-house.

(b) The debate of the said account.

(c) Payment of such balance as may be found to be due to the plaintiff upon a debate thereof, together with interest thereon.

(d) Delivery to her of a certain bill for £333 6s. 8d., signed by a certain Miss E. O'Sullivan, dated June 19, 1903, and falling due on October 1, 1903.

(e) Alternative relief.

(f) Costs of this suit.

To this declaration the plaintiff pleaded as follows:

1. Paragraphs 1 and 2 of the declaration are admitted.

2. In January, 1903, the plaintiff carried on business as a boarding-house keeper, in premises known as Linda Vista, at Rondebosch, and on the 20th of January she entered into a written agreement with one Casper Henry May, which, after reciting that owing to financial difficulties she had decided to relinquish the said business, and had arranged to hand it over to the said May, provided that she made over and assigned to the said May all her interest in the tenancy of the said premises, and of the trade and business carried on herewith, that plaintiff was to receive certain payment per month, that the said May was entitled and empowered at any time to dispose of the said business, and right to and interest in the said tenancy, and any surplus that existed over £1,500, the value fixed of the furniture and goodwill, to be divided between the plaintiff and May in equal shares, that the amount paid to all existing creditors and all furniture, etc., necessary to carry on the said boarding-house as a going concern were to be deducted from the £1,500 payable to the plaintiff when the business was sold, that all profits arising from the said business should belong to May, and that this agreement should only take effect in the event of May coming to an amicable agreement with existing creditors, and the landlord not objecting to May taking over the premises, and that to give greater effect to the agreement the plaintiff had granted a general power of attorney, and undertook not to revoke it during the continuance of this agreement.

3. The said May came to an agreement with the creditors, the landlord agreed to his taking over the premises, and the said May carried on the said boarding-house business under the said agreement from January to April, which became and was of full force and effect.

4. In April, 1903, the said May by written authority placed his said boarding-house in defendant's hands to be

sold to the best advantage, keeping within the terms of May's agreement with plaintiff, handed over the full management of the said business to defendant, who was to receive all moneys, make all necessary disbursements, and to pay all creditors, and the said May delivered to the defendant the annexed balance-sheet, marked "A," which contains a list of creditors.

5. Under the said due and legal authority of the said May the defendant took over the management of the said business, and carried out the said instructions, and in or about the month of May, 1903, sold the said business to one Miss O'Sullivan, from whom he received £900 in cash and three promissory notes for £333 6s. 8d. each, and made disbursements and paid creditors, as instructed by the said May. The plaintiff had full knowledge of all the aforesaid facts, and from time to time received moneys from the defendant, acting as aforesaid.

6. On the 6th of August, 1903, the defendant received notice from the firm of attorneys, Michau and De Villiers, that the power granted him by the said May had been cancelled, and that they were authorised to obtain from the defendant all documents, papers, promissory notes, etc., held by defendant, in return for which they would pay whatever might be due to the defendant. The defendant therefore handed over to the said firm all documents, papers, etc., in his possession, including two of the aforesaid promissory notes, the proceeds of the third of the said notes having been paid by him to the creditors, shown on the said balance-sheet as authorised as aforesaid by the said May, and also delivered a full account showing all his dealings and transactions, and showing a balance in defendant's favour of £24 5s. 10d., which was paid by the said firm to the defendant.

7. Save as above, the defendant denies the allegations in paragraphs 3, 4, 5, 6, and 7, and says that the plaintiff is not entitled to demand any account from him, or the delivery of the said bill dealt with by him as aforesaid.

8. In case this Honourable Court should hold that the plaintiff was entitled to demand such an account from him he says that the plaintiff, through her attorneys, received a true and proper account of his transactions before action brought, and he says that the proceeds of the bill now claimed by the plaintiff was paid by him to the creditors of the said business as appears from the said account.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

The plaintiff's replication was as follows:

1. The plaintiff says, with regard to paragraph 2 of the defendant's plea, that the power of attorney therein mentioned as being referred to in the written agreement therein mentioned was a power of attorney, dated the 16th day of January, 1903, and signed by the plaintiff in favour of Casper Henry May therein mentioned, appointing him as her agent for managing and transacting her business and for other matters.

2. The plaintiff thereafter, on the 20th day of January, 1903, signed a document purporting to be an agreement whereby in effect she leased the said business and her furniture to the said May for the sum of £20 per month, as will appear more fully from the said document on reference thereto, and this is the agreement referred to in paragraph 2 of the defendant's plea. She signed the same in ignorance of the terms thereof, and believing that she was then signing an agreement more specifically appointing the said May as her manager to carry on her business and to act on her behalf in respect thereof at a salary of £8 per month, until the said business was disposed of; and the said May did thereafter manage the business on those terms. The defendant was fully aware that the said May was such manager, and thereafter treated with him as such.

3. The plaintiff admits the allegations contained in paragraph 3 of the defendant's plea, subject to the qualification stated in the last foregoing paragraph.

4. The plaintiff in any case admits that she empowered the said May to dispose of the said business, and acknowledged and ratified the power given by the said May to the defendant to act in her behalf in the manner stated in paragraph 4 of the defendant's plea.

5. The plaintiff, on the 1st day of May, 1903, by mutual agreement with the said Casper Henry May, cancelled all powers given to him by her; and the said May and the plaintiff shortly after-

wards gave notice to the defendant of such cancellation. The defendant thereafter ceased to recognise the said May in this matter, and had no further dealings with the said May therein, save in so far as he, acting as on behalf of the plaintiff, in the month of June following, called upon the said May to render him an account of monies received by the said May during his management of the business.

6. The defendant, in the month of June, 1903, paid out to a certain Ruthven, claiming to be a creditor of plaintiff's, the sum of £50 sterling, besides then and previously certain other smaller amounts.

7. The said sum of £50 was portion of a larger amount of £400 alleged by the said Ruthven to be due by her to him, but which sum the plaintiff at the time contended was not due to him, and was then the subject of litigation. The said Ruthven offered to compromise his claim for £150, which compromise the plaintiff rejected.

8. The plaintiff having become acquainted with the fact that such payments had been made, on the 25th day of June, 1903, through her attorneys required the defendant in writing not to make any further payments on her behalf to any person or persons without the concurrence of themselves, as being appointed by her to act as her attorneys and agents in the matter. On the 9th day of July following she again by her attorneys prohibited the defendant from making any further payments, and in particular any payments to the said Ruthven, and drew his attention to the fact that her power to May had been cancelled; and the defendant undertook to make no such further payments.

9. Notwithstanding the prohibition of the plaintiff, the defendant nevertheless, in the account rendered by him to her as mentioned in paragraph 8 of the defendant's plea, brought up two amounts of £50 and £100 respectively as having been paid on 15th and 30th July, 1903, respectively, and these amounts, if so paid (which plaintiff does not admit) were paid to the said Ruthven after the date of her prohibition.

10. The plaintiff through her attorneys again on the 29th July following instructed the defendant in writing not to part with any monies belonging to her; nevertheless the defendant, on the 4th day of August following, according to the said account, paid out to the said Ruthven the sum of £150 sterling. The plaintiff, however, does not admit that such payment was made.

11. The defendant unnecessarily discounted one of the bills mentioned in his plea in order to pay the said Ruthven, there being at the time more than sufficient funds of hers in his hands to pay all her other creditors; and he brought up in his account the sum of £10 18s. 8d. for discounting the said bill and for stamps thereon; for which amount the plaintiff is not liable.

12. The defendant also brought up on the said account he sum of £25 for services rendered by him in arranging to pay her accounts and the like, but the said amount is not due to him by reason of his having already brought up the amount of £95 for brokerage, and in any case is not claimable owing to his maladministration.

13. The plaintiff and the said May, on the 29th day of July, 1903, formally cancelled all powers given to the defendant on her behalf, and the plaintiff, through her attorneys, on the 6th day of August following, gave notice to the defendant of such cancellation, and required him to deliver over to them all papers and documents in his hands; and the defendant handed over to them the documents and papers mentioned in paragraph 6 of the defendant's plea. The plaintiff further admits the allegations contained in the said paragraph 6, but does not admit that the account delivered to her attorneys was a full and proper account of his transactions.

14. The plaintiff denies all allegations of fact or conclusions of law contained in paragraph 7 and 8 of the defendant's plea.

Wherefore the plaintiff prays the judgment of this Court with costs as before.

Mr. M. de Villiers (with him Mr. Van Zyl) for the plaintiff; Mr. Upington (with him Mr. J. E. R. de Villiers) for the defendant.

Casper Henry May secretary of the Salt River Co-operative Society, said that in June last year the plaintiff had a business at Rondebosch. He kept her books. In the early part of this year she was in bad health. He suggested that she should go to the seaside, and that he should look after the place in her absence. She afterwards received a wire

from Mr. Ruthven, of Johannesburg, and he came down. Mrs. Van Nierop went away. It was agreed that witness should run the place in her absence, and that he should have her general power of attorney. He would be paid £8 a month, and have a share of profits.

Mr. Upington said he was reluctant to interrupt, but he must object to evidence being led in order to vary a written agreement.

Mr. De Villiers said that he was entitled to lead evidence from a third party.

De Villiers, C.J., said he did not think evidence should be led in order to upset a written agreement which was not in dispute. He would like counsel to quote an authority for his contention.

Witness (continuing) said that the agreement was drawn up, and also the power of attorney. He was being further examined by his counsel with regard to the agreement, when

Mr. Upington again interrupted, and said that he must object to this evidence.

Mr. De Villiers said that one important reason why they should have evidence as to the agreement was that Mrs. Van Nierop was not aware of its contents when she signed. Mr. Ruthven exercised a certain influence over the plaintiff. He held over her *in terrorem* an accommodation note.

[De Villiers, C.J. This final agreement is the one upon which all parties acted, is it not?]

Mr. M. de Villiers: Yes, my lord, but the difficulty is that I do not understand the exact position that my learned friend takes up.

Witness (continuing) said that the agreement was signed in his office. Acting upon that agreement, he gave certain instructions to Mr. Kidney, and employed him to sell on his behalf the boarding-house business. Witness took that step upon the power of attorney given to him by the plaintiff. The power of attorney was revoked in May. He gave notice of that fact to Kidney by calling at his office. Under the agreement Ruthven was to receive 75 per cent. of the profits eventually realised, after deducting witness's salary of £8 a month, and witness was to receive the remaining 25 per cent. Ruthven was also to have free board, and lodging, and washing, so long as he remained at the place. Ruthven took up the position that he was a partner in the business, and that he had a big share, because he held a bill for £480 odd passed in his favour by Mrs. Van Nierop. He did not come to understand the true position of affairs until the day he cancelled the power of attorney, when he found that Ruthven had no interest whatever in the business. On the 19th June he received a letter from Mr. Kidney, accusing him of receiving certain payments which were due to the business, and which payments he repudiated.

Mr. M. de Villiers next quoted the rule of evidence bearing on the point as to examining the witness as to the agreement, and contended that he was entitled to lead evidence from a third party as to a written agreement.

[De Villiers, C.J.: The agreement is not in dispute, and I do not see any need to call evidence for purposes of interpretation.]

Cross-examined by Mr. Upington: Witness said on the 25th April he wrote a letter to the defendant authorising him to dispose of the boarding-house, in which he said: "Having got into difficulties with my creditors, I place my boarding-house at Linda Vista, Rondebosch, with you, to be sold to the best advantage; of course, keeping within the terms of my agreement with Mrs. Van Nierop." He also handed over the full management of the business to the defendant, and authorised him to pay all creditors before settling with him (the witness). He entered into an arrangement by which Ruthven was to receive 75 per cent. of the profits, and witness was to receive 25 per cent. of the profits. Witness was to receive £8 a month as salary, irrespective of the profits. He saw Mr. Kidney at his office about the middle or so of May, and told him that he had cancelled his power of attorney from Mrs. Van Nierop, and that Mrs. Van Nierop would in future give him all instructions. When witness took over the business the plaintiff was in financial difficulties, and could not carry on the business any longer. Witness could not carry on the business successfully. He handed to the defendant a list of creditors, who were to be paid before he settled with witness. The schedule of creditors was prepared by Mr. Ruthven's brother, Mr. S. P. Ruthven.

Re-examined: Witness was never able to find out for whom Kidney worked.

By the Court: Witness made out the account produced in which Ruthven was shown to be a creditor to the amount of £449. Witness always told Mrs. Van Nierop that Ruthven was a creditor, but he did not then know the amount.

J. J. Michau, attorney, said that in May, 1902, he acted for Ruthven in respect of a claim he had against plaintiff for £66, an amount awarded to him under arbitration. In May, witness issued summons against the plaintiff. Appearance was entered, and the matter was settled by the parties, witness drawing up a promissory note for £480 on instructions from Ruthven. Mrs. Van Nierop was present. In July, summons was issued, and witness entered appearance. Ruthven issued summons. Witness had previously written to defendant in June. Ruthven repeatedly called on witness and offered to compromise for £150. Witness told him to go to his attorneys. On the 25th June witness wrote a letter to Kidney on plaintiff's instructions, enclosing a copy of a letter addressed to Miss O'Sullivan, and stating that Kidney was not to make any further payment on behalf of Mrs. Van Nierop without witness's concurrence. The letter to Miss O'Sullivan informed her she was to make no payments to anyone but witness. On the 25th June Kidney replied that he would not part with a penny until the letters to him and Miss O'Sullivan were withdrawn, or until an order of Court was made. If Kidney had not agreed not to part with the money, witness would have sought an interdict. On the 29th July witness called on Kidney, and had a conversation with him. Witness told him on no account to pay Ruthven, and he undertook not to pay Ruthven. Witness told him also that the power of attorney to May was cancelled, and that May had been called upon for an account. Kidney said he also had called upon May for an account, considering that May had not treated plaintiff properly. He said he would do all he could to protect Mrs. Van Nierop. The money was paid by Kidney to Ruthven after this conversation. Witness referred to further correspondence, in the course of which Kidney was warned that if he parted with money belonging to Mrs. Van Nierop he would do so at his own risk. When witness found from the account that payments had been made to Ruthven after the date of prohibition, he immediately demanded an explanation, and Kidney replied that he thought he had done what was right, and that he had acted *bona fide* throughout.

Cross-examined by Mr. Upington: On the 6th August witness sent a formal cancellation of the powers to Kidney. Witness did not know whether there was any other formal cancellation in existence. This was signed by Mrs. Van Nierop and May, and was dated July 29. Witness could not make up his mind at once as to whether it was necessary to send the formal cancellation to Kidney. On the 9th July witness went to Kidney, and told him no further payments were to be made. Witness was then acting for Mrs. Van Nierop and May. In July Kidney wrote that he had promised to hold the money until an interdict had been obtained, and as matters were continuing in a go-as-you-please style, he proposed to pay out moneys to prevent creditors from calling for a settlement of long overdue accounts, and to pay on the 27th July a sum not exceeding £150 on account to Ruthven.

Maria Christina van Nierop, the plaintiff, said that in January, on account of ill-health, she had to go to the seaside. It was arranged that witness's housekeeper and May should look after affairs. Witness gave May a power of attorney to sell the property. The place was sold on the 1st May, and witness went to see Kidney, whom she then met for the first time. She went to Kidney on the advice of Ruthven on the 1st May, and Kidney then said he had to go up-country, and that he could not then arrange the matter. Witness afterwards saw Kidney's son, who showed her a telegram which he said he had received from his father. This telegram read: "Don't pay any moneys out; we must protect Mrs. Van Nierop." This gave witness confidence in Kidney. In May witness gave the document produced, cancelling the power to May to Kidney. Kidney said it was all right, and that they could not act on that power, as it was in his possession. Witness told Kidney not to pay Ruthven. Kidney said that was all right. Afterwards she found that

payments had been made to Ruthven. Witness went to see her attorneys (Messrs. Michau and De Villiers), and again went to Kidney, and asked for the return of the power. Kidney gave her the document to copy. Witness then first knew of the contents of the agreement. Witness saw the account, and instructed her attorneys to act.

Cross-examined by Mr. Upington: Witness was not in financial difficulties at the time of the agreement, and May did not, as a consequence of her embarrassed position, take over the business. She had never seen the produced list of creditors and balance-sheet. Ruthven had never brought these documents to her; he had promised to do so. She had never seen the agreement. She admitted that she had signed it. She thought at the time that if she withdrew the power of attorney the agreement fell back. She was not aware until the 16th February that the agreement was that they took over the boarding-house and got the profits. She knew that from a letter sent to her by May. She had only lately found that the whole business was in financial difficulties. Ruthven told her in the last week of April that he had put Mr. May out of the place, that he had put the place in the hands of the defendant, and that the defendant would see as to the payment of creditors. She told Mr. Kidney that she did not know her place was taken from her. She had thought she would be able to come back to it. She received a letter from May in February stating that the place had been taken out of her hands. She had handed over the letter to Mr. Michau. (Letter produced.) Ruthven and May continually promised they would let her see the agreement. All that was said to her by Ruthven and May was quite different from the agreement that she signed.

At this stage Mr. Upington said that his learned friend (Mr. J. E. R. de Villiers) had read the letter sent to the plaintiff by May in February, and he found that it had a bearing on the case. In the letter, which was dated the 21st February, May said he enclosed a detailed account to date, which he trusted she would find in order, also 30s. advance, to go on with in the meantime. He hoped to square and settle up at the end of the month, according to the way things stood. Should she then have overdrawn the amount agreed upon—viz., £20 a month—he would again advance her some money from time to time till the end of next month. After that date she would receive her allowance as agreed upon, according to the notarial agreement drawn up—viz., £20 a month. In the course of the letter May also protested against the conduct of Mrs. Van Nierop in several particulars, declaring that she had interfered with certain business that did not concern her, that she had caused a certain amount of disturbance at his place, that she had belittled him before his servants, that she had misbehaved herself in his place, that she had insulted a friend of his, Mr. Ruthven, and that she had insulted himself (Mr. May) in his place. He also stated that when he visited her the other night, in company with Mr. Ruthven, they were undoubtedly treated most shabbily, and they also had the door slammed in their faces, "which was a dastardly act." In future he must request her not to call at his place, but when she had any communication to make to him, to do so by letter. "Your interests in the business," he added, "are absolutely null and void. The place is entirely mine, and to do with as I please and think fit, and I most emphatically allow no man or woman to contradict me or interfere in my business. In the event of my selling the business, you are to receive £1,500, after deducting all amounts due to the creditors, and so forth."

[De Villiers, C.J.: What has this letter had to do with the case before the Court?]

Mr. Upington: The portion bearing on the case is this—that on the 21st February, May, in this letter, said to her, "The place is mine."

[De Villiers, C.J.: Yes, but what has that to do with the question whether this power continued, and whether he was not afterwards paying creditors when he had been told not to do so?]

Mr. Upington: I quite agree with that, my lord, but the point is this, supposing there had been no power at all under that agreement, Kidney, presuming that he was authorised by May, would have been entitled to do as he pleased.

[De Villiers, C.J.: It really has no bearing on the case.]

Mr. Upington: I must submit that my learned friend and myself both thought

it had in this respect, and that she has stated that she knew nothing of the terms of the agreement.

[De Villiers, C.J.: Yes, but we have excluded that evidence. The Court has repeatedly said that we consider the agreement binding on both parties.]

Further cross-examined by Mr. Upington: Witness did not see a balance-sheet as to her affairs. She was repeatedly asking to see who it was that was pressing.

Re-examined by Mr. M. de Villiers: She had not seen any receipts between Ruthven and Kidney. Kidney was a "man of straw."

This closed the plaintiff's case.

The defendant, William Lambert Kidney, called by Mr. Upington, said that they came to him in April last, accompanied by Ruthven, and told him they wanted Linda Vista to be sold. He took down the particulars. He only saw May on one other occasion, as far as he remembered. The sale took place on the 1st May. On that date he left for the Transvaal, and returned on the 15th. He did not see May on his return. He denied that May came and told him that the power given to him by the plaintiff had been revoked. He often saw Mrs. Van Nierop, but she did not make any mention of the revocation of the power of attorney. The first notice he had of such a thing was on the 6th August. The bills given by the purchaser of the property were made payable to witness's order. He interviewed creditors. The business was in a very bad state, when he took it over. There were two or three judgments against the estate. There was a difficulty about the sale of the business. He made arrangements with the creditors as to not pressing their claims, and intimating that they would be paid out of the proceeds of the sale. He paid the amounts to Ruthven shown in the balance-sheet, less what was owing to witness. He had handed over the receipts to the plaintiff's attorneys along with the other documents. The payment to Ruthven was made by cheque. He had made payments from time to time to the plaintiff. Mrs. Van Nierop was fully aware of what was going on. She knew that the creditors were being paid. In the account witness had prepared there was a payment to Ruthven of £57 10s. on June 9. In paying creditors and also Ruthven, he was acting, he thought, on behalf of May. In addition to the schedule supplied to him by May of Mrs. Van Nierop's debts, he had also to pay debts contracted by May. His charges were for brokerage on the sale, and extra work previous to the sale. He had rendered an account.

[De Villiers, C.J.: What items in the defendant's account are in dispute?]

Mr. M. de Villiers said that they disputed three payments made to Ruthven or alleged to have been made to Ruthven, viz., £50 on July 15, £100 on July 30, and £150 on August 4. They also disputed a charge of £25 made by Mr. Kidney, and an item of £10 8s. 8d. for discounting a bill and stamps, saying that the bill was unnecessarily discounted, there being then, according to the accounts, sufficient funds in hand to meet all the creditors.

Witness (continuing) said that after the letter of the 15th July, Mr. Michau came to see witness, and the conversation which ensued between them was substantially as related by Mr. Michau with the exception that witness remembered nothing concerning the cancellation being said.

Cross-examined by Mr. M. de Villiers: Witness knew that Mr. Ruthven was suing for the money, and that appearance had been entered.

Knowing that, what right had you to pay money out to him?—Well; I acted as I was advised.

Mr. Ruthven is a man of straw, is he not?—It appears so.

What did Mr. Ruthven owe you? What did you get back?—I got back 2½ per cent. on the purchase price, £47. He agreed to give me that out of his own money.

[De Villiers, C.J.: Where is Ruthven now?]

Witness: In the Transvaal.

Mr. M. de Villiers: Mr. Ruthven now claims £150. Don't you say that is a fraudulent claim?—No answer.

Cross-examined as to why, after giving the understanding not to pay out money given to Mr. De Villiers, he paid Ruthven, the witness said that he understood from Mr. Michau that he would take out an interdict, considering the matter was so involved.

By the Court: Witness had given the receipts to Messrs. Michau and De Villiers' clerk.

[De Villiers, C.J.: I don't understand your taking this risk when you were told that if you paid out the money it would be entirely at your own risk.]

Witness: I was advised that I was acting entirely in accordance with the law.

Advised by whom?—By my attorneys.

Mr. Upington closed his case.

After hearing Mr. Upington on the facts and without calling on Mr. M. de Villiers, the Court gave judgment.

De Villiers, C.J.: It is not necessary in this case to inquire whether the plaintiff owed any money to Ruthven. Ruthven is not before the Court, and upon this question he might have something to say. The plaintiff's case, however, is that she disputes the debt; she says that the promissory notes given by her were accommodation notes, and that if she were sued by Ruthven she would have a valid defence against that claim. That is her case. Now, it appears that the plaintiff, wishing to sell her business, entered into an agreement with one May, under which May was to take over this business. At the same time a general power of attorney was given by her to May, and in the agreement it was provided that the power which she had given should be an irrevocable power. After that, on the 25th April, May entered into an agreement with the defendant, and that agreement is evidenced by a letter addressed by May to Kidney in the following terms: "Dear sir,—Having got into difficulties with my creditors, I place my boarding-house, known as Linda Vista, in Rondebosch, in your hands, to be sold to the best advantage, of course keeping within the terms of my agreement with Mrs. Van Nierop. I want you to see my creditors and make arrangements with them to wait until the sale is effected. In the meantime I hand you over the full management of the business, you to receive all the money, and make all necessary disbursements. I will at all times give you what assistance and information you require." And in a postscript it is stated: "I also authorise you to pay all creditors before settling with me." Now, there can be no doubt that any payments actually made by the defendant on behalf of May would be valid payments, and cannot be set aside. I am satisfied, however, that the defendant knew that the debts which he claims to have paid—viz., the debts to Ruthven, were debts not owing by May at all, but were debts owing by the plaintiff. He knew also that the business he had to dispose of was the plaintiff's, and that the proceeds belonged to her. The defendant proceeded under this arrangement to collect moneys, and to pay them out; but on the 25th June he got specific notice from the plaintiff's attorneys to the effect that no further payments of any debts owing, or alleged to be owing by Mrs. Van Nierop should be made. A letter was addressed to him in the following terms: "At the request of Mrs. Van Nierop we enclose herewith a copy of a letter we have this day sent to Miss O'Sullivan. We have to ask you not to make any further payments on behalf of Mrs. Van Nierop to any person or persons, without our concurrence, as she has appointed us to act as her attorneys and agents in all matters in which she is interested." The letter which was enclosed is clear and specific in its terms: "Dear Mademoiselle,—We are instructed by Mrs. Van Nierop to inform you that she has revoked the power of attorney granted by her in January last to Mr. May, and that at present nobody has any authority to receive any moneys due to her by you or anyone else, except the balance still owing by you to us," and so on. Now the letter of the defendant in answer to that is as follows: "In reply to your letter of the 25th inst., I beg to say I have neither the time nor the inclination to visit you on Mrs. Van Nierop's business. The matters are now in such a position that I shall not at present part with a single penny until your letters to me and to Miss O'Sullivan are withdrawn, or until I receive an order of Court." Here there are two conditions. He promised not to part with a single penny until either the two letters were withdrawn—they were never withdrawn—or he received an order of Court. Yet, in face of this, he proceeded to pay out this money to Ruthven. What was his authority? He had no authority. whatever. In the face of the express prohibition of Mrs. Van Nierop, he should not have paid any money to Ruthven. Now, I have no doubt that he acted *bona fide*, but he acted quite illegally. He had no right to bind Mrs. Van Nierop by paying this money to Ruth-

ven. Let us suppose that Mrs. Van Nierop had a good defence to the claim of Ruthven. What right had he to prejudice her defence by paying without any authority? He knew before he made the payments that she had withdrawn the power of attorney which she had given to May, and that she wished no further payments to be made. Ruthven could not have compelled the defendant to pay him, and no other circumstance existed to make his power irrecoverable. He took this tremendous risk upon himself, and though he acted *bona fide*, he is bound to account for the money. In regard to the other items, I don't think they should be pressed. The plaintiff cannot claim back the promissory note, for which she got full credit. She may claim back, no doubt, the amount paid for discount, but upon the whole, seeing that he acted *bona fide*, and that he acted under what he supposed to be authority, I think that claim should not be pressed. In regard to the £25, there seems to have been considerable work attached to this business, quite independently of the brokerage. The further receipts, correspondence, and so on, entitle him to some payment, and I do not think £25 is excessive. It is said, however, that he had already got 2½ per cent. in addition from Ruthven, but I am afraid he will get very little out of that if he is made to pay out the £300 to the plaintiff. The judgment of the Court must therefore be for the plaintiff, for £300, with costs.

Maasdorp, J., concurred.

[Plaintiff's Attorneys: Michau and De Villiers; Defendant's Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice KOTZE.

AFRICAN BANKING CORPORATION V. HILLS AND ANOTHER. { 1903. Oct. 28th. Nov. 6th.

Debentures—Act 43 of 1895—Preference.

In an action to have it declared that the plaintiff, as the holder of debentures of a certain company, has a preference against the assets of a certain partnership, which, after the date of the issue of the debentures, had taken over the assets and liabilities of the company, it appeared that the assets were not mentioned and described in the debentures as required by Act 43 of 1895, and that the creditors of the partnership were in no way represented in the action.

Held, *that it would be premature to declare such a preference, even if it could legally be claimed, until the estate of the partnership had been sequestrated or execution had issued at the suit of the debenture holder.*

This was an action brought by the African Banking Corporation for an order declaring that the plaintiff had a preferent claim over the amount of the judgment in the case of *Hills* v. *Colonial Government* (13 C.T.R., 618, 661), and restraining the paying out of the same until the plaintiff's claim in respect of certain debentures had been fully satisfied.

The declaration set out that the plaintiff bank carried on business in London, Cape Town, and elsewhere. The defendants were Arnold Frank Hills, John Walker, John Walker, jun., and Thomas Mouat Cameron Walker, now carrying on business as the Grand Junction Railways, and Edward Ridge Syfret, who was the liquidator of the said railways. It appeared that in 1896 the original company entered into a contract with the Colonial Government for the construction of three lines of railway within the Colony, viz., Somerset East to Fort Beaufort, Fort Beaufort to King William's Town, and Oudtshoorn to Klipplaat. The company proceeded with the work, acquired rights, and expended money. In 1896 the company issued debentures, and passed a bond under date October 23, 1896. Thereafter, in July, 1898, Hills and the firm of John Walker and Sons, carrying on business

in this colony and elsewhere, entered into partnership, for the purpose of constructing the said railways, and carrying out the said contract of 1896. On March 18, 1899, a fresh contract was, in so far as the said railway was still to be executed, entered into between the Colonial Government and the company registered in England, and known as the Thames Ironworks and Shipbuilding Company, for the further construction of the said railways. For the purposes of the said contract, the old company, in July, 1898, ceded and assigned all its rights to and interest in and to the contract to the said Thames Ironworks Company and to the defendant Hills, acting for and on behalf of the partnership. The work was proceeded with under the contract of 1899 until 1900, when fresh contracts were entered into with the said Government, in lieu of the said contract of 1899, in so far as the last-named contract still remained to be executed. The said Thames Company proceeded with the execution of the said contracts until December, 1900, when they ceded and assigned the contracts of 1896, 1899, and 1900 to the defendant Hills, acting personally and for and on behalf of the partnership. All transfers, cessions, and dealings were made without notice to and sanction by the holders of the said debentures. Thereafter the said Hills, acting as aforesaid, proceeded with the construction of the railway until the 30th June, 1902. He received sums from time to time from the Colonial Government in respect of the said contracts. The amount of costs incurred and expended up to the 20th July, 1898, was (according to the figures given in Hills's declaration in the case of *Hills* v. *the Colonial Government*) £254,769 13s. 6d. Further costs and expenses, amounting to a large sum, were thereafter incurred to the 20th June, 1902. From September, 1898, the plaintiff bank advanced large sums to the said Hills and to the partnership, amounting, with capital and interest to the 31st March, to £59,384 0s. 6d., for which debt promissory notes, signed by the partnership of the said Hills and Walker and Sons, were duly given to the plaintiff, who still held the same, and for the said advances the said Hills and the partnership pledged as security to the plaintiff certain debentures of the face value of £116,000, which debentures the plaintiff still held. In November, 1902, the said Hills, acting both personally and in his capacity as trustee for and on behalf of the said partnership, instituted an action against the Colonial Government, and was awarded £76,225 9s. 4d. Plaintiff prayed for an order declaring that the bank was entitled to preference over the total amount of the said judgment, given in favour of the said Hills, personally, or as trustee for the partnership, or the paying out of the assets mentioned, or any part thereof, until the said claim of £59,384 0s. 6d., together with interest and costs, had been fully satisfied, and such further and other relief as to the Court might seem meet, and as against the first-named defendant's interest and costs of suit.

The defendant Hills, in his plea, said that, by order of the High Court of England, Hills had recently been appointed receiver for the co-partnership business known as the Grand Junction Railways. Subject as above, the defendant admitted the other paragraphs, save as to paragraph 9. He denied the allegations, and said that the various cessions, assigns, and transfers referred to were made with the notice and consent of the holders of the debentures. As to paragraph 2, he admitted that a large sum was expended on the construction of the said works. He denied the allegations in paragraph 16, and said that in law the plaintiff was not entitled to a preferent claim, but was only entitled to rank concurrently with the other concurrent creditors of the said Hills.

The plaintiff filed a replication, upon which issue was joined.

Sir H. Juta, K.C. (with him Mr. McGregor) for plaintiff; Mr. Searle, K.C. (with him Mr. Close) for defendant.

Mr. McGregor said the other defendant, E. R. Syfret, had filed a plea craving leave to submit to the judgment of the Court, and praying to be relieved from costs.

Mr. Searle put in a number of documents relating to the transactions, and also put in a letter from John Walker and Sons to the manager of the A.B.C. Bank, giving notice on the 20th July, 1898, of the cessions.

Thomas Mouat Cameron Walker said he had been engaged in the office of the Grand Junction Railways since the contracts were entered into in 1896. There

were certain creditors in the Colony of the partnership between Hills and John Walker and Sons. The amount of concurrent claims was £54,300. These claims consisted of £8,500 for salaries, £4,000 wages due on the Mossel Bay section, and the balance of about £42,000 was due principally to merchants for goods supplied at Port Elizabeth for the works on the three different railways, such as coal and stores. Some of the creditors had obtained judgments, the larger creditors, but there were a number of small creditors who had not taken out judgments. These were the people, he thought, who would come into competition with the claim of the A.B.C. Bank. The debts were incurred before July, 1902—he should say in or about December, 1901, and in the first three months of 1902. The company closed the works about March, 1902, and all the debts he had named would then be in existence.

Cross-examined by Mr. McGregor: The wages due on the Klipplaat-Oudtshoorn and Somerset East-King William's Town sections were ordered to be paid by the Government, but not the salaries and not the wages due upon the Mossel Bay section. The Mossel Bay section was not referred to in the action. He was not aware that the sums of £8,500 and £4,000 that he had mentioned were included in the provision as to payment by the Government. The item of £42,000 was for coal, timber, food, stores for the men, and a little corrugated iron, but it did not include the larger supplies of sleepers, rails or cement, these materials being purchased by the London office and sent out to South Africa.

Re-examined by Mr. Searle: The claims he had described were all local claims in connection with the working of the Cape office. The bank advanced the money now in question in England to the London office of the undertaking for the purpose of the construction of the railways here.

This closed the evidence.

Mr. Searle intimated that the defendants' contention was that all claims ranked alike, and that the plaintiff bank had no preference.

Mr. McGregor (for plaintiff): I will in the first place refer to Act 43 of 1895, Section 2 (as to the power of a Company to issue debentures and cause them to be registered, and the rights of the holders of such debentures), and Section 6 (as to the title of debenture-holders to enforce their rights). Now these debentures were duly registered and there was (I take it) no prior claim on them. The bearer of the debentures is entitled to receive £100. We do not claim priority over the other debenture-holders (see Section 2 of the contract). A subsequent section shows that if half-yearly payments have not been made the defendants are in default (see the agreement of July, 1902).

[De Villiers, C.J.: The property must be mentioned and described in the debenture.]

They had no property at the time, but they bound their future rights to property.

[De Villiers, C.J.: But the property bound by these debentures consisted of moveables, and *mobilia non habent sequelam*.]

This case must to some extent be guided by English law. As to the meaning of "debentures," see the *Panmure Company* case (5 Ch., 318). This is not a case of one company succeeding another; we have to deal with the same company throughout.

[De Villiers, C.J.: But they were different corporations.]

Yes, but see *Palmer's Company Law* (p. 73). Under Section 3 of Act 40 of 1898, the company have the power to deal with this property, and when Hills succeeded the Thames Ironworks he took over their liabilities, as well as their assets.

[De Villiers, C.J.: But was not a new agreement entered into with a new company?]

Yes; but here there is no question of personal rights, but of real rights. The property is bound, not any particular person. Having regard to the special facts of this case, I submit that the defendants are bound to pay off these debentures. The debenture-holders are entitled to payment on two grounds: (1) No interest can now be paid as the funds from which it would otherwise have been paid are in the hands of the Court; (2) the general rule as to priority of debentures is perfectly clear. *Palmer's Company Debentures*, Vol. 2, p. 401 and seq.). As to priority, see *Palmer* (p. 125) and *Allen* v. *Richardson* (13 Ch.D., 530). It is only equitable that a

man who finances the whole undertaking should be responsible to those who have advanced funds to carry on that undertaking. It might be asked "why did not the debenture-holders try to enforce their rights at any earlier stage?" There was no reason why they should do so. This is no ordinary case of borrower or lender; it is almost impossible to say what persons are entitled to claim; but we do ask the Court to hold that the debenture-holders have priority.

Mr. Searle (for defendants): I must confess I can hardly follow counsel's argument. The Debenture Act never changed the Common Law. We deny that no notice was given to the plaintiff company. An Act of Parliament is sufficient notice to everybody. The debt is not denied, but the preference of the debentures is.

[De Villiers, C.J.: Doesn't the letter include all the rights of debentures?]

I submit not, my lord. "To pay all the debentures" is no acknowledgment of preference. They did not undertake to pay any preference. The plaintiff did not rely on that letter; otherwise he might have sued on a promise to pay. In all probability it would be found that when the bank ceased to advance money, the other creditors came in. If it be held that the bank had a preference, the whole of the assets would be swept away, and there would be nothing left to meet the liability of Colonial creditors to the extent of £60,000. See *Hamilton on floating and fixed security*. It is quite clear that a company may even part with the whole of its assets, and in such case it is the duty of the debenture-holders to apply to the Court for the appointment of a receiver, when the floating security would become a fixed security. Had an application been made to the Court on the occasion of the transfer, a receiver would undoubtedly have been appointed. I cannot see under what principle the debenture-holders of the Grand Junction Railway could recover their money, because the Grand Junction Railway were the first to obtain the rights, and an entirely new contract was made, and the character of the railway was changed.

[De Villiers, C.J.: On your argument that the company should have made the floating security a fixed one, didn't Hills give the bank the assurance that he was taking over all the liabilities? Doesn't his letter mean that he took over the debentures and all the liabilities?]

It is merely a personal matter, and they might sue him for breach of contract.

[De Villiers, C.J.: It is quite possible the Corporation might have done what you say they ought to have done, had they not received that assurance.]

They say that the debenture-holders had no knowledge of the transfer, so that the case your lordship suggests is not really the case they make out. The £76,000 awarded against the Government, over which the bank claims a preference, was awarded to Hills personally and as trustee of the partnership. Therefore, I contend that there can be no preference awarded in this action without the rights of creditors coming up. The plaintiff contends that he is entitled to preference upon the amount of the judgment given in favour of Hills personally or as trustee of the partnership. I submit that the liability of Hills, by contract or any other way, to pay this money does not specifically come up in this action. The point is, whether the plaintiff is entitled to preference over a fund which was awarded to the Grand Junction Railways and Hills together. The plaintiff has not even obtained a judgment. The application is standing over, just the same as the proceedings for provisional sequestration are standing over. The debentures were pledgeqd as a collateral security. The present action is really in the nature of a special case. The object is not to obtain judgment, but rather to obtain a declaration as to the plaintiff's right to preference, as against the claims of the other creditors. I would suggest that the other creditors might properly be given notice to intervene. In the undertaking, the Grand Junction Railways were not mentioned at all. I submit that this case, which is really a special case, should be answered in favour of Hills, acting for himself and as receiver of the Grand Junction Railways.

Mr. McGregor having been heard in reply,

Mr. Searle mentioned to the Court that a case which would be found of

some value in this matter was the *Government Stock and Investment Co.* v. *Manila Railway Co.* (1897, Appeal Cases, p. 81).

Cur. Adv. Vult.

Postea (November 6):

De Villiers, C.J.: The question to be determined in this case is whether the plaintiff bank is entitled to a preference upon the amount of a judgment given by this Court against the Government in favour of Hills personally and as trustee for a partnership known as the Grand Junction Railways. It is admitted that the first defendants, namely, Hills and the partnership, are indebted to the bank in the sum of £59,384 for advances made in September, 1898, and that the bank holds as security for such debt debentures to the face value of £116,000, issued by the company known as the Grand Junction Railways (Limited) in 1896. This company was placed in liquidation in 1902, and the liquidator, who is the second defendant in this suit, does not dispute the bank's right to a preference in respect of any assets in his hands. It does not appear, however, that he has any such assets, for the judgment already referred to was given in favour of Hills and a partnership which, although having the same title as the company with the omission of the word "Limited," is a different *persona* from the company which issued the debentures. It further appears that the Supreme Court of Judicature in England has appointed Hills as receiver of the partnership, and it is in his capacity as such receiver, as well as in his individual capacity, that he now opposes the bank's claim to a preference. I am bound to say that, if the decision of the question at issue had affected only the immediate parties to this suit, I should have been prepared to hold that the first defendants are not entitled to set up the defence that the liabilities under the debentures attach solely to the original issuers of the debentures and not to the partnership which took over the contracts of the company. At the time when the partnership took over those contracts, it also agreed with the company to pay all its debts, including the debentures, and the fair inference is that it agreed that any preference enjoyed by the debenture-holders should attach to the assets of the partnership. It is of the very essence, however, of a preferent charge that it affects, not the debtors themselves, but other creditors of the debtors, and therefore an unregistered agreement to give such a preference cannot affect creditors who are no parties to such an agreement. The question of preference can only arise where the person claiming such preference enters into competition with other creditors, but in the present case the Court is asked to decide such a question as between the debenture-holders and the cessionaries of the issuer of the debentures, without regard to the rights of the creditors of such cessionaries. If such cessionaries had been in the possession of land specially mortgaged in favour of the debenture-holders, the latter would, of course, be entitled to a preference in respect of such land under the general law of this colony. It is not alleged, however, that the first defendants hold land thus mortgaged. As to any movables which they might hold the general rule of our law is *mobilia non habent sequelam*. It is not necessary now to inquire whether and to what extent this rule has been modified by Act 43 of 1895, for that Act only recognises a preference in respect of "so much of the property of the company as shall be mentioned and described in the debenture," and the debentures now in question contain no such description. The preference which is claimed is not a prior claim in respect of specific property, but a general priority, such as is continually asserted in insolvency under general bonds. Such a priority can only arise where there is a competition between creditors, and at present no such competition exists. If the estate of the partnership should be sequestrated, such competition would arise, but the person to protect the interest of the creditors would be the trustee of the insolvent estate, and not the receiver of the partnership. As the case now stands, it would be premature to decide the question of preference as against the first defendants. If they are solvent they will be able to pay the full debt owing by them to the plaintiff bank, and if they are insolvent their estate must be sequestrated, or, at all events, execution must issue in respect of the debt before the question of preference

can arise. I find from the records of the Court that a provisional order has been granted for the sequestration of the estate of the partnership, and that the application for final sequestration is to be heard on the 14th inst. I find also that the bank has sued the partnership for the amount of its claim, but subsequently withdrew the action. The proper course for the bank to have taken was to proceed with its action, and raise the question of preference upon suing out execution for the amount of the judgment. If, however, the estate of the partnership should be sequestrated, the bank will prove its debt and claim a preference in insolvency, when the trustee will be able to protect the interests of the creditors. In the present action, however, there must be absolution from the instance, with costs, but the interdict already granted will be continued until the hearing of the application for the final sequestration of the partnership estate.

[Plaintiff's Attorneys: Sauer and Standen; Defendant's Attorneys: Tredgold, McIntyre and Bisset.]

Ex parte ANDREWS.

Mr. Alexander moved for an order authorising the issue by the Registrar of subpœnas to eleven persons in Cape Town, to appear before Advocate Close, who had been appointed as commissioner, on November 2, at 3.30 p.m. Petitioner was acting as agent in Cape Town for defendant's attorneys in Johannesburg, and the evidence of the said witnesses was most important to the defendant in the pending suit of *Miriam Cohen* v. *David Langleben*, to be heard in the High Court of the Witwatersrand, Transvaal. Mr. Alexander mentioned that the action was one for breach of promise.

Order granted as prayed.

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZE.]

ADMISSIONS. { 1903. Oct. 29th

Mr. Morgan Evans moved for the admission of Henry Sylvester Williams as an advocate.

Application granted, and oath administered.

Mr. Benjamin moved for the admission of Gerald Francis Joseph Scanlon as an attorney.

Application granted, and oaths administered.

PROVISIONAL ROLL.

ESTATE RIX V. CLEMENTS.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £450, with interest and costs, and for the property specially hypothecated to be declared executable.

Order granted.

FINCHAM V. ARNOT.

Mr. Gardiner moved for provisional sentence on a promissory note for £87.

Order granted.

HUTTON V. POOLE.

Mr. Sutton moved for provisional sentence on a mortgage bond for £1,000, with interest, and for the property specially hypothecated to be declared executable.

Order granted.

ESTATE HIDDINGH V. THEUNISSEN.

Mr. Buchanan moved for provisional sentence on certain three mortgage bonds, with interest, and for the property specially hypothecated to be declared executable. The bonds were for the amounts of £4,000 (less £16 10s. paid on account), £600, and £1,000.

Order granted.

SMITH AND CO. V. ALLIS.

Mr. Van Zyl moved for provisional sentence on a promissory note for £128, with interest and costs of suit.

De Villiers, C.J., pointed out that the promissory note was unstamped. There would be a fine of a sovereign to be paid upon it.

Order granted, subject to the document being stamped and the fine paid.

MALCOMESS AND CO. V. MULLER.

Mr. M. Bisset moved for provisional sentence on a mortgage bond, with interest and costs of suit.

Order granted.

ILLIQUID ROLL.

NOLAN V. SIBBETT AND STEPHAN. { 1903. Oct. 29th

Rule 319—Damages.

The defendants had undertaken to finance the plaintiff by raising a certain loan for him. This they failed to do. He now sued them under Rule 319 (inter alia) *for damages on the ground that they had prevented him by their default from completing a certain contract. The Court refused to give damages (1) on the ground that the damages claimed were not liquid; (2) that the defendants had not guaranteed a loan.*

This was a motion for judgment in default of plea under Rule 319, for (a) £474 19s. 6d., balance of moneys due from defendants to the plaintiff, together with interest due thereon *a tempore morae*; (b) £6 2s. 11d. as and for damages sustained by the plaintiff by reason of the default of the defendants; (c) costs of suit.

Mr. Gardiner, in moving, explained that the plaintiff had had to incur certain legal expenses which had proved fruitless by reason of the defendants having failed to render to him the assistance they had promised. These expenses could be ascertained, and he submitted that they were therefore liquid damages.

[De Villiers, C.J.: You had better call your evidence.]

William Jones Nolan said that in May of this year he purchased certain properties through the defendants. He arranged with Sibbett that they should finance him. Sibbett and Stephan were to provide the money owing to witness, and to raise the rest of the purchase price on mortgage. Chapman, the vendor, agreed to take back one of the properties. Witness had been put to certain legal expenses. The transfer expenses were £6 2s. 11d.

[De Villiers, C.J.: Have you the bill of costs?]

I put in the taxed bill.

[De Villiers, C.J.: But where is the consideration?]

We engaged to purchase their property, and because they could not give us the assistance they had promised we have incurred useless costs.]

[De Villiers, C.J.: I do not see how you have proved your damages.]

Yes, we have called our evidence, and the plaintiff is always at liberty to prove a liquidated demand under Rule 319 where the defendant has been barred.

[De Villiers, C.J.: But here the defendants have not agreed to pay money but to try to find somebody who will. How could you sue them for breach of contract?]

They not only promised to try to raise the money, but to do so.

De Villiers, C.J.: Judgment will be given for the first item, with costs, but not upon the second item. The item of £6 is not really liquidated damages, and it is not clear that there was a guarantee that the defendants would succeed in finding a person to lend the plaintiff the money.

WIENER AND CO. V. EBRAHIM.

Mr. Smith moved, under Rule 329d, for judgment for the sum of £114 5s. 10d., for goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Order granted.

ESTATE ISAACS V. MARKS.

Mr. Close moved, under Rule 319, for judgment in default of plea. The declaration claimed the sum of £21 for

rent. Originally provisional sentence was granted for the sum, which was claimed upon a lease, but thereafter the defendant entered appearance, and the declaration was filed. The defendant was in default of plea to the declaration, and was barred. He then gave notice of an application, which was set down for the 15th inst., for removal of bar and for leave to plead. That application was granted, but on the 15th defendant made no appearance, and, in case there might have been a mistake, the Court ordered the matter to stand over. Defendant had not appeared since. Counsel asked that costs should include costs of the notice to remove the bar.

Order granted as prayed.

ESTATE OLGAAR V. OLGAAR.

Mr. P. S. T. Jones moved, under Rule 329d, for an order directing the defendant to hand over certain goods belonging to the plaintiff's estate, or to pay their value.

Order granted.

VAN DER BYL AND CO. V. MINNAAR.

Mr. Struben moved, under Rule 329d, for judgment for £61, for goods sold and delivered, with interest and costs.

Order granted.

ZWARENSTEIN V. SIMES.

Mr. Buchanan moved for judgment, under Rule 329d, for £28 4s. 7d., balance of account. The defendant incurred certain costs and damages in connection wtih a divorce case, conducted by the plaintiff for the defendant, and had paid £30 on account.

Order granted.

MARSH AND SONS V. HUXHAM.

Mr. Russell moved for judgment, under Rule 329d, for £146 1s. 5d., balance of account for goods sold and delivered, with interest *a tempore morae* and costs.

Order granted.

REHABILITATIONS. { 1903. Oct. 29th.

Mr. P. S. T. Jones moved for the rehabilitation of Johan Christian Marais, whose estate showed a deficiency of £139 odd.

Granted.

Mr. Benjamin moved for the rehabilitation of Bernard Viland, who became insolvent in 1885.

Order granted as prayed.

Mr. C. W. de Villiers moved for the rehabilitation of Johannes Lodovicus Conradie, whose estate was surrendered in 1882, and showed a deficiency of £1,081.

Order granted, the Chief Justice stating that in view of the trustee's report it was only because the applicant had been insolvent for 20 years that he was rehabilitated.

Mr. Benjamin moved for the rehabilitation of Wm. Alfred Grey Webster, whose estate was surrendered in 1887, and showed a deficiency of over £693. The trustee called attention to the fact that applicant had for some years been absent from the Colony.

Granted.

GENERAL MOTIONS.

Ex parte SIMPSON.

Mr. C. W. de Villiers moved to make absolute a rule *nisi*, granted under the Derelict Lands Act.

Order granted.

Ex parte FRIEDLANDER.

Mr. Upington moved as a matter of urgency for a temporary interdict. Petitioner said that he was an attorney of this Court, and held general power of attorney of a firm in Hamburg, Germany, who were the owners of certain stock and furniture situate in and upon the premises known as number 68, Caledon-street, Cape Town. On October 11 last the petitioner entered into an agreement with Grayer and Sussman to buy the said stock for £240, payable in four instalments, the first to be £50 cash, and the remainder in sums of £60, £70, and £60 respectively. None of these instalments had been paid, except the cash payment of £50. Petitioner, on going to the said premises, found that they had been cleared of all stock, and that the stock was now in the possession of one

Lewis, of No. 1, William-street. Petitioner had reason to believe that the said Grayer and Sussman intended to defraud his principals. He intended to proceed against the said Grayer and Sussmann for compulsory sequestration of their estate.

A rule was granted calling upon Lewis to show cause on Thursday next why he should not be interdicted from parting with the property pending an action to be instituted by the petitioner, rule to operate as an interdict in the meantime leave being granted to Lewis to move the Court for the discharge of the order. It was understood that the petitioner would proceed at once to sequestrate the defendant's estate.

Ex parte OOSTHUYSEN.

Mr. Alexander moved for a rule *nisi* to be made absolute, calling upon John William Armstrong and the trustee in the insolvent estate of Armstrong, formerly trading under the style of Holland and Co., to show cause why an order should not be granted, cancelling the entry in the Debt Registry of the Colony of a certain mortgage bond.

Rule made absolute, as prayed.

Ex parte SCHOOMBIE.

This was an application to have made absolute a rule *nisi* calling upon one John McAlister to show cause why, on account of his absence from the Colony, he should not be removed from the executorship under his late wife's will. The petition of Johannes Jacobus Schoombie stated that McAlister had lived at Steynsburg, but had gone away after his wife's death to Johannesburg, leaving his child, and his present whereabouts were unknown. Under the will of his wife, the minor child of the marriage was appointed sole heiress, and the respondent was appointed executor. Petitioner prayed that the respondent should be removed from executorship, and that an executor dative of the estate and a guardian of the said minor should be appointed.

The affidavit of the respondent stated that he was employed as an engine driver in Johannesburg by the Municipality, that he made no secret of his departure from Steynsburg when he left, and that it was his intention when he settled down again in a home of his own to have the said child with him. His attention was only called to the application by accident, upon his seeing a notice in the "Star." He verily believed the object of the petitioner was to possess himself of the said property.

Mr. De Waal for applicant; Mr. J. E. R. de Villiers for respondent.

Mr. De Waal said that he did not know that he could really press for the removal of the respondent from the executorship, but he thought there were grounds for maintaining that he did not intend to carry out his duties as executor. More than six months had elapsed since the death of his wife, and no account had been filed with the Master.

Mr. De Villiers was not called upon.

De Villiers, C.J.: The estate can be administered without the respondent necessarily coming from Johannesburg to Steynsburg. There has been no sufficient cause shown for removing the respondent from the executorship. There will be no order upon the petition. Costs will come out of the estate.

ESTATE MULLER V. MULLER.

ESTATE MULLER V. DU TOIT.

In the first of these motions the respondent, Abraham Johannes Muller, of Groot Drakenstein, Paarl, was called upon by the applicant, Jacob Isaac de Villiers, in his capacity of sole surviving trustee of the insolvent estate of Hendrik Lodewyk Muller, of Fortuin, in the district of Sutherland, to show cause:

Why a proof of debt tendered by the respondent for £700 and accepted by the Master should not be expunged on the ground that it is false and unfounded, and

Why the respondent should not be interdicted from parting with any property either in the said insolvent estate or in his own estate, pending an action to be brought by the applicant to recover any property in the said estate.

In the second case the same applicant applied to have a proof of debt lodged by one Paul Phillippus du Toit for £35 on the same insolvent estate expunged on the ground that such claim was false and unfounded.

Mr. Schreiner, K.C., with him Mr. Searle, K.C., appeared for the trustee; Mr. Upington appeared for the respondent Muller, and Mr. Benjamin for Du Toit.

Mr. Schreiner said that the two motions were so closely allied that they might be taken together. Very important affidavits had been filed in the first case, and in the second, certain affidavits had been handed in at noon that day that would necessitate replies. Interdicts would be asked for in Muller's case, and the applicant was in this position, that the insolvent, who was the principal witness, and able to answer the allegation of the respondents, was at Sutherland. He thought the motions should stand as summonses, in order to proceed to file pleadings. The debt was alleged to be money advanced to the amount of £700, and it was alleged that the respondent, Mr. A. J. Muller, had been taking all the assets out of the insolvent estate. They had either to ask for a postponement to file further affidavits, or else to go to trial. The debt in the second case, that of £35, was alleged to be the other way about, and it was stated that the second respondent had been put in as a creditor, so as to get a vote in the insolvent proceedings. Counsel moved that the Court should direct that the two notices should stand as summonses, in order to proceed with the action.

Mr. Upington, for the respondent Muller, raised no objection to the case being tried by pleadings, but he submitted that costs should be made costs in the cause.

Mr. Benjamin, for the respondent Du Toit, said he was instructed to oppose the matter being tried by action. It was within the discretion of the Court to say whether or not the matter should be tried by pleadings. The amount was so exceedingly small, and as the matter had been standing over for about four years, he submitted that his client, who had been prosecuted for perjury, should not be put to an expensive trial.

De Villiers, C.J., said that if the case of Du Toit had stood alone, the Court might have heard the case at once. As there was some connection between the two cases, he thought it better that both cases should stand over. The Court would therefore order that the questions of fact in these cases be tried by action and that the notice of motion stand in lieu of summons, costs to be costs in the cause.

[Applicant's Attorneys: Walker and Jacobsohn; Respondent's Attorneys: Faure and Zietsman.]

Ex parte ROBERTSON. { 1903. Oct. 29th.

Rule of Court.

The Court refused to make a certain agreement between the petitioner and the Municipality of M. a rule of Court.

Mr. Buchanan, for the petitioner, moved that a certain agreement with the Mowbray Municipality with regard to the construction of a stormwater drain and sewer convenient to the petitioner's property should be made a rule of Court.

De Villiers, C.J., said that a precedent could not be established in the matter, and that the application must be refused.

TUROK V. CHRISTOPOULUS AND ANOTHER.

Mr. Alexander applied for this matter to stand over until Thursday next to enable applicant to reply to an answering affidavit filed that day. The application was for an order amending a certain contract of lease.

Mr. Pyemont, for the defendant, said that the affidavits showed that the matter should be dealt with by way of action. It was by no means clear that there had been a mistake.

Mr. Alexander said that if the affidavits of his client were correct, a purely clerical error had been made, and the matter was one that could be decided by motion. The figures 161 had been inserted instead of 165.

De Villiers, C.J. (to Mr. Alexander): You will have to take the risk of having to pay costs in case it is decided that the matter cannot be dealt with by motion.

The matter was ordered to stand over till Thursday next, question of costs also to stand over.

Ex parte LORD AND ANOTHER.

Mr. Buchanan moved for leave to raise a sum of £4,500 on second mortgage, in

order to renovate and repair the Central Hotel at King William's Town.

Order granted as prayed.

BANGEE V. DUSTAY.

Mr. Burton (with him Mr. Upington) moved for a temporary interdict restraining Ebrahim Cotwal and all others from disposing of the property of petitioner's partnership with Dustay and the appointment of a receiver. The petitioner said that he resided at Lady Grey, in the division of Aliwal North, and he was the plaintiff in an action against the respondent for £500 sterling, damages sustained through the illegal action of the said respondent by virtue of his denial, and refusal to abide by a certain partnership agreement in respect of a certain retail business and for an account of the said partnership. Petitioner said that the goods of the partnership had been attached under a judgment against the respondent, that the respondent had now surreptitiously disappeared leaving another person ostensibly in possession, but deponent had reason to believe that the sale was merely a bogus one to defeat the petitioner's objects. Counsel said the action was set down to be heard on the 13th November, and after the pleadings had been closed the goods of the partnership had been attached upon judgments against the private estate of Dustay. It appeared that the principal of the attachments had now been withdrawn, and the bulk of the goods had gone back to the possession of the supposed buyer. The application was made *ex parte*.

A rule was granted as prayed, rule to be served upon Ebrahim Cotwal, to be returnable on the 13th November, and to operate as an interdict in the meanwhile. The Court also authorised Mr. H C. M. Getliffe to take charge of the property on behalf of the alleged partnership.

SYME V. COLONIAL GOVERNMENT. { 1903. Oct. 29th.

Interdict—Costs—Raising of road—Public utility.

The Government, in the course of constructing an overhead bridge over one of its railways, found it necessary to raise a divisional road leading to the bridge, and this was done with the consent of the Divisional Council. In consequence of the raising of the road the applicant's property, which bordered on the road, was deprived, in part, of convenient access to the road.

Held, *that although the applicant might be entitled to compensation for depreciation in the value of her property, she was not entitled to an interdict restraining the raising of the road.*

This was an application on behalf of one Miss Syme, who is the owner of property abutting upon the Lansdowne-road, Claremont, for an interdict, restraining the Colonial Government from proceeding with the erection of a certain wall and for costs of the application.

The affidavits of the plaintiff and others stated that the C.G.R. were constructing an overhead crossing at Claremont, and were raising the road and building a wall on the boundaries of the applicant's property. If this wall were erected, it was believed, the surface water would be thrown on her property, and the value of the estate would be diminished, inasmuch as applicant would be prevented from cutting the land into building lots, and the frontage to Lansdowne-road would be lost. Mr. Jones, sworn appraiser, estimated the damage to the property at about £1,200.

The affidavit of Mr. Dalton, chief engineer of the C.G.R., stated that work complained of was necessary work in connection with the erection of the overhead bridge at Claremont, and was being done with the approval of the Divisional Council, in which body the said road was vested. The plaintiff was mistaken in supposing that the said work would throw the surface water upon her property. It would not prevent the applicant from cutting up her land into building lots, though it would, no doubt, affect

a portion of the frontage to the applicant's ground.

It appeared from correspondence which had taken place between the respective attorneys that the C.G.R. intimated that they recognised Miss Syme's claim to be compensated, that the applicant then offered to submit the matter to arbitration if the Government would pay the costs of the application, and that the Government replied that, as there were no grounds for an interdict, they could not agree to pay the costs.

Mr. C. W. de Villiers, for the applicant, and Mr. H. Jones, for the respondent, were heard on the question of costs.

De Villiers, C.J.: This application was originally made on two grounds: (1) That by reason of the respondents raising the road, the surface water would be thrown upon the applicant's property, and (2) that her property would be seriously diminished in value, as it would prevent her cutting it up into building lots, and deprive her of frontage to Lansdowne-road. The engineer, Mr. Dalton, in his affidavits, states that the applicant is mistaken in thinking that the surface water would be thrown upon her property, as a footpath would be constructed from the top of the road, and drained with kerbing and guttering, which would prevent any water from passing over the road on to her ground. There is no answer to this, and I think, therefore, that the applicant abandons the first ground that water would be thrown upon her property. The Court now has to deal with the second ground that her property would be seriously damaged in value in consequence of the raising of the road. But the raising of the road took place with the full consent of the Divisional Council. It is admitted that if the Divisional Council had done it the Court would not have interdicted the Divisional Council. Now, in my opinion, if the Court would not interdict the Divisional Council, the Court would equally not interdict the Government, acting with the consent of the Divisional Council in raising this road if it is done for the purposes of public utility. No one can deny that this railway bridge is for purposes of public utility, and, I am satisfied, even if compensation was ultimately payable, it is not a case in which the Court would grant an interdict. This is not a case of injury to property, which would justify an interdict. Now, it is quite true, that the attorneys of the Government did recognise the applicant's claim to be compensated, but it does not follow that it is any recognition of a right to an interdict against a construction of this road. In the absence of proof that the applicant was entitled to such an interdict, I am of opinion that the costs of that application should be paid by the applicant. There will, therefore, be no order upon this application, but the applicant will have to pay the costs.

Kotzé, J., concurred.

[Applicant's Attorneys: W. E. Moore and Son; Respondent's Attorneys: Reid and Nephew.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice KOTZE.]

REVIEW.

REX v. STUURMAN BOTES. { 1903. Oct. 30th.

Evidence from spoor.

Kotzé, J., said that this case, which had been heard before the Resident Magistrate of Sutherland, had come before him for review. The defendant was charged under Act 35 of 1893 with the theft of one sheep, the property of Michael Boshof, and was sentenced to twelve months' imprisonment with hard labour, and to receive 25 lashes. The case rested entirely upon the evidence of a little girl, nine years old, the daughter of Boshof, as to the prisoner's spoor. To test her knowledge of the prisoner's spoor certain other prisoners were taken along with the prisoner Botes outside the gaol, and they made footmarks on some ashes, when the little girl, without hesitation, pointed out the prisoner's spoor. A police

sergeant who was present says there was very little difference between the different spoors. The evidence of spoor should be very cautiously acted upon, especially when it stood by itself, and unless the evidence was very clear and satisfactory, he did not think there should be a conviction. In the present case, there certainly was a doubt, and he thought, having regard to the age of the child and the fact that her pointing out the spoor might have been purely accidental, the prisoner ought to have had the benefit of the doubt, and the conviction, therefore, should be quashed.

TRIAL CAUSES.

SWART V. SWART.

This was an action brought by Susanna Maria Johanna Swart, of Bredasdorp, against her husband, now residing in the Orange River Colony, for restitution of conjugal rights, failing which a decree of divorce, plaintiff to have custody of the children, division of the joint estate, and a contribution by way of maintenance for the children. Mr. Upington appeared for the plaintiff, and the defendant was unrepresented.

Charles W. H. Smith, clerk, in charge of the Marriage Record at the Colonial Office, produced the original register of the marriage.

Susanna Maria Johanna Swart said she was married to the defendant on the 14th June, 1887, at Riversdale. Four children had been born of the marriage. The eldest was 14 years of age, and the youngest 10. All the children were girls. Witness and her husband at first lived in the division of Ladismith, Cape Colony. They lived together until 1889, when the defendant left for Johannesburg. He stayed away a couple of months, and then returned, when they lived at Heidelberg. He lived with her until 1898, when he went to Johannesburg. He made an arrangement that his brother, who was a storekeeper, had to supply her with goods, and pay for the children's schooling. This was done until 1899. The defendant had not supported her since. She had asked him to come back. In his replies he had asked her to give him a divorce, as he could not live with her again. She was quite willing to go and join her husband in the Orange River Colony. The defendant was a general dealer at Vrede, and was doing a good business. Witness was at present housekeeper at the Heidelberg Hotel.

By the Court: The defendant fought for the Dutch during the late war, and was taken prisoner. He was sent to the Green Point Camp, and was afterwards removed to Bombay. Defendant had asked her to let him have a divorce.

Decree of restitution granted, defendant to return to or receive the plaintiff on or before the 31st December, failing which a rule calling upon the defendant to show cause on the 12th January why a decree of divorce should not be granted, why he should not be ordered to contribute a sum of £4 per month as maintenance to each child until the said children should have attained the age of 16 years, and why he should not pay costs.

MIDDLEWICK AND ANOTHER V. BRODIE.

1903. Oct. 30th. „ 31st.

Lease—Evidence—Credibility of witnesses.

This was an action instituted by the plaintiffs as executrices testamentary in the estate of the late William Middlewick against Robert Charles Brodie, of the farm Klipkraal, in the district of Sterkstroom, for the ejectment of the defendant from the farm Donkershoek, and damages in respect of refusal to quit and the destruction of trees.

The declaration was in the following terms:

1. The plaintiff Susannah Elizabeth Middlewick is the surviving spouse, and the plaintiff Annie Elizabeth Wright (born Middlewick), who is married out of community of property to Walter Irvine Wright, and by him duly assisted as far as need be, is the daughter of the late William Middlewick. The plaintiffs have been duly appointed, and have been granted letters of administration dated 23rd June, 1896, as executrices testamentary of the estate of the said late William Middlewick, and sue in their capacity as such. The first-named plaintiff also sues in her individual capacity.

2. The defendant is a farmer residing at the farm Klipkraal, in the district of Sterkstroom, and division of Queen's Town, in this colony.

3. By the joint last will and testament of the said late William Middlewick, who died on or about the 24th day of May, 1896, and of his spouse, the first plaintiff, the usufruct for life of the farm Donkershoek, in the said district and division, of which said farm the said Middlewick was, in his lifetime, the registered proprietor, was bequeathed to the first-named plaintiff, and the said plaintiff has adiated and enjoyed the said usufruct.

4. In or about the month of June, 1900, the plaintiffs, in their said capacity, and the defendant entered into a certain agreement of lease whereby the plaintiffs let and the defendant hired the said farm Donkershoek for a term of three years, commencing on the 1st day of July, 1900, and terminating on the 1st day of July, 1903, and at a rental of £100 per annum, upon the terms and conditions set forth in a certain document, signed by the defendant on or about the 4th day of September, 1900, copy of which is hereunto annexed marked A.

5. By clause 5 of the said document, it is provided that the lessee shall not fell or cut, or cause to be felled or cut any timber or trees of whatsoever kind growing upon the said property, except such as he may require for firewood for domestic purposes, and then such firewood shall only be obtained by pruning the said trees.

6. The defendant entered into possession and occupation of the said farm under the said agreement, and subject to the said terms and conditions, and has enjoyed all the rights, privileges, and benefits of the said lease for the said period of 3 years, which expired on the 1st day of July, 1903.

7. The plaintiffs have duly given the defendant full legal notice to quit and give up possession of the said farm, but the defendant wrongfully and unlawfully refused, and still refuses, so to do.

8. The defendant has further wrongfully, unlawfully, and in breach of the said agreement, cut and felled great quantities of timber and trees growing upon the said property, and has thereby damaged the said property to the extent of £213 sterling.

9. By reason of the said wrongful and unlawful refusal of the defendant to quit and give up possession of the said farm, the plaintiffs have been deprived of the use and occupation thereof, have been unable to let the same, and have otherwise sustained damage in the sum of £200 sterling.

Wherefore the plaintiffs claim: (a) That the defendant be ordered to forthwith deliver up to the plaintiffs possession and occupation of the said farm Donkershoek, and that the defendant be ejected from the same. (b) Judgment for the sums of £200 and £213 sterling as and for damages as aforesaid. (c) Alternative relief. (d) Costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraphs 1, 2, 3, 4, 5, and 6 of the plaintiffs' declaration.

2. As to paragraph 7 thereof, the defendant says that in or about March, 1902, the plaintiffs agreed to and did let the said farm to the defendant from the 1st of July, 1903, the date of expiration of the current lease, for three years, on the following terms and conditions: (a) The plaintiffs to have the right to extend the said period of three years to five years, if they so desired; (b) the rent to be £110 per annum; (c) the defendant to pay all rates and taxes; (d) the other terms to be the same as those of the current lease (viz., the lease annexed to the declaration).

3. The defendant says that, under and by virtue of the said agreement of lease in the preceding paragraph mentioned, he is and has been since the 1st of July, 1903, in just and lawful possession of the said farm, and is entitled to remain in possession thereof.

4. Save that he admits receiving notice to give up possession and refusing to do so, the defendant denies paragraph 7 of the declaration.

5. The defendant denies all the allegations in paragraphs 8 and 9.

Wherefore the defendant prays that the plaintiffs' claim may be dismissed, with costs.

Mr. Upington (with him Mr. Alexander) for plaintiff; Mr. Burton (with him Mr. Van Zyl) for defendant.

Mr. Upington said that the plaintiffs proposed to amend the declaration, and to substitute £800 damages for the amount of £213. He understood that his learned friend had no objection.

Mr. Burton intimated that they raised no objection.

Mr. Upington said that the defendant admitted that notice was given to him to quit. The issues of fact would

seem to be, firstly, whether there was a new lease granted on the terms set forth in the plea; secondly, what damages had, in point of fact, been sustained by the felling of the timber; and, thirdly, if any new lease was granted, and what damage had been sustained by the plaintiff by being kept out of possession. Counsel submitted that the onus of proving the issue of the alleged new agreement of lease rested upon the defendant.

[De Villiers, C.J.: Yes, but shouldn't you prove your damages as to the felling of the trees?]

Mr. Upington said that that, no doubt, was so, and he would accordingly call evidence.

Susannah Elizabeth Middlewick, one of the executrices in the estate of her late husband, William Middlewick, said her co-executrix was her daughter, Mrs. Annie Elizabeth Wright. She was enjoying the usufruct of the estate. She did not transact business herself. It was done by her daughter, Mrs. Wright. She did not sign a prospecting agreement to the defendant in July, 1902.

Cross-examined by Mr. Burton: She did not remember whether the defendant had a lease of the property under her late husband. Her husband got the property about fifteen years ago. Brodie was not the first tenant. Mr. Alton was the first tenant. She had not been to the place since Mr. Brodie had had it from 1900. Her daughter had been to Donkershoek three times.

Annie Elizabeth Wright, wife of Walter Irvine Wright, said she was co-executrix with the last witness in the estate of her late father. She knew the defendant Brodie. The estate included the farm Donkershoek. In 1900 they let the farm to Brodie, who signed a lease. Prior to that they had not received a communication from the defendant. They had a letter from Mr. Visser. Mr. Visser was not acting as their attorney at the time. The letter was written on behalf of one Prinsloo. In the early part of March she was staying at Cheviot. Her sister Emma sent a message to her, and in consequence, she wrote a letter on the 7th March. She subsequently saw Brodie about the end of March or beginning of April, at their house in Queen's Town. There was nothing said at the interview with reference to the letter of the 7th March. Brodie afterwards came, and saw her with regard to coal prospecting on the farm. They arranged to give him the right for a year. An agreement was drawn up. As to the lease of Donkershoek, she casually mentioned that they had a letter from Prinsloo asking for the lease of Donkershoek. She told him that Prinsloo had offered £100, and all rents and taxes. Brodie said that Prinsloo had been cutting off branches, and that he had been sub-letting veld to Boers from the Orange River Colony. Brodie seemed very excited. She afterwards saw Prinsloo, and asked him whether he had cut down any trees, and he said that he had not. On the farm were two very fine belts of mimosa trees. She saw the defendant at Klipkraal. She afterwards saw a man named Diedrichs at the main farmhouse at Donkershoek. Shortly afterwards Brodie came up. They did not speak for about an hour. Brodie spoke to her about the lease. She asked him what about the trees that he had destroyed. He replied that he had destroyed none. She said: "Can you say that in sight of the trees near the kraal?" She put a question to the man, and then she told the defendant that he was speaking a falsehood. The defendant said that he had always considered her interests. She now claimed £800 for the destruction of the trees on the farm. She gave Brodie notice to quit, and give up possession of the farm. She asked for the farm to be advertised. She received an offer of £180. The farm contained about 1,700 morgen. She did not know the value of the farm, but they would not take £4,000 for it.

Cross-examined by Mr. Burton: Mr. Brodie was the first tentnt, but she was not aware that his first lease was a verbal one. She did not know of three or four different tenants between the period of Brodie first entering into possession and 1897, when the lease was given him. No inspection was made of the farm on the expiration of occupation by any of the other tenants. She did know of the state of the farm in 1897, when Brodie got the lease. One of the other tenants had assured her that no trees were cut down by him. When Brodie came to her he never spoke about the lease. It was

not so that she told Brodie that she had received a higher offer for the farm, neither did she remember saying that Prinslo had offered a higher price. She had no recollection of fixing up a lease at an increased rate. Witness said that Prinsloo was mad when asked for a lease. She had proved that the trees were early cut down. She had seen two or three willows cut town.

Re-examined by Mr. Upington: In June or July, 1902, she told Brodie of Prinsloo's offer.

Walter I. Wright, farmer, and husband of the plaintiff, residing at Haslemere, stated that he remembered Brodie calling at the farm at the end of June or the beginning of July. Brodie came about prospecting rights, and wanted an agreement. The plaintiff, when the defendant asked for a renewal of the lease, said that she would first go over the farm. When the defendant heard that Prinsloo had made an offer he said that the latter was an undesirable tenant, as he had been cutting down trees. In February he again asked for a renewal of the lease, but it was pointed out that there would be difficulty in obtaining a lease on account of the trees being cut down. Later, in the month of June, witness inspected the farm, and found trees cut down. Wood had been found in Brodie's place, and Hendrichs entirely denied any knowledge of it. When Brodie was accused of cutting the trees he first of all denied it, but, subsequently, he admitted that he had been doing it for years. In July, when he inspected the farm, he found ninety-one mimosa trees had been cut down, and in another part of the farm over a hundred trees had been cut down.

Cross-examined by Mr. Burton: In June, 1902, when the interview took place, witness was in the next room to the plaintiff and defendant. He could not say why they delayed inspecting the farm for five months. Some of the trees had been cut down five or six years ago but, as near as he could remember, the most of the trees had been cut down recently. The trees were not cut down with discretion to allow the younger trees to grow. It would take about ten trees to make the kraal.

Re-examined by Mr. Upington: He would say the majority of the trees had been cut down within three months.

Emma Jane Middlewick, daughter of the firstnamed plaintiff, said that she was generally present at business interviews. This was in consequence of the deafness of her mother and sister. She remembered that in January last Mr. Brodie called. She was sent on a message in February or March. Mr. Brodie saw witness, and said he wanted the farm for a few years longer. He did not mention the rental. Mrs. Wright conducted the business of the estate. Brodie came to Queen's Town in July, 1902. Mr. and Mrs. Wright were in the dining-room. Witness and her sister went in the drawing-room to meet Mr. Brodie. She had heard Mr. Wright's evidence as to what took place. A renewal of the lease was spoken of, but Mrs. Wright did not grant one, and she told the defendant to go off the farm. At the interview in March the defendant merely spoke about the rates. Witness was present at the interview in December, and the renewal was again spoken of, but Mrs. Wright declined to consent to the renewal.

Cross-examined by Mr. Burton: At the interview in July Brodie told Mrs. Wright that Prinsloo had cut down the trees.

Henry Edward Halse, a farmer, in the Wodehouse district, said he had given special attention to tree planting. On the farm Carnarvon, owned by witness and his brother, they had close upon a million trees. They had tried the mimosa, but had not been successful. The mimosa was a valuable tree as a shelter to stock. A large solid load of mimosa timber would be worth about £3. Two very large trees would make a load. At the request of Mrs. Wright, he had visited the farm Donkershoek, together with Mr. Patterson and Mr. Wright. Mr. Patterson was a forester. He visited the farm on the 24th September and 22nd October. He counted the trees which had been destroyed. There were two belts—one on the north-west boundary and the other on the south-east. On the former fifty odd large trees, he found, had been destroyed. Seventy odd small trees had been destroyed. On the south thirty large and a little over 100 small trees had been destroyed. The large trees on the north-west were very fine, and he should estimate their value at £5 each. The small trees he should estimate to be worth £1 each. In the south-east plantation, the large trees were, in his opinion, worth £5 each, and

the small ones about 6s. each. The general value of the small trees was greater; he was simply giving the commercial value. He should say that the trees had been shamefully hacked to pieces. The large trees had been cut down almost flush with the ground. There was only one tree in the plantation that had been pruned, or cut back. All the trees he had counted had been cut within the past three years. A considerable number had been very recently cut. Speaking generally, he should estimate the damage done to the farm at about £500.

Cross-examined by Mr. Burton: The farm contained a large number of mimosas. The mimosas grew very slowly—more slowly than the oak, and he did not think there had been any large increase during the past few years. The trees had acted as a wind-break, and in view of the removal of the trees, the plain was more wind-swept than it had been. He thought that in a commercial sense the plantations would be of the value of about £1,500. He should say the farm was of the value of about £2 10s. per morgen. He did not consider that the cutting of the large trees would be an advantage to the young trees. Nearly all the trees were cut within two or three feet of the ground. The trees that were cut were what might be called "Queens of the forest." If it had been a question of pruning for firewood, there was sufficient snow-broken branches lying about.

By De Villiers, C.J.: Ten shillings per load would be a fair allowance for cutting and transport, and that would bring the price down to £2 10s. per tree.

John Patterson, forester, residing at Carnarvon, said he was formerly employed in the Forest Department. He was well acquainted with the mimosa, and he went over the farm with Mr. Halse. He had heard part of Mr. Halse's evidence, and he agreed with what he heard.

[De Villiers, C.J.: We will have to know what part that is?]

Continuing, under examination, witness said that he found both belts of trees damaged. He estimated the value of the large trees at £5 each, and computed the total damage at something like £500.

Cross-examined by Mr. Burton: He agreed with Mr. Halse that the trees were worth between £1,500 and £2,000. He did not count the trees.

Ruben Diedrichs, builder and farmer, said that up till recently his father had a sub-lease on the farm from Brodie. He had cut mimosa and willow trees, but not many of the former. The kraal was made of mimosa trees.

Cross-examined by Mr. Burton: Mr. Brodie told him he might get firewood, but cautioned him against destroying any trees. He did not destroy any of the trees.

George Edwards, farmer, said that he went out to the farm Donkershoek with Mr. Wright for the purpose of counting the trees. Most of the 215 trees had been cut down within three years. He calculated the total damage at £500 or £600.

Cross-examined by Mr. Burton: He was reckoning the damage from all the trees cut down.

Re-examined by Mr. Upington: He took no notice of trees cut down beyond three years.

Mr. Upington closed his case.

Mr. Burton called

Richard Charles Brodie, the defendant, who said that he was the first tenant of the farm, which he had under a verbal lease for a year. There was an interval, and six years ago he got a written lease. Prinsloo was with him when he got the lease. Six years ago the belts of mimosas were in a similar condition to what they were in now. Prinsloo was cautioned by witness not to use many trees. Since 1900 Prinsloo had used no wood at all, and witness had only three loads during that time, and he obtained the supply by pruning. Witness never removed any wood from the farm. The mimosas had very much increased within the past fifteen years. In January, 1902, he went down to Queen's Town to see about a renewal of the lease, and he heard nothing further until he received a letter in March, when he again journeyed to Queen's Town. There he met Mrs. Wright and Mrs. Middlewick, and they told him he would have to advance the price if he wanted the farm, and witness agreed to pay the highest price, which was that of Prinsloo. It was arranged to draw up a new lease on the same lines as the old. The rent was to be £110 per annum, and all the rates. Mrs. Wright said they would have to let Prinsloo know that he could not get the

lease. At the end of June Mrs. Wright said that she had thoroughly talked over the matter with her mother, and it was agreed to let witness have a lease. He had not seen Mrs. Wright until June this year, when the latter met him on the farm Dornhoek. Mrs. Wright said that she could not give a lease until she consulted her mother, as witness was destroying the farm.

Cross-examined by Mr. Upington: A definite arrangement had been arrived at in March, 1902. When he met Mrs. Wright and Mrs. Middlewick he never mentioned anything about the lease.

He denied that in December, 1902, Mrs. Wright said that she wished to know if the farm was all right before giving a lease. The first time he talked of a written lease to Mrs. Wright was at Donkershoek, on June 15. He received the letter of demand in March, but it was not after that he claimed a renewal of the lease. Prinsloo had no lease from witness. There was no reason for putting anything about the new lease into the prospecting agreement. He denied Mr. Halse's statement as to the number of trees cut down. It was not correct that he had pruned the trees off the face of the earth. He did not know that Mr. Huise was a man of great experience. Diedrich's instructions were not to cut any good trees.

Re-examined by Mr. Burton: The day after he received the letter to quit, his attorney wrote asking for a copy of the lease.

Laurence Stephanus Prinsloo, farmer in the Tarka district, said he formerly occupied the farm Donkershoek as sub-tenant under the defendant. He had seen that some trees had been cut down since he left the farm, about nineteen. He left in February of this year. He made an examination during the present month. He cut down some trees in 1898. After he became sub-tenant he did not chop down any trees. He cut off some of the branches for firewood purposes. As to the statement that he wanted a lease in February, 1902, he applied for the lease by going down to Queen's Town, inasmuch as he had heard that Brodie wanted to re-lease the farm. He went to see Mr. Visser.

Mr. Upington said he must object to any evidence being given of a conversation between the witness and Visser, as the latter was not proved to have been agent of the plaintiff at the time.

Witness said he saw Mr. Price, Mr. Visser's partner, who referred him to Mr. Visser, saying that the latter was acquainted with the family matters.

Mr. Burton read the letter sent by Mr. Visser, embodying the offer of the witness to the second named plaintiff, and urged that the construction was in favour of Visser being the plaintiff's agent. Visser acted as a broker between the parties. He was the intimate friend of the family on the one side, and he was the person to whom the witness went, under that impression, on the other. It was of importance that the answer given by Mr. Visser should be known.

[De Villiers, C.J.: Visser can be called and questioned as to what his position really was at the time.]

Mr. Burton said that, if he called him, he should be bound by Visser's answer.

[De Villiers, C.J.: The Court will call Visser.]

Visser (answering the Chief Justice) said he remembered writing the letter of the 15th February. He acted on instructions from Prinsloo. He did not hear anything from Mrs. Wright for a while. Afterwards, in March, Prinsloo called upon him. He believed he saw her before Prinsloo called, and as far as he remembered, she said that Prinsloo could not be given a lease, as Brodie was the tenant. He became the attorney to the plaintiffs in July, 1902. He was not acting for them in March, though he was a friend of the family. Witness told Prinsloo that Miss Middlewick said that he could not get the farm, as Brodie was the lessor.

[De Villiers, C.J.: Prinsloo may be asked what Visser told him.]

The witness Prinsloo (continuing his evidence) said he told Visser that he had heard Brodie had taken the farm. He was advised by Mr. Visser to increase his offer. He promised to increase it by £10, and all the expenses. Visser said he would do his best to get the farm from him. He subsequently saw Visser at his office again. He asked him what the reply to his application was. He said that it was no use taking further trouble, as Brodie had got the ground. Witness then gave it up, and went and bought a

farm of his own, leaving Donkershoek in February, 1903.

Cross-examined by Mr. Upington: Excepting the load he took and the nineteen trees, no others were cut down. He could not understand the other witness speaking of a couple of hundred old trees.

By Kotzé, J.: On the second occasion, Visser told him to make a higher offer.

Joseph Roland Staples, farmer, residing in the Queen's Town district, said that he had fourteen years' experience of farming. He had a practical knowledge of mimosa trees. This month he inspected the farm Donkershoek, and he found on the north-west side thirteen trees cut with discretion. He did not think stock would do the younger trees any harm. Further on, he found half a dozen trees that had been cut about five years ago. Another tree was found cut, but the branches had been broken by the snow. All the trees in the neighbourhood had been more or less damaged by the snow. On the southern portion, he found one tree lying on the ground that had been damaged by the snow, and the others of recent cutting were, in some measure, damaged by snow. On the southern portion, he would say the trees had been cut about six months ago. The willows were suffering from drought, and the characteristic of that tree under such circumstances was that the branches fell away. He found no willows cut down. As a landlord, he would say that the farm had been well looked after.

Cross-examined by Mr. Upington: Although he did not make a systematic examination, he saw as much as Mr. Halse. The kraal consisted of freshly-cut mimosa branches. He did not see all the trees Mr. Halse referred to.

Petrus Johannes Waghner, farmer in the Sterkstroom district, said that he accompanied the last witness in the inspection, and corroborated his statement in every respect.

By Maasdorp, J.: Nineteen trees had been cut within the last six months, and the remainder had been cut a long time ago.

Mr. Burton closed his case.

Postea (October 31):

Mr. Upington (for the plaintiffs): Although there is no doubt some conflict of evidence as to the precise amount of damage done to the trees on the farm, it is abundantly clear that very considerable damage was done, and that we are entitled to be compensated for that damage. The only question is what should be the amount of compensation? At all events there can be no doubt that we have wrongfully and unlawfully been kept out of our property, and we are certainly entitled to substantial damages for that. Neither our own law nor English law regard with favour tenants who hold over in this way.

Mr. Burton (for the defendant): As to the renewal of the lease, I admit that the onus lies upon us to prove the renewal of the lease on July 1, 1903. On this point we have a conflict of evidence. On the one side we have the defendant's evidence and on the other we have, it is true, that of four witnesses. I submit, however, that the Court will not decide this case by simply counting heads. If the evidence of the defendant is to be believed, there could be no mistake about the matter. The four witnesses for the plaintiffs all belong to the same family. The old lady's evidence is clearly valueless. Mr. Wright tells the same story, and so does Miss Emma Middlewick. £The defendant gave his evidence in a very satisfactory manner, and it was not shaken in cross-examination. I submit that the Court will look at the whole of the surrounding circumstances of the case, and judge from them as to the probabilities of the case. The lease of 1900 has been put in, and the farm was not to be sublet, save to Prinsloo. In January, 1902, Brodie wanted to have the lease renewed. He saw Emma Middlewick and said he wanted a renewal. In February she communicated the defendant's message to the plaintiff; but before she did so Prinsloo had asked for the farm, and in February, 1902, Visser wrote to Annie Middlewick (Mrs. Wright) stating that Prinsloo wanted a renewal. Mrs. Wright knew that Brodie's lease expired on July 1, 1903. Brodie was not entitled to claim a renewal, and therefore it was no answer to Prinsloo to tell him that he could not have the farm "because Brodie was the lessee. Mrs. Wright's letter of March 7 does not agree with her evidence in Court.

[Council proceeded to argue further on the facts.]

Mr. Upington in reply.

De Villiers, C.J.: It is, the undoubted practice of the Court in all cases where parties claim a right to a lease, or where parties claim to purchase land, to require clear and distinct evidence as to such agreement of lease, or as to such sale, and, unless in any case the plaintiff can establish to the entire satisfaction of the Court that an agreement or a lease has been actually entered into, the practice of the Court has been to decide in favour of the person who claims that there is no such lease. In the present case, if we look only to the number of witnesses who deny the statement that an agreement of lease has been made, they certainly preponderate over the number who said that such a lease had been made. But, of course, it is not the number of witnesses, but the weight of the witnesses which should guide the Court, and where there is any doubt, where there is any difficulty in saying which set of witnesses is to be believed, the Court always attaches great weight to any extraneous evidence, to any evidence to be derived from documents for the purpose of assisting the Court in arriving at a conclusion Now, I must confess that if the decision of this case had rested entirely upon myself, I should have been greatly influenced by the evidence recorded by the documents produced in the course of the case. I shall not refer to all of them, but simply to a few, which will illustrate what I mean. On the 7th March, 1902, one of the plaintiffs, Mrs Wright, who really had the matter of the management of the estate in her hands writes to the defendant: "My sister has told me that you wish to hire Donkershoek. No doubt you know you cannot have it at the present low rental. What amount are you prepared to give. Kindly let me know as soon as possible, as we have had several applications for the farm." Now, this clearly was written with a view of bringing Brodie to the point. She is unable now to state what those applications were, and the only application that is proved to have been made is the application made by the witness Prinsloo, who, at the time, was a sub-lessee from the defendant. It appears that he had been in communication with Visser, and Visser, who was a friend of the plaintiffs, informed the plaintiffs of the application made by Prinsloo. There was no immediate answer. The defendant, upon receipt of the letter of the 7th March, at once went to see the plaintiff. That is common cause—that he did go. His evidence is that on the occasion of that interview a further lease was mentioned, his object in going was to have a fresh lease, the thing was mentioned, and an agreement was come to that he was to have such a lease that he was to pay an additional £10, which would square with the statement that Prinsloo had offered an increase of £10, and it was then arranged, according to his statement, that on the expiration of the former lease a fresh lease should be entered into giving him the right to a further period of three years, with a right of extension to five years. All the terms of the old lease were to be incorporated in the new One of the points in her evidence, which to me is wholly unintelligible, is her statement that at this interview nothing was said about a fresh lease. Prinsloo was pressing for an answer, she is pressing Brodie for an answer, this pressing letter is written to him, and yet she says that nothing is said about the lease. I confess, it may be, as stated by Mr. Upington, that there is an explanation, but I don't see it I should have thought that a much more probable circumstance is what is stated by Brodie, that getting this pressing letter, he goes there, enters into communication, and receives this reply that he could have it. Well, then, what is the answer ultimately given to Prinsloo? Prinsloo had asked, according to Visser's letter, for a lease from July, 1903. That is what Prinsloo had asked for. That is what the plaintiffs knew Prinsloo had asked for—a lease from July, 1903—and yet the message which the plaintiffs told Visser to give to Prinsloo is, "Oh, he is mad; the defendant already has the lease." The defendant then had the lease up to July, 1903, not for the period for which Prinsloo wanted the lease. Therefore, I cannot see what that had to do with it, what the fact that the defendant had a lease up to July, 1903, had to do with Prinsloo's application for a lease from July, 1903. It does seem, therefore, much more probable that the answer given was, "You are mad; we cannot

give a lease, because we have already entered into a lease with Brodie from the 1st July, 1903, the period from which Prinsloo asked to have a lease." But then, it is said by Mr. Upington that it is an equally extraordinary circumstance that in July, 1902, the defendant had communications with the plaintiffs, that there was actually a document entered into for the prospecting rights of the farm, and yet that no lease should then have been entered into. If the defendant's version is correct, the whole thing is explained, because stamps and so on would have to be paid, and I can well understand that the parties would say there is no necessity for having any expense of putting stamps on the documents until the period has arrived when the fresh lease is to be begun, viz., July, 1903. If his statement is correct, that would immediately explain why in July, 1902, there was no document. These, I say, are the difficulties which would weigh with me in deciding upon the question whether the defendant's version is to be dismissed. At the same time, I admit that the defendant should clearly prove his case, and as my brethren, at all events, have a doubt upon that point, I am bound to agree to the view that the plaintiffs should succeed in this action. The next question, when the defendant should go. I think the defendant should have another month, and should quit on the 1st December, and that rent should be paid at the rate of £10 a month. That would make for the five months £50 for the use and occupation of the farm. I come next to the question of damages. There is no doubt, in regard to any damages for the trees, the defendant only had a right to take firewood, such firewood as could be taken by pruning, and I think he has gone further, he has cut down some trees entirely, which I do not consider to be pruning at all. Mr. Halse has given evidence as to the damage done, and I have no doubt that Mr. Halse has seen all these trees cut down, and that he has given his evidence perfectly conscientiously. But I have grave doubts as to whether Mr. Halse can be perfectly confident as to the dates when those trees were cut down. Those trees have not died, they are still alive, and I confess it must be a matter of the greatest difficulty in trees still alive to say when the cutting actually took place. There is great discrepancy in the evidence, but, on the whole, I am of opinion that there is no proof that more than nineteen trees had been cut down during the tenancy of the defendant, and the defendant clearly cannot be held liable for more than that number of trees. The Court is of opinion that the sum of £75 would compensate the plaintiffs for any damage done. There will, therefore, be judgment for the plaintiffs for the defendant to quit the premises and to pay damages to the extent of £75 and the costs of this action.

Maasdorp J.: As I hold rather a different view with reference to the evidence I should like to give my reasons for that view, and I should like to approach the conflict of evidence in this case from another point of view. We have in one portion of the case certain facts, admittedly proved, and I will inquire what bearing those facts have upon the evidence of Mr. Brodie. It has been proved from undisputed evidence that at least 19 trees were destroyed upon the farm within the last six months of the period of the lease, and those were trees of some size. Mr. Brodie was called upon to give evidence upon any trees that he might have removed, and he stated positively that during the whole of his tenancy he only took away three small loads. Now it has also been established upon the evidence that three small loads would only account for about six large trees. These trees had been destroyed, and the allegation is that they have been destroyed by the defendant. Anyway, the defendant has to explain how these trees were removed from the farm, and he meets it by a denial that he is responsible for the removal of these trees. It is suggested now that his evidence did not quite amount to that, because he has called other witnesses to prove that 19 trees were destroyed; but I find nowhere in his evidence that he admitted the truth of the evidence given by his own witnesses. Then, it is also suggested that these trees were destroyed by somebody else without his knowledge. Now, it is proved that these trees were destroyed from the belt of trees on the borders of his farm, but there were indications of trees having been removed to his place, and I am satisfied that Mr. Brodie knows more about the removal of these trees than he

is prepared to admit. This evidence then leads me to the conclusion that I am not satisfied with the evidence given by Mr. Brodie in this case, but I may mention in passing also that I would have held upon the evidence of Mr. Halse that a far larger number of trees were actually destroyed during the tenancy, and that the responsibility lies upon the defendant. But, as a different view is taken by my brethren in this case, I yield upon that point. Now, having once determined that there is a point in the evidence which assists me in coming to the conclusion that Mr. Brodie's evidence is unsatisfactory, then I ask myself whether I can accept his evidence when it comes into conflict with four or five other witnesses. The other witnesses have suggested, among other things, that in July there was an interview, at which the lease was discussed, and they say that at that interview Mr. Prinsloo's name was brought up by the defendant himself as a very unsatisfactory tenant, and one to whom the lease should not be granted. If the name of a Prinsloo was brought up at that time by Mr. Brodie, then it is clear that the manner in which it was brought up proves that no agreement was entered into or concluded in March, because the effect of the statement made by Mr. Brodie is this: "Don't give Prinsloo the lease, because he has done something," which he describes as "cutting tuckies." When asked, "Has he done much damage?" he said, "Not much, but you cannot say now what he would do if he had a lease himself." I believe that statement made by Mrs. Wright and her sister, but the important point of that conversation is this, that a circumstance is brought to the knowledge of the lessors which runs through the whole case, and that is, that damage was being done upon this farm, and Mrs. Wright says that no sooner was that brought to her knowledge than it made an impression upon her, because she knew how these trees had been prized by her father at all times, and she also seems to have valued them. She always refused to enter into a lease until she had seen the extent of damage that had been done. Now, I believe those statements made by these witnesses, because there is no reason why I should not believe them. It was argued that Mrs. Wright and her husband came to the farm in June, 1903, and that then they, for the first time, saw that some damage had been done. Then the suggestion was that, after that they most falsely and fraudulently set about concocting three conversations at three separate times before that, by introducing a fact which had never come to their knowledge until long after these conversations. Under the circumstances, I come to the conclusion that the evidence given by Brodie leaves a doubt in my mind, but that the evidence given by Mrs. Wright and the witnesses who corroborated her is truthful, and that defendant, upon that ground, has failed to prove his case. There are features, but I shall only mention one, that seems to tell against the plaintiffs, and that is the conversation as to a lease having already been closed with Brodie, and that, consequently, Prinsloo could not have a renewal. That does not make any impression upon my mind. To my mind, the "madness" alluded to had reference to Prinsloo calling himself a tenant, and as a tenant asking for a renewal of his lease. Under all the circumstances of the case, I am prepared to accept as to the alleged renewal of the lease the evidence of the plaintiffs, and not that of the defendant. On the other features of the case, I concur with what has been said.

Kotzé, J.: I concur in the judgment.

[Plaintiff's Attorneys: Walker and Jacobsohn; Defendant's Attorney: V. A. van der Byl.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

GENERAL MOTIONS.

Ex parte EDWARDS. { 1903. Nov. 2nd.

Mr. Close said that this was the return day of a rule granted by the Court on

me a singular thing that the Magistrate made no order as to costs.

Mr. Burton: I do not dispute that plaintiff was entitled to his extras but I would like to call the attention of the Court to certain of the facts. There is no doubt that the wall in question was built very crooked. The plaintiff had a lot of work on hand, and he would be glad to avoid having to knock down and re-build the wall. Mr. Attorney De Waal said that the plaintiff seemed rather pleased to have the opportunity of avoiding that work, and that it was agreed he should do the extras for nothing. It appeared as if the bulk of the extras had been contemplated by the parties before the date of the meeting.

De Villiers, C.J.: The parties to this suit were careful when they entered into the original contract to reduce it to writing, and the memorandum of agreement was entered into specifying particular work, which the plaintiff was to do in consideration of which he was to receive the sum of £60. During the course of his work it was found that one of the walls was not square. Objection was taken to that, and it was ultimately agreed that the wall should remain as it was. But the question now in dispute between the parties is whether this agreement that the wall should stand was in consideration of a promise by the plaintiff that any extra work which the defendant might order would be done by him. The effect of the evidence given on behalf of the defendant is that there was really no limit to the work which the plaintiff would be bound to do because of this wall not being square. It is quite clear that it would cost the plaintiff only a few pounds to pull down the wall and make it square, and it seems to me most improbable that the plaintiff would take such unlimited liability on himself to save the trouble and expense of pulling down this wall, which would cost him, according to his own account, £2 10s., and, according to the defendant, about £5. I am satisfied, however, that there was some arrangement that some additional work should be done, but I am satisfied of this, that it is the duty of the defendant, who relies upon this fresh agreement, to prove how much of this extra work the plaintiff had agreed to perform. Defendant had an opportunity of giving his evidence upon the point, and the only item which he can specify as being clearly in contemplation between the parties, when this fresh agreement was made, was building the two fireplaces. The rest is mere speculation. It is possible that the walls of the kitchen may have been in contemplation, but, as I said, it is for the defendant to prove what really was in contemplation, and formed part of the contract between the parties. I am inclined to think that it was the extra work of building the two fireplaces which both the plaintiff and the defendant intended to be the consideration for allowing the defective wall to remain. I can find no specific evidence that this man undertook to do this additional work gratis and for nothing. It is not a question of the credibility of witnesses, but it is a question of inference from the evidence given, and I accept the evidence given on behalf of the plaintiff, and I do not think that there is clear and undoubted evidence as to the work agreed upon and performed without reward. The first item of £5 must be deducted from the claim of £20, and so must £1 15s., because the plaintiff claims for £3 10s. The sum of £6 15s., deducted from £20, leaves £13 5s. In my opinion, the appeal must be allowed, and judgment entered for the plaintiff for £13 5s., with costs in the Court and the Court below.

[Appellant's Attorneys: Herold and Gie; Respondent's Attorneys: Walker and Jacobsohn.]

Ex parte HILNA.

This was a motion for an order restraining the Registrar of Deeds at King William's Town from transferring a certain piece of land, the property of the petitioner. The petition set forth that the petitioner's attention had been called to a certain rule *nisi* granted on February 24. A certain piece of land, lot 160, near Stutterheim, was the property of petitioner, and had been transferred to him in October, 1865. Deponent had not disposed of or sold the said piece of land, which still stood registered in his name. He had been informed that the said piece of land had again been transferred in December, 1881, but under what circumstances he was unaware. The rule was published,

but it was not served personally. These two transfers were not brought to Mr Justice Buchanan's notice when the rule was granted. The Registrar of Deeds in King William's Town made a special report to the Registrar of Deeds in Cape Town, and when that report was made it was necessary for the petitioner to come to Court, and ask for an order.

Mr. Benjamin (for the applicant) stated that the previous order had not been carried out, and suggested that telegraphic instructions might be sent to King William's Town to prevent transfer going through.

An order was granted that telegraphic instructions should be sent to King William's Town, restraining transfer of this property (lot 160), pending a further order of Court, the Registrar authorised, on consent being given on behalf of the respondent, Mart Mabuya, to issue an order for the publication of the rest of the lots mentioned in the Registrar's report, which have been ordered to be republished.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZÉ.]

POLE V. POLE.

This was an action for divorce brought by Peter Arnold Pole against his wife Elizabeth Pole (born Ross), on the ground of her adultery with some man unknown.

The declaration set out that the parties were married in community of property in Cape Town in July, 1881. There was issue of the marriage, a girl of about 20 years of age. In July, 1891, plaintiff was sentenced to a term of imprisonment on the Breakwater, and remained there until 1897, when he was released, and discovered that the defendant had had two children to some other man unknown. The plaintiff had never cohabited with his wife since 1891.

Mr. Wilkinson for the plaintiff; defendant in default.

Charles W. H. Smith, clerk in charge of the Marriage Register, at the Colonial Office, produced the original copy of the register of the marriage between the parties.

Peter Arnold Pole, the plaintiff, said that he was married in July, 1881. The register of marriage produced was correct. He lived with his wife up to 1891, and there was one child of the marriage. Certain circumstances compelled him to be absent from his wife for a number of years, and since that time he had no access to her. He discovered that she had two children during his absence of which he was not the father.

By Maasdorp, J.: Witness said he was in prison from 1891 to 1897 for theft.

Maria Collinson stated that the plaintiff's wife was her sister. She stayed with her a couple of months, and then went away again. At that time she had two children. One was born in 1899, and one last year. Her husband never came near the place. The defendant was mostly in service during the time plaintiff was in gaol. The man whom witness believed to be the father of the children was a man named "Sam." This man paid all the expenses of one of the children's illness. She had seen familiarities between the parties.

[Maasdorp, J.: Did this man stay overnight with defendant?]

Witness: Yes; he did.

Where was the husband at this time?

Witness: He never came near her.

[Kotzé, J.: Did this man's visit extend over a year or more?]

Witness: Yes; he was there during the time the child was born.

Decree granted as prayed.

LIQUIDATOR OF THE LIFE BRANCH OF THE S.A. FIRE AND LIFE ASSURANCE CO. v. THE BOARD OF EXECUTORS. — 1903. Nov. 2nd, " 3rd, " 27th.

Administering liquidator—Trust funds—Investment.

The directors of a certain Company having decided to liquidate the Company, appointed one H. as administering liquidator. In 1883, H. deposited the funds in his hands with defendants, who agreed to pay interest half-yearly at the rate of 5 per cent. per annum on such moneys. In 1888, the defendants gave

notice that they would reduce the rate to 4 per cent., which they accordingly did. In 1895, they gave notice that in future they would pay no interest on these moneys. They again agreed to pay interest from 1899 at 4 per cent., to be reckoned yearly. The plaintiffs now sued the defendants for an amended account.

Held, *that as the directors of the plaintiff Company had consented to the course pursued by the defendants, the account rendered by the latter must be held to be true and correct.*

This was an action brought by Charles Christian de Villiers, in his capacity as sole surviving liquidator of the life branch (in liquidation) of the South African Fire and Life Assurance Company, against the Board of Executors, for a statement of accounts, and for the return of such moneys as might be found due to the plaintiff.

Mr. M. de Villiers (with him Mr. McGregor) was for the plaintiff, and Mr. Searle, K.C. (with him Mr. Gardiner) was for the defendant.

Mr. De Villiers narrated the principal facts of the case, and Mr. McGregor read the pleadings (for which see 13. C.T.R., 977).

Evidence was then called for the plaintiff.

Charles Christian de Villiers, the plaintiff, said he was the sole surviving liquidator of the South African Fire and Life Assurance Co. Producing the minutes, witness stated that these dated from 1880. The minutes referred to many other things besides those connected with the case. They were handed to him by "Mr. Roos." Witness read the resolution of May 3, 1881, connected with the appointment of the liquidators for the association. Several of those present at the meeting had a share in the Board of Executors. It was resolved to dissolve the old company, start a new company, and liquidate the life branch. It was also resolved that Mr. Hofmeyr should be chief liquidator. Subsequently unpleasantness arose between Mr. Hofmeyr and Mr. Watermeyer. It was then resolved that the Board would receive all premiums and pay out on the policies when they fell due. The policies were payable after three months' notice. Whilst Mr. Hofmeyr was administering the money was kept in the South African Bank. The cheques were all signed by Mr. Hofmeyr for self and liquidators. Witness then referred to a letter dated April 4, 1895, which showed how the liquidators dealt with claims, requesting policy-holders to send in papers connected with their claims. He understood that the defendants were prepared to take the money at the current rate of interest and make what overplus they could. Referring to the minutes of the Board of Executors, 13th November, 1883, he found that Mr. Roos was also a director of the South African Fire and Life Assurance Company. It was shown there that the liquidators were acknowledged as representatives of the funds. It appeared from the accounts that the South African Bank paid six per cent. on the 1st October, 1884. Notice was given that this interest would be reduced to five per cent. on January 1, 1895. Referring to the minutes of January 13, 1888, witness showed that it was resolved to reduce the rate of interest on capital. From time to time shareholders got refunds. In April, 1896, witness left for Europe, and returned towards the end of the year. The Board of Executors held his (witness's) private power of attorney. From January, 1897, to 1899, not a penny of interest was paid. Towards the end of 1899, a refund was paid, which he signed for at the Board of Executors' office. It was not correct to say that interest had not been charged. Mr. Farmer died in 1899, and Mr. Hofmeyr died in 1900. Referring to the minutes of the Board of Executors, witness stated that the resolution to reduce the interest on capital was not communicated to him. It was perfectly correct to say that he applied to the Board of Executors for a statement of affairs and accounts. The arrangement was, that the Board of Executors were to frame half-yearly accounts. They received the premiums, and paid out claims, as they arose. The objection was that they had omitted to render half-yearly accounts.

A great mass of correspondence was then read between witness and the

defendants, respecting the matter of interest. One of the letters received in reply to a request for fuller details, respecting certain interest withheld, stated that the defendants had an agreement with the late Mr. Hofmeyr, and abided by that in their transactions.

[Maasdorp, J.: I wish to know whether it is your contention that the liquidators should pay six per cent. on unclaimed dividends.]

Mr. M. de Villiers: We do not state any particular amount of interest. The English courts place it at four per cent., my lord.

[Maasdorp, J.: Had the liquidators an office in the Board of Executors for conducting their business?]

Mr. Hofmeyr was chairman of the Board, and, of course, his office would be there.

Continuing, witness stated that he received a letter from defendants' attorneys, Van Zyl and Buissinne, in which the statement was made that defendants were prepared to hand over capital, together with uncashed cheques of the company on proof that witness was the sole surviving liquidator. On the 24th June, 1897, an account was furnished, and in that account £1,000 was debited against the liquidators on a claim named Caine. On the 14th November, 1898, W. Roos wrote in reply stating that the Board of Executors had handed over a cheque in settlement of this claim. That was 17 months afterwards, and during that time witness assumed that defendants had the benefit of this money. Respecting the query whether the defendants could have found means for profitable investment, witness stated that the defendants refused on one occasion to find money on the security of a certain farm, on which he (witness) eventually advanced £2,700 at 8 per cent. interest. He interviewed Mr. Roos with regard to the cheques not being sent out to shareholders in settlement of their dividends, and Mr Roos informed him that it was not his duty to find out people who were entitled to refunds. The dividends had been properly advertised, and it was the duty of claimants to call or apply for them. £225 was the amount that he believed had not been repaid on refunds by defendants. He could not give a complete idea of the amount of commission earned by the defendants, but believed it would amount to a very large sum. Taking the period from 1st January, 1890 to 1891, he found that the difference in the interest paid and received would amount to about £729. He, witness, received as emoluments £125.

Cross-examined by Mr. Searle: They had absolute confidence in the late Mr. Hofmeyr. It was understood at the meeting that Mr. Hofmeyr should be the administering liquidator. The liquidators occasionally had meetings, perhaps half a dozen in all. Mr. Hofmeyr kept a kind of minute-book. He was not aware that the Board of Executors were the executors under the will of Mr. Hofmeyr. They had not called a meeting of shareholders since they commenced to act as liquidators. He discussed the matter with Mr. Hofmeyr after the first dividend had been paid. Mr. Hofmeyr said he had all the books and papers. The shareholders seemed quite satisfied with what Mr. Hofmeyr did. Witness did not take any steps to communicate with the Board of Executors. Mr. Hofmeyr had those matters in his hands. The reduction of interest from 5 per cent. to 4 per cent. was not communicated to witness. It required no resolution; it came about automatically, because it was arranged that the current rate of interest on deposits should be paid. They had a large amount of money in the South African Bank. That bank paid them 6 per cent. The bank afterwards went into liquidation, but the liquidators were paid in full. The accounts as to the transactions with the Board of Executors, were rendered, and if the liquidators wished to see them they could do so. Witness received in June, 1893, by way of commission, £125. There was no notice given of that. Witness asked Mr. Hofmeyr if he was not going to call a meeting of shareholders, but Mr. Hofmeyr said he had all the papers, and if any of the shareholders wished for an explanation they could have one. A sum of £500 was distributed among the liquidators. On one occasion Mr. Farmer was away. Witness and Mr. Hofmeyr differed on a certain point, and Mr. Hofmeyr then said he gave his casting vote against witness, and that he must therefore give way. There was a distribution in November, 1899. Witness received £2 10s. From 1896 up to the beginning of the present year, there was a plethora of money, particularly during the past

three years. The Board of Executors could have put the money into the Post Office Savings Bank at 3½ per cent. In 1900 Mr. Hofmeyr died. The funds were in the administration of the Board of Executors. The whole matter worked automatically. He required an indemnity from the Board before he would accept a cheque from the Board against any interest claimed from him by the shareholders. His objection to the will of Butler's was that the money should be placed in the hands of the Master, instead of being paid by the Board. The amount involved in that matter was upwards of £50. The Board required rebate if they paid out any refunds in less than three months. Since Mr. Hofmeyr's death no policy had fallen in.

By the Court: Mr. Hofmeyr knew when the Board decided not to pay any more interest, but he was there in his capacity as a director of the Board of Executors. Witness did receive an intimation, or he would have immediately taken steps to withdraw the money. As a matter of fact, no interest had been paid. He had been quite ignorant of that, otherwise he would have removed the money. Nothing occurred to put witness on his inquiry as to whether interest was being paid. Witness considered the resolution they passed was illegal, because he was not given notice.

Mr. M. de Villiers: Our position is that, supposing there had been the greatest negligence on the part of the plaintiff, it has nothing to do with the case, because he sues as representing the shareholders.

G. W. Steytler said he was secretary to the Colonial Orphan Chamber. He was interested also in the South African Fire and Life Association, and also in the Board of Executors. He considered that the terms offered by the defendants were liberal to the plaintiff. The Board of Executors had to invest their money in mortgages. In the years 1898 and 1899 money was very plentiful, and it would only have been possible to invest it at a low rate of interest, but not at call.

By the Court: By money at call he meant that if money were placed with the Board at call, people could withdraw it next day if they liked.

By Mr. M. de Villiers: He was quite prepared as a shareholder in the life branch of the company to forego his interest, as it only amounted to about 2½d. in his case.

Daniel Krynauw said he was a shareholder in the life branch of the association. He had received several dividends, but did not receive anything during the distribution in 1899.

Cross-examined by Mr. Searle: No mention was made of the cheque that was lying there for him. Since 1896, which was previous to Mr. Hofmeyr's death, he had had no intimation of any cheque being due to him for dividend Dividends were generally sent to him, but he went sometimes to the Board of Executors for his dividends. He was a shareholder in the Board of Executors. When he got the note from Mr. De Villiers he was much surprised to find that there was money waiting for him with the defendants.

Harry Gibson, an incorporated accountant, late manager of the South African Fire and Life Association, stated that money was plentiful in 1898 and 1899, but investments could have been made in mortgages. In the case of unclaimed dividends, these lay as a rule in a separate banking account, but in that case he did not think interest would be allowed.

Cross-examined: He had never had a case under his knowledge similar to this. In investments made on mortgage bonds, of course there would have to be three months' notice of withdrawal. It was only comparatively small amounts, of course, that could be taken in the Post-office Savings Banks.

By the Court: On several occasions he believed that money would be taken at call, and 4 per cent. allowed, but this would be a special case.

Francois Jean Hohne, Controller of the Post-office Savings Bank, stated that insurance companies and trust companies could invest large sums in the Post-office Savings Bank, subject to the approval of the Government. At present 3 per cent. was paid on ordinary deposits; formerly it was 3½ and 3½ per cent. An individual could deposit £1,000 on ten certificates, and this sum could be withdrawn subject to three months' notice, or a fee of 10s. per £100.

Cross-examined by Mr. Searle: One individual could not, on deposit and cer-

tificate accounts, have more than £1,500 in the Savings Bank, but as far as trust funds were concerned, these were practically unlimited, and could be withdrawn at twenty-four hours' notice. He could not swear that there were trust funds in the Savings Bank up to £5,000, but he believed there were.

By Mr. M. de Villiers: He could not say whether Mr. Hofmeyr had ever made any application for investments in the P.O. Savings Bank.

Johannes R. M. Smuts said he was an executor in the estate of J. G. Borcherds, and went to Mr. Roos on an intimation from plaintiff to collect the dividends belonging to the estate, but was told that these could not be paid. Of course, he had received dividends before at the offices of the defendants.

By the Court: He had never made any claim for 6 per cent. from the defendants.

G. Watermeyer, interpreter, said that in September he received notice that £12 10s. was lying at the Board of Executors for him. He went and saw Mr. Roos, and was referred to Mr. De Villiers. He had formerly received payments. Mr. Hofmeyr used to tell him when there was any money to be claimed.

By the Court: He had not yet received the refund. He did not raise any question as to the interest.

This concluded the plaintiff's case.

Johannes Ewen Neethling Roos, secretary of the Board of Executors, said he had occupied that post since 1897, but was previously acting secretary for a few years. He was well acquainted with the late J. H. Hofmeyr, who, except for a short period, was chairman of the Board from about 1875 until 1900. Witness knew that Mr. Hofmeyr, Mr. De Villiers, and Mr. Farmer were the liquidators of the Life Assurance. Mr. Hofmeyr was the only liquidator that they knew about officially or recognised. He remembered the minutes produced. He was a comparatively young clerk at the time, and the book was handed to him to extract certain particulars for Mr. Hofmeyr. It arose out of the payment of Mr. Watermeyer's pension as secretary in 1883. These minutes were not brought before the Board, and really had nothing to do with the Board. These papers belonged to the liquidators. All the accounts were submitted to Mr. Hofmeyr and investigated by him, and filed by him amongst his own papers. The books were kept by Mr. Hoffmann, who was the bookkeeper of the Board of Executors. On the payment of dividends, Mr. Hofmeyr used to insert an advertisement in the newspapers intimating the hours during which the dividends would be paid. All the cheques were made out at the same time when a dividend was payable, and the cheques were placed in the receipt book by Mr. Hofmeyr. The Board did not at any time deal with the other liquidators, either the present plaintiff or Mr. Farmer. On the 30th November, 1884, a resolution was taken to receive £20,000. Those moneys were to bear 5 per cent. interest. In 1886 the interest was reduced. In 1896 he was present at the meeting when it was resolved to discontinue the interest on the sum of £5,000 odd standing to the credit of the liquidators. They had large sums lying idle. In the following month they invested £17,000 in the bank at 3 per cent. It was impossible to find profitable investment for all the moneys lying in their hands. Even in that year they had a balance of £18,000 on current account after making the 3 per cent. investments. Supposing the arrangement come to at the meeting had not happened the Board would have given back the money. They resolved that they could only retain the money on the condition that it should bear no interest. The liquidators attended to all the policies and saw that they were in order. He did not find any liquidator's minute book in Mr. Hofmeyr's papers. After the charges for dividends had been made out the Board had nothing further to do with them. Mr. Hofmeyr would set aside a certain amount for dividends, and witness would make out the cheques. Mr. Hofmeyr, as managing liquidator, paid out the shareholders.

Cross-examined by Mr. De Villiers: He would contradict the plaintiff if he said that he wanted a statement of account on his return from Europe. His memory was fairly good, although he had overlooked two important instructions from the plaintiff prior to his departure for Europe. When Mr. Hofmeyr died he did not know under whose power the

Board was acting. He had no trace of any notice having been sent to the other two liquidators when payment was suspended. After Mr. Hofmeyr's death they received premiums. He did not remember filing as a receipt with the life branch an acknowledgment of £1,005 paid to the credit of Mr. C. C. de Villiers The current rate of interest was allowed on the deposits, and the Board was responsible to the shareholders, and not to the liquidators.

Kotzé, J.: Do you know anything about £500 divided amongst the liquidators?—Yes.

How did that arise?—On instructions by Mr. Hofmeyr.

How was it divided amongst them?—Mr. Hofmeyr took £250, and each of the other liquidators took £125 each.

Did the Board get any benefit?—No, Mr. Hofmeyr would at least have had to pay £150 a year for a clerk.

Do I understand you to say at the time mentioned that the Board charged no commission?—None at all.

C. D. Hoffman, bookkeeper to the defendant Board, said he had been connected with the Board since 1861. The first sum was received from the association in July, 1883, and moneys were received until January, 1888. The first account was over a period of a year and a half. He framed the accounts, and most of them were handed over to Mr. Hofmeyr direct. Up till December, 1899, the accounts were drawn up half-yearly. He never had any instructions from Mr. De Villiers. At the end of 1396 there was a large amount of uninvested money with the Board. The difference between making up the accounts yearly since 1900 amounted to £7 14s. 3d.

Cross-examined by Mr. De Villiers: He would not admit that the accounts were wrong to the extent of £7 14s. 3d. For the first eighteen months, although only one account was made out, interest was allowed half-yearly.

Wm. Edward Moore, chairman of the Board of Executors, stated he succeeded Mr. Hofmeyr as chairman. With the exception of Mr. Van der Byl, all the directors of the Board in 1881, when the Board was entrusted with the affairs of the life branch, were dead. After Mr. De Villiers's letter to the Board they allowed interest at 4 per cent. merely on the ground of moral responsibility.

Cross-examined by Mr. De Villiers: The plaintiff's letter, thanking the Board for their acknowledgment of liability, came before the Board. The position the defendant took up was that, however scarce money might be, the Board was not legally liable for any interest.

This concluded the evidence.

Mr. De Villiers, addressing the Court for the plaintiff, said that as sole surviving liquidator the plaintiff was wholly responsible to the shareholders, and it would also have to be remembered that the plaintiff was a shareholder in the defendant board. On Mr. Hofmeyr's death the plaintiff consulted the secretary of the Board with a view of framing an account. When the plaintiff found that no interest had been paid for three years he inspected the accounts, and found that a large amount of refunds extending over a period of twenty years had been merged in the funds of the Board, and on which no interest was allowed. The nature of the agreement between the administering liquidator and the Board was that the Board was to undertake the administration of the funds, and invest the moneys in the manner stated in the pleadings, and in that way a contract was established between the administering liquidator and the Board of Executors. Counsel maintained there was an actual contract which could only be broken by mutual agreement. The position the defendant took up was that the agreement of 1883 was modified to such an extent that no interest was to be paid. The great factor in the case was that although he (counsel) had nothing to say about Mr. Hofmeyr, he was acting in the dual capacity, and counsel maintained no court of law would recognise the agreement he came to between himself and that gold mine, the Board of Executors. It was idle for the defendants to say they derived no benefit from the moneys during the three years, or that they derived no benefit during the sixteen years. The Board of Executors remained in possession of the funds, and derived the benefit of it under an arrangement, which should not have been made, and the profits should have gone to the shareholders.

Mr. Searle said, in regard to the question of interest, the Court would have to decide with whom did the Board of Executors contract, what was the agreement and could it be terminated. It was

clear that the Board contracted with Mr. Hofmeyr, and it was significent that none of the shareholders had moved since the original meeting of shareholders since 1881. Among the Board's papers there was not a single reference to shareholders, and it was clear that the shareholders understood that Mr. Hofmeyr was the administering liquidator. There could be no doubt the money would have been returned in three months had it been demanded, and there could be no agreement that the contract could only be cancelled by mutual consent. Counsel submitted that the agreement was one that could be terminated or varied at reasonable notice by either side. If the agreement was unalterable the plaintiff should have claimed the original rate of 5 per cent. interest. Mr. Hofmeyr undoubtedly got notice of the cessation of payment of interest, and counsel contended that was sufficient for the shareholders, and submitted that the mere technicality of a letter not being written by Mr. Roos was not sufficient for the plaintiff's claim. It was quite lawful for the Board to pass the resolution, and it must be remembered at that time the Board had a surplus of over £20,000. There could be no breach of trust on Mr. Hofmeyr's part in not informing the other liquidators, and there was no evidence before the Court that there was any investment, as the policies would have to be paid within three months. Everything was fair and above board, and Mr. Hofmeyr, who had made a very favourable arrangement with the Board at the outset, could not be accused of colluding with the Board to the detriment of the shareholders of the Life Assurance. The question of the yearly instead of half-yearly interest was a subsidiary one, and only made an infinitesimal difference. If the Board had tendered to pay the interest for the three years, it was a mere matter of grace. On the question of the interest on the unclaimed dividends, counsel maintained that when the Board caused the cheques to be handed to the liquidator, their duty ended. If the money had been put in the bank on floating deposit there would have been no interest, and it could not be said that it was the duty of the Board to put it at fixed deposit.

Cur. Adv. Vult.

Postea (November 17):

Maasdorp, J.: It appears from the evidence in this case that in March, 1881, the shareholders of the South African Fire and Life Assurance Company resolved to dissolve the said company, to form a new fire insurance company, instead of the fire branch of the then existing company, and to liquidate the life branch of the company. On the 3rd of May, at a general meeting of shareholders, it was resolved that the sum of £25,000 be reserved for the shareholders' liability in the life branch. And a further resolution was passed to the effect that the liqcidation and working out of the life branch remain in the hands of the present sub-committee, consisting of W. M. Farmer, J. H. Hofmeyr, and C. C. de Villiers; and that all transfers of land, cessions of bonds, and other assets shall be signed by not less than two of their number; and that the sub-committee be vested with all the powers hitherto held by the chairman and deputy-chairman under the old trust deed. That all moneys received by them be invested in deposits bearing interest half-yearly, and that the general management and control be entirely left in their hands. Subsequently the members of the sub-committee agreed that Mr. Hofmeyr should be the administering liquidator. The liquidators carried on the work of liquidation themselves until November, 1883. The funds under their control consisted of moneys invested partly in bonds bearing interest at the rate of 6 per cent. per annum, and in fixed deposits in the South African, Union, and Cape of Good Hope Banks. The interest paid by the two former banks was 6 per cent., but Mr. De Villiers could not say what was paid by the last-named bank. The liquidators kept their account with the South African Bank. In November, 1883, Mr. Hofmeyr, the administering liquidator, with the knowledge, and we must therefore take it with the approval of his co-liquidators, made arrangements with the Board of Executors to carry on the work of liquidation. At that time the fund reserved for the purposes of liquidation had in the process of liquidation been reduced from £25,000 to £20,000. There was no written agreement containing the conditions upon which the Board undertook to administer the liquidation, and the only

authentic document on the subject consists of the minutes of a meeting of the Board of Executors of the 30th November, 1883. It appears that the administering liquidator was also chairman of the defendant Board. The minute is to the following effect: "With reference to a conversation already had on the matter, the chairman now brings forward the application of himself and others as liquidators of the life branch to undertake the money administration and the receipt of the life premium, and refer to the Government advertisement of this day's date. The purposes of the admin istration will be: (1) To receive the premiums upon the unexpired life policies, as they fall due free of commission; (2) to receive a sum of £20,000 between the present date and the 31st March next (a portion of which has already been deposited here), these moneys to bear interest at the rate of 5 per cent., and to be capitalised at the end of each half-year when also the premiums of the past half-year will be added to the capital; (3) to pay the reassurances. Payments for life losses for reassurance of capital for distribution, or part thereof to be done under direction of the liquidators, who are the persons acknowledged as the owners or representatives of the fund. Resolution was passed unanimously to accept trust." The plaintiff said in his evidence that he understood that the profit which the Board of Executors was to make out of this transaction was to arise in the difference between the rate of interest they paid the liquidators and the rate they received from deposits. That the Board generally had their money out at 6 per cent. interest, whilst they were paying the liquidators 5 per cent., and later, when they reduced their charge to 5 per cent., they were paying the liquidators 4 per cent. The Board carried on the liquidation upon the terms mentioned in the minutes of the 30th November, 1883, until the 13th January, 1888, when they passed the following resolution: "The matters of interest on moneys under administration at 5 per cent. per annum being taken into consideration, it was resolved, taking effect from 1st of January last, to reduce the rate of interest from 5 per cent. to 4 per cent. on the capital administered for the South African Fire and Life Assurance Co.'s life branch in liquidation." In accordance with this resolution, the administration of the liquidation was carried on until the 18th of September, 1896, and accounts were rendered from time to time to the administering liquidators. There is no difference or dispute between the parties in respect of any of their transactions up to this time. There certainly was until then no room for objections to the terms upon which the work was done by the defendant Board in view of the evidence given by Mr. G. W. Steytler, who said in his evidence: "I was a shareholder in the Life Assurance Company. As secretary to the Colonial Orphan Chamber, I consider that the terms which the defendants were allowing to the Assurance Company were most liberal, one per cent. less than the current rate of interest in money at call is most liberal." That liberal terms were allowed by the Board to the liquidators is not surprising when we bear in mind that Mr. J. H. Hofmeyr was chairman both of the Board and of the Assurance Company, and was interested to see that no undue advantage was gained by one over the other. In 1896 the fund under the administration of the liquidators was further reduced in the process of liquidation to £5,124. At that time the Board, according to the evidence of Mr. Roos, the present secretary, found it impossible to invest their money profitably and, although they invested large sums at three per cent., they had a balance of £18,000 on current account at the end of the year. On the 18th of September, 1896, the Board passed the following resolution: "On the secretary's report that an account of £5.124 is standing to the credit of the liquidators, bearing interest at the rate of four per cent., it was resolved to give notice to said liquidators that interest on the capital will not be allowed after the 31st December, 1896." Until March, 1900, the liquidation was continued by the Board, and accounts of administration were rendered to the administering liquidators from time to time until then, in which no interest was allowed. In March, 1900, Mr. J. H. Hofmeyr died, and the plaintiff, who is the only surviving liquidator, says that it was not till this year that he discovered that no interest was paid on the fund in the hands of the Board. Upon that ground, he

questioned the accounts. He wrote to the Board, who passed the following resolution on the 17th July, 1903: "The matter, as contained in C. C. de Villiers' letter of the 26th June, 1903, which stood over from the 3rd July, being again brought forward, it was resolved that, as the only liquidator with whom the Board dealt, viz., the late J. H. Hofmeyr, had approved of the account rendered up to and including 31st December, 1899, interest be allowed at 4 per cent. on the £3,500 balance capital from 1st January, 1900." Upon these facts, the issue in the case have been raised between the parties. Accounts have been rendered by the defendants bringing up interest for the whole period, except the years 1897, 1898, and 1899. The plaintiff claims that interest shall be brought up for these years also. The defendant pleads that on or about the 18th September, 1896, it was agreed between the Board and the administering liquidator that interest should not be allowed on the capital fund in the hands of the Board after the 31st of December, 1896, and the accounts rendered on that basis by the Board for the years 1897, 1898, and 1899 were accepted as correct by the administering liquidator; and that interest thereafter was allowed voluntarily by the Board, at the request of the plaintiff, without any legal obligation on the Board to allow such interest. The plaintiff replies that the administering liquidator, to the knowledge of the Board, exceeded his powers in entering into the abovementioned agreement, to the detriment of the shareholders of the Assurance Co., and that the transaction, to the knowledge of the Board, amounted to a breach of trust. Before entering into the legal bearing of this issue, it would be well to ascertain what the pecuniary effect of the alleged agreement was. During the three years in question the fund in the hands of the Board varied in amount, but was on an average about £4,400. The defendant says that for large amounts of money they could find investments in the beginning of the period in question at only 3 per cent. At that percentage, the interest on £4,400 would have been £132. Mr. Roos stated that to administer the fund, the liquidators would have required the services of a clerk at a salary of at least £150, and an office would also have been required, instead of the one used by the administering liquidator at the Board of Executors. The expenses of administering the fund would therefore have exceeded the interest on the fund at 3 per cent., or even at 3½ per cent.. if the administration had been taken out of the hands of the Board. The plaintiff does not insist on the payment of 4 per cent., because he says in his evidence that if the Board had no other way, they could have gone to the Post Office Savings Bank, and got 3½ per cent. on their money. If the administering liquidator had done so after removing the money from the Board, the change would have upon the above calculation resulted in a loss to the Life Branch in liquidation. Consequently, if this position is correct, the alleged breach of trust operated to the advantage of the Assurance Company. Moreover, I am not satisfied that upon a fund held at call, as this fund was, it would have been so easy to obtain the 3½ per cent. in the manner indicated. And it must also be borne in mind that the very operation of constant investment, and withdrawal from investment, is attended with some expense. The plaintiff contends that the liquidators had positive instructions from the shareholders to invest the moneys received by them on deposits bearing interest half-yearly, and that any deviation from that course was *ultra vires*, and a breach of trust. These instructions may or may not have been imperative, as far as the liquidators were concerned, although I am rather inclined to doubt that they were; but the question is, how do they affect the Board? The Board agreed to do the work of the liquidation for the liquidators in 1883, on certain terms. Those terms were varied in 1888, and in 1896 they gave notice that they would no longer pay interest on the capital fund. There can be no doubt that notice to Mr. J. H. Hofmeyr, who accepted accounts on that footing subsequently, was notice to the liquidators, including the plaintiff. It was open then to the liquidators to withdraw the fund, and take the administration of the liquidation out of the hands of the Board. It was contended on behalf of the plaintiff that an irrevocable trust was created on the part of the Board in the interest of the shareholders of the Assurance Com

pany, making the Board liable for breach of trust to the shareholders. But in my opinion, the Board were nothing more than the agents of the liquidators in the work of the liquidation. Either party had a perfect right to put an end after reasonable notice to the agreement of 1883. If, after receiving the notice of 1896, the liquidators had allowed the fund to lie idle to the loss of the shareholders, they may have been guilty of neglect, but could not be said to have acted *ultra vires*, and the Board would have no responsibility in the matter. But it has been already pointed out that it was to the advantage of the Assurance Company to leave the liquidation in the hands of the Board, even on those terms. If it had been proved that the Board had made a profitable use of the moneys for their own benefit, the plaintiff might have been entitled to recover on that ground. But it appears that they had no use for the fund, which remained uninvested in their hands. I am therefore of opinion that the plaintiff must fail upon his claim for rectification of the accounts in respect of interest for the years 1897, 1898, and 1899, and the claim for half-yearly statement of interest must fail for the same reasons. This view of the facts of the case obviates the necessity of going into the questions of law raised at the Bar. The plaintiff alleges in his declaration that from time to time dividends by way of refunds became payable by the said Board to shareholders, that certain of those dividends remain unclaimed in the hands of the Board, and were merged in their funds, and that, consequently, the Board is liable to pay interest on these dividends. It seems to me incorrect to say that the Board became liable to shareholders, because the Board only undertook as agents of the liquidators to pay to the shareholders such dividends as they might be entitled to. No proof has been given in this case of the right of shareholders to interest on unclaimed dividends. Our Companies Act of 1892, which has, however, no application to the present case, provides, in section 76 of the third schedule, that no dividend shall bear interest as against the company. The amount of such interest would be very trifling, and the Board were prepared to honour at any moment cheques for dividends which were placed in the hands of the administering liquidators. Nothing has appeared to lead to the conclusion that the shareholders are entitled to interest on their unclaimed dividends. But, whatever the liability of the liquidators may be in this respect, I am of opinion that the plaintiff must, as against the defendant, fail upon the issue also. I come to the conclusion that the defendant has rendered true and correct accounts to the plaintiff, and tendered to plaintiff what is due on such accounts. Judgment is given for the defendant with costs.

Kotzé, J.: I am of the same opinion. I agree that the Court should be careful not to encourage a breach of trust by persons standing in a fiduciary position. I cannot, however, regard the Board of Executors as trustees. According to the evidence, the three liquidators of the South African Assurance Company were trustees for the shareholders, and the Board of Executors were simply the depositaries of the funds, and the agents of the liquidators, who could at any moment, upon reasonable notice, terminate the agency, and withdraw the moneys placed in deposit with the Board. In the same way the Board of Executors could likewise terminate the agency or notify to the liquidators that it would no longer continue to pay or allow interest on the moneys deposited with it. This the Board, in effect, did, by the resolution of September, 1896, when it was resolved to give notice to the liquidators that after 31st December, 1896, no interest would be allowed on deposits. We must take it that Mr. Hofmeyr, the administering liquidator, had notice of this resolution, and of the fact that from the 1st January, 1897, no inteerst was credited in the accounts, which were rendered him from time to time by the Board of Executors until his death in March, 1900. Such is the conclusion at which I have arrived after considering the evidence of Mr. Roos, the present secretary of the Board of Executors. Notice to the administering liquidator was notice to the other two liquidators, who, if they had inspected the accounts, would have at once discovered the true and exact position of affairs. After the taking of the resolution of September, 1896, by the Board of Executors, it became the duty of the liquidators to invest or put out the moneys at interest elsewhere, instead of letting them remain idle in the hands of

the Board. It has been contended, on behalf of the plaintiff, that, by allowing the moneys to remain with it, without the payment of interest thereon, the Board became a party to a breach of trust by the administering liquidator. Assuming that there was a breach of trust, I fail to see how the Board can in any way be said to have been a party to it. I, therefore, think that, having given due notice to the liquidators that from the 1st January, 1897, no interest would be allowed on deposit, and the administering liquidator having acquiesced therein, the Board cannot be held liable in this action.

[Plaintiff's Attorneys: V. A. van der Byl; Defendant's Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.]

SMITH AND ANOTHER v. SHARENOVITZ. 1898. Nov. 3rd.

Sale—Delivery—Hire purchase—Means of knowledge.

The plaintiff sold a bicycle to A. on condition that the bicycle should remain the plaintiff's property until the price was paid. A document embodying this condition was given to A. A. sold the bicycle to the defendant and shewed him the document, but, according to the defendant, he did not read it. The defendant sold the bicycle to another person, but was unable or unwilling to give the name of the purchaser.

Held, *that as the defendant had the full means of knowing the condition on which, as between the plaintiff and A. the property was to rest in the latter, he was liable for the value of the cycle notwithstanding that he had parted with the possession.*

Sadie v. Standard Bank (*7 Juta 87*) *approved.*

This was an appeal from a judgment of the Resident Magistrate of Somerset West, in an action brought by the appellant against the respondent for the recovery of a bicycle, or its value, £13 13s., £5 damages for unlawful detention, and costs of suit.

From the record in the Court below, it appeared that the bicycle was sold to one Aston in July last, and had to be paid for by instalments, the first to be £1 cash down, and the rest by fortnightly instalments of 30s., the bicycle to remain the property of the sellers until the price had been paid in full. Aston failed to pay the plaintiffs the value of the said bicycle, and in August last he wrongfully disposed of the machine to the defendant, who was summoned for having wrongfully and unlawfully possessed himself of the said bicycle. Plaintiffs had demanded the return of the machine from the defendant, but he refused to comply. The Magistrate gave judgment for the defendant, with costs.

The Magistrate, in his reasons for judgment, said this was a case of purchase of a certain bicycle on the hire system, plaintiffs basing their claim on the agreement signed by the original purchaser, Aston. The opinion he formed was that the *dominium* had passed from the plaintiffs to the man Aston, by virtue of the sale and delivery of the bicycle, and the plaintiffs agreeing to give credit for the balance of the purchase amount, thus differing from the case of *Daniels* v. *Cooper* (1 Buchanan's E.D.C. Reports, p. 174), the plaintiffs, no doubt with the intention of pushing their trade, having given credit to Aston and thus taken the risk upon themselves. On the failure of Aston to pay the second instalment on the 3rd August, the plaintiffs took no action against him, although he was at his work at De Beers until the 18th August; nor after he left did they take even reason-

able measures to trace the bicycle. The defendant appeared to have acted *bona fide* in the matter, and having ascertained that Aston was employed at De Beers, he had every reason to believe that the bicycle offered was the property of Aston.

Mr. Alexander (for appellant) contended that it was perfectly clear from the Magistrate's reasons that the Magistrate had founded his judgment upon a case which did not appear to apply to the present case, viz., *Daniels* v. *Cooper*. He should have followed other decisions in the Law Courts, where the principle involved in this case had been dealt with. In the case of *Daniels* v. *Cooper* (1 E.D. 174), it was an out-and-out sale. Counsel quoted *Keyter* v. *Barry's Executor* (Buch. 1879-175), *Harvey and Another* v. *Martin* (5 H.C. 167), and submitted that Aston had no property in the bicycle, that he could not pass property to the respondent, and that the respondent was properly liable, as being the last person in the possession of the property, and one who could not give an account of where the property had now gone.

Mr. Wilkinson (for respondent) submitted that this was not a question of whether the property in the bicycle passed to Aston or not. It was simply a question whether the plaintiffs could maintain a vindicatory action against the respondent, who no longer had the property in his possession, and who acquired possession in good faith, and had parted with it in good faith. The case of *Sadie* v. *Standard Bank* (7 Juta, 87) was decisive on that question. He contended that the defendant acted in entirely good faith throughout the transaction.

Mr. Alexander was not heard in reply.

De Villiers, C.J.: The action brought in this case was a vindicatory action. The plaintiffs claimed the bicycle or its value, upon the ground that the property still was in the plaintiffs. Now, the ordinary rule undoubtedly is that a vindicatory action should be brought against the person in possession of the property. The defendant admits that he bought the bicycle from Aston; he does not give the name of the person to whom he sold the bicycle, and the plaintiffs, therefore, proceeded against the defendant. If the defendant was free from blame in the matter, it is clear that the plaintiffs would have had no remedy against him, and the only question in this case is, was the defendant acting in good faith when he bought the cycle from Aston and resold it to a stranger whose name he is unable or unwilling to disclose? The contract between the plaintiffs and Aston is set out in the agreement, which is in the form of a receipt: "Received from Messrs. Smith and Woodville one free-wheel cycle, complete, for which I agree to pay the sum of 13 guineas, as follows: £1 cash, and the balance in fortnightly instalments of £1 10s., commencing the 3rd August, 1903; the cycle to remain the property of sellers until paid for in full." It is clear, then, that, as between the plaintiffs and Aston, the property would not pass until the purchase price was paid. It is unnecessary now to refer to the decisions as to third parties dealing with the purchaser under the hire-purchase system, because, as I said before, the sole question raised in the present case is whether there is perfect *bona fides* on the part of the defendant or not. Now, upon this point, the evidence given by the defendant himself appears to me to be perfectly clear. He says: "Aston showed me the agreement produced, but I did not read it; he did not willingly show me the document." Surely a purchaser under such circumstances cannot be held to be a *bona fide* purchaser. "Aston did not show me willingly." That was one important reason why he should have read the document. The fact that he did not show it willingly was notice to him that there was something behind it, and it was clearly his duty to have read this agreement; and if he had read it he would have seen that Aston was not justified in selling. I adhere to the view expressed in *Sadie* v. *Standard Bank* (7 Juta 92), that the sale and delivery of goods belonging to another with knowledge of the owner's claim is a wrongful act, which the person committing it cannot avail himself of as a defence to an action for the delivery of the goods on payment of their value. It is said that the defendant in the present case possessed no such knowledge, but he had full means of knowledge, for Aston, although unwillingly, showed him the document in which the plaintiff's rights of owner-

ship are reserved. Having deliberately closed his eyes to such means of knowledge, he must bear the consequences. The Magistrate was wrong in his judgment, and the appeal must be allowed, with costs in this Court and the Court below.

Mr. Alexander: Does your lordship give judgment as prayed?

His Lordship: Not for the £5 damages. Judgment will be entered for £13 13s., with costs in this Court and the Court below.

[Appellant's Attorney: D. Tennant, Junr.; Respondent's Attorney: W. G. Coulton.]

BARRY V. CUMMING.

This was an appeal from a judgment of the Resident Magistrate of Qumbu, in an action brought by the respondent against the appellant for £52 rent, a writ of ejectment from the premises hired by the appellant, and £100 damages for wrongfully continuing in occupation of the premises after receiving notice to quit. The Magistrate gave judgment for the plaintiff for £52 rent, £40 damages for illegal occupation, and an order for ejectment.

The Magistrate's reasons (from which the facts of the case sufficiently appear), were as follows:—

"In this case plaintiff (married to Mr. A. C. Cumming out of community of property), sues defendant for £52 rent, for a writ to eject defendant from the hired premises, and for £100 damages for wilfully continuing in occupation of the premises after receiving notice to quit.

For the plaintiff. A. C. Cumming states that in December, 1900, he bought from the insolvent estate of one Jas. Barry (father of the defendant), certain improvements on land occupied by Jas. Barry without title in the village of Qumbu. He states that these improvements consisted of a garden, 4 huts, a cottage, etc., etc. He further states that about the middle of December, 1900, defendant came to him with a view to hiring the land, that he hired the property to defendant for a rental of £2 *per mensem*, and that defendant paid £1 as rent for half December, 1900. Since that date defendant has not paid any further rent although demanded by Mrs. Cumming's attorney. In September, 1902, Mr. Cumming, on behalf of the plaintiff, sold the property to Mr. E. C. Goss for £100, and at the same time gave defendant notice to quit the premises by November 1st, 1902. Defendant telegraphed in reply, declining to vacate the premises, and disputing plaintiff's right to ownership of same. Mr. H. Batteson states that he was present when defendant came to hire the premises, that nothing was said about purchasing them, that defendant paid £1 as rent for December, 1900.

Mr. Alwyn Rein, R.M., Qumbu, states the meeting in Jas. Barry's Insolvent estate was held before him in June, 1900. At this meeting Jas. Barry was examined in regard to his insolvency, and that he gave evidence to the effect that he bought the improvements then under discussion for £60. Mr. Rein further states that the improvements surrendered and sold included the buildings at present occupied by the defendant.

For the defence, Mr. John Barry, defendant, states that he bought half the premises (formerly those of Mr. Ruthers) from his father in January, 1897, for £30, that he approached Mr. Cumming in December, 1900, with a view to purchasing the other half, occupied and surrendered by his father. Defendant states that Mr. Cumming informed him he would have to consult plaintiff before deciding to sell the property. Defendant further states that he hired the premises then for one month for £1 5s., in order to save his mother from being turned out. He says that Mr. Cumming promised to write to him and acquaint him with Mrs. Cumming's decision in the matter, but he never did so. In November, 1901, defendant received a letter from Mr. M. P. Milner, of Tsolo, plaintiff's solicitor, demanding rent for the hired premises, and calling upon him to enter into a formal agreement of hiring. Defendant put the matter into the hands of his law agent, who states that he interviewed Mr. Milner, who told him that he could give him no further information about the matter.

In coming to a decision in this case, I believed the plaintiff's version of the matter. I could not believe that defendant had bought half the property from his father in 1897. If such had been the case, he would have mentioned

the fact to the Magistrate who examined and valued the premises when James Barry applied to have all the land surveyed. Mr. James Barry did not mention the fact either, although he knew the Government had consented to have the land surveyed on the first favourable opportunity. Mr. Rein positively asserts that all the buildings were under discussion, including those at present occupied by defendant, and that these buildings were all surrendered and sold. Defendant's action on receiving notice to quit was also peculiar. According to his account, he had only rented half the property from Cumming, and yet on receiving notice to quit, he disputes plaintiff's ownership *in toto*. In the face of the combined evidence of Messrs. Rein, Batteson, Cumming and Milner, there can be no doubt that all the improvements were sold by the trustee to the plaintiff.

In regard to the rent, even if the defendant had proved his ownership to half the property, which he has not done, and if he had only hired the place for one month for his mother, he would be liable for the period the buildings were occupied by his mother after the expiration of that month for allowing his mother to continue in occupation. Had he wished to free himself of further liability in regard to the rent, he should have given Mr. Cumming notice to the effect that his mother was continuing the occupation in her own name, instead of allowing her to hold over after the period had expired for which he alleges he had hired the premises. He never did this, and in view of Mr. Cumming's and Mr. Batteson's evidence, I have no alternative but to believe that the hiring was not for a fixed period but at the will of the plaintiff at £2 *per mensem*. It would seem that the arrangements referred to by Mr. Batteson meant the preparation of an agreement of hiring, which the defendant was called upon to complete by Mr. Milner.

The defendant's agent, in excepting to the summons, contended that it too vaguely described the premises, but I consider it would have been impossible to have described them more clearly. I therefore over-ruled the exception.

In regard to the claim for damages I was guided by the case of *Nicholson* v. *Myburgh* (14 Juta, 384). Mr. Goss bought the property in September last, and should have gone into occupation on November 1 last. I was guided by the claim he has made against plaintiff in arriving at £40 damages.

Mr. Benjamin (for the appellant) said there was no doubt that in 1897 the defendant's father John James Barry, who became insolvent, purchased this property. The whole of the dispute in the matter seemed to have arisen out of the unfortunate position that the property occupied by Barry, senior, the insolvent, and which he purchased, was an unsurveyed portion on the confines of the township of Qumbu. Had the ground been surveyed, no dispute in the case could have arisen. There was no doubt that in 1897 the insolvent purchased the property, and he would submit that the son, the defendant in the action, purchased the half of the property from his father, and that he was entitled to that half. He paid for that half, he said, the sum of £30. He made considerable improvements. The building was originally an old stable, and he converted it into a homestead. In addition to that, he appeared to have improved the land, so that he acted as if he were the owner. Some stress was laid on the fact that the insolvent in his schedule did not bring up his son as the owner of half the land. That was not to be wondered at, because the insolvent appeared to be an uneducated man. It was also very curious that this matter should have been allowed to drag on for two years without any rent being demanded. Subsequently the plaintiff came down for accumulated rent for over two years. Even if the Court were against him on the main point of the appeal, the amount of damages awarded was certainly excessive. The purchase price of the property was £100, and the magistrate actually awarded £40 damages.

Mr. Buchanan (for the respondent) said that there was overwhelming evidence to show that the defendant could not have bought this half property. He had only recently taken up this position.

De Villiers, C.J., asked whether the plaintiff's husband, in the letter he sent to the insolvent, did not bring improper influence to bear upon him. The letter said: "I suppose you know your son John intends to dispute Mrs. Cumming's claim to the ground at present occupied

by him. As you know, Mrs. Cumming has a very strong case against you criminally, and it will depend to a great extent upon the action of your son in this matter" He tries to influence the son in this civil action, by virtue of his having a criminal action against his father—that is, by virtue of something else.

Mr. Buchanan said that he must admit that it was a most unfortunate letter; but, after all. the man was exasperated, no doubt, because of his being kept out of his property.

De Villiers, C.J.: The plaintiff is the wife of Archibald Cumming, who was the trustee of the insolvent estate of James Barry. In his capacity as such trustee he gave notice that he would sell certain property belonging to the estate. At the sale he, on behalf of his wife, purchased this property for £25. He received no transfer of the property, nor would it have been possible to receive transfer, seeing that the insolvent himself had no title to the property. It appears that the insolvent had made certain improvements upon the property, but he had never obtained title. After the plaintiff had so bought this property her husband entered into communication with the defendant, and the real question in dispute between the parties arises out of what took place at that communication. According to the plaintiff, from the property which she bought she let the property to the defendant at the rate of £2 per month. According to the defendant, the property was divided into two parts, one of them occupied by the defendant's father and mother, and the other occupied by defendant himself, and according to him he did engage to pay rent for one month, but he says that the reason why he did so was that Mr. Cumming (the plaintiff's husband), wished to see his wife before he could enter into any final arrangement, and it was only to tide over that period that he was to pay the rent. But he says that in regard to the property that he himself occupied at that time, and still occupies, he had previously bought it from his father and paid him £30. Then Mr. Pattison is called to corroborate the plaintiff as to what is alleged to have taken place, and Mr. Pattison, in my opinion, by no means corroborates the plaintiff, because all he can say is that he saw the money paid, but it was arranged that a further arrangement should be come to at a future time, so that Mr. Pattison does not in any way support the plaintiff's statement. that there was a definite agreement on that occasion under which the defendant was to hire the property from the plaintiff. After the defendant had been in possession for some time a dispute arose between the parties, a letter was written to the plaintiff claiming this property, but the defendant practically took no notice of the claim, and then the plaintiff, in order to indirectly influence the defendant to yield to his (the plaintiff's) demand, writes to the defendant's father that there was a criminal claim against him, and he brings that into connection with the claim against the defendant in order that he may be able to coerce the defendant into yielding on this action. Now, I mention this, not as conclusive in this case, but as showing the shift to which the plaintiff felt himself obliged to resort for the purpose of inducing the defendant to yield to the claim which he was making. Plaintiff proceeded with his action, with the result that in respect of the property for which he (the plaintiff) had paid £25, he gets a judgment from the Resident Magistrate that the defendant is to give up occupation, and to pay £52 rent and £40 damages. In the year 1900 he has paid £25 for this property, and yet the defendant is ordered to surrender to the plaintiff this property, and to pay him £92 for it, nearly four times what he paid for it. The Magistrate orders that this property is to be given up to the plaintiff, and £92 to be paid to the plaintiff. Well, such a judgment may be law, and if it is law, I am bound to protect it, certainly it would not be justice, but, in my opinion, it is neither law nor justice, and, under all the circumstances, it should be overruled. I am satisfied from the evidence that the defendant did purchase the portion of that property for £30, and I am in the same position to judge as to the credibility of the plaintiff's witnesses, at all events, as the Magistrate himself, seeing that the plaintiff's evidence was given by interrogatories. That evidence leaves a good deal to be desired, and certainly it should not weigh against the definite evidence given

on behalf of the defendant that he paid £30 to his father three years before the plaintiff had bought this property from the insolvent estate. I am satisfied that the defendant throughout believed he had bought this property, and that when he entered into communication with the plaintiff in regard to the land, it was simply to tide over the month so as to enable Archibald Cumming to see the plaintiff in regard to the matter. Now, it is quite clear that so far as the portion is concerned which is occupied by the defendant's father, that that must be vacated by him, but the defendant does not appear to me to be in possession of that portion or ever to have been in possession, and, therefore, there should be no judgment against defendant in regard to that portion. If the plaintiff has any claim against the father, he may proceed to prosecute his claim, but, under all the circumstances, I am clearly of opinion that the judgment the Magistrate should have pronounced was to give absolution from the instance so far as the claim is concerned, which affects the property occupied by the defendant. As to the property occupied by the father, the plaintiff of course, can proceed against the father. As regards the other claim, I am of opinion that the Magistrate should not have given an order for ejectment and *a fortiori* he is not entitled either to the rent of £52, for which the Magistrate has given judgment, nor to the £40 damages which have been awarded. The appeal will, therefore, be allowed, and absolution from the instance given, with costs in this Court and the Court below.

[Appellant's Attorneys: Faure and Zietsman; Respondent's Attorneys: Findlay and Tait.]

TRIAL CAUSES.

KETS V. MANEVILL.

Mr. C. W. de Villiers said that this was an action brought for the recovery of the purchase price of certain land, which was sold, failing that, cancellation of sale. The defendant, since the institution of the action, had become insolvent, and his trustee had not yet elected whether he would go on with the action or whether he would consent to the cancellation of the sale. He wished to consult a meeting of the creditors, which would take place some time during this month. He applied for the substitution of the trustee for the defendant in the action, and for the case to be allowed to stand over until the 12th December.

De Villiers, C.J.: A definite date cannot be appointed, but the case will stand over *sine die*.

FARRELL V. WOODSTOCK MUNICIPALITY. { 1903. Nov. 3rd.

Negligence—Burthen of proof—Due precautions to prevent accidents—Municipality.

The Municipal Council of W., in the course of excavating a street, left a heap of clay lying in the street, over which the plaintiff stumbled during the night time.

Held, *in an action brought by the plaintiff against the Council for damages for bodily injury occasioned by the fall, that the burthen of proving that due precautions had been taken to prevent the obstruction from being a source of danger to persons lawfully using the street during night time lay upon the Council.*

This was an action brought by John William Farrell, a clerk, residing at Woodstock, against the Municipal Council of Woodstock, to recover £1,000 damages for personal injuries alleged to have been occasioned by the negligence of the defendants or their servants.

The declaration set out that the defendant Council was responsible for the roads situate in its Municipality. In or about the month of July, 1903, the defendants, their servants, or agents made or caused to be made certain excavations in Victoria-walk, and for the purpose thereof deposited upon the said road a large heap or mound of earth, gravel, and other material, and thereby obstructing the said road, street, or thoroughfare, and rendered it dangerous to passengers. It was the duty of the said Council to take reasonable precautions to ensure the safety of the

public, and more particularly to indicate and give notice of the position of the said heap. The defendant Council neglected so to do. On or about the 24th July, wrongfully, unlawfully, and negligently, and in breach of their duty, the Council left the said heap wholly unattended, and without lamp or light to indicate the existence of the heap. On the morning of the 24th July the plaintiff, while it was dark, fell against the said mound or heap, and was thrown to the ground with great violence, and sustained a fractured rib, and was cut and bruised, and otherwise seriously injured in body and health, and had sustained damages in the sum of £1,000.

The defendant Council, in their plea, said that in July, 1903, they lawfully caused excavations to be made across the footpath of the said Victoria-walk, for the purpose of laying down the sewer to connect the drain from the public school with the sewer in Victoria-walk. The earth or gravel deposited on the road formed a heap 18 inches high. The excavation was duly covered with boards, and on the night of July 23 a lamp was fixed, so as to show a light on the heap. The lamp burned through the night, and was still burning at seven o'clock on the morning of the 24th July. The defendants said that they had no knowledge of the injuries sustained by the plaintiff, that any injuries that he sustained were received by his own negligence, and not through any act for which the defendants were responsible. They therefore prayed that the plaintiff's claim be dismissed, with costs.

Mr. Upington (with him Mr. Sutton) for the plaintiffs; Mr. Gardiner (with him Mr. Russell) for the defendants.

Mr. Upington produced the plan of the scene of the accident.

[De Villiers, C.J.: Does the defendant admit that there was a light?]

No, our evidence will be that there was no light, neither on that morning nor the previous evening.

[De Villiers, C.J.: That will be the main question, I suppose.]

Yes. There was a lamp further down, but our evidence will be to the effect that between this lamp and the mound against which the plaintiff fell there was thick foliage, which prevented the mound being seen.

John Wm. Farrell, the plaintiff, said he was a clerk in the Post-office, in receipt of a salary of £185 a year. He resided in Mountain-road, Woodstock. On the 24th July, about 5.50 a.m., he left his home for the purpose of proceeding to his duties at the Post-office. It was still dark. He was on early duty at 6.30 that week. He proceeded across Mountain-road into Earl-street, and then turned into Victoria-walk. He was walking slowly. He knew the road well. He was in the habit of going along Victoria-walk to the Toll-gate, and then taking a tram. He suddenly came into contact with a heap of earth, and was thrown to the ground, and he remembered nothing more till he was picked up. There was no light whatever near by. He could not see the mound. Mr. Aldred came up and picked him up, he believed. The first thing he remembered was Mr. Aldred telling him to go home. Witness felt a severe pain in his head and at his side. Witness said he would go to work, and he proceeded to the Post-office, leaving again at 11.30 a.m. He felt very ill. His breathing was difficult. He saw Mr. Aldred sitting on the stoep, and arranged for medical assistance to be called in. Witness went to bed, and Dr. Smith afterwards attended him. Dr. Smith had attended witness from the 24th July to the present time. He was unable to move his leg, and he was now only able to use it by the aid of a crutch. Dr. Smith's account up to the present would be £69 13s. 6d. Witness had had to expend a good deal of money on medicines. He had spent £40 in cash. He had received his salary from the Post-office. He believed that for six months he would draw full salary; for a further six months, he would receive half-salary, and at the end of that period he would have to go on pension.

Cross-examined by Mr. Gardiner: He usually went by that road when he was on early turn. He did not notice the earth in the road on the day before the accident. He passed on the previous morning in the darkness. He did not tell an official of the Council that the accident occurred at the junction between Earl-street and Victoria-walk. He said that he fell over a mound by the public school. He did not see a lamp on the mound, or anywhere near. There might have been a lamp there without a light.

John Aldred, who resided with the plaintiff, said he recollected the plaintiff leaving home on the 24th July. It was pitch dark when the plaintiff went out. Witness went out about five minutes afterwards, and turned into Victoria-walk. Just as he got to the mound, he found Farrell lying there. There was no light burning. The plaintiff was not conscious. The mound was sufficiently large to be dangerous. He escorted the plaintiff to the car. On witness's return he examined the heap, and he should say it was 2 feet 6 inches high. It was lying close up to the footpath. There was no light that would show anybody that there was a mound in the road.

Cross-examined by Mr. Gardiner: He had not been discharged from the Gas Company's employ for drunkenness. He had lived on his private means. The reason why he was out so early in the morning was that it had been his habit to rise early during the twenty years he had been in the Tramway Company's employ

John M. Blundell, hairdresser, said that on the evening of July 23, he passed along Victoria Walk on his bicycle. He saw some excavations going on, and he noticed a number of lamps at the side. He accordingly rode on the other side of the road, and collided with a heap o' earth. He was thrown off his machine.

Dr. Thomas Hector Smith said that prior to the accident plaintiff was a strong, healthy man. The witness described plaintiff's injuries. He attended plaintiff still. Plaintiff was in bed for three weeks. He was unable to bend his leg. Witness regarded his condition as very grave. There were indications of brain trouble. Witness's account for attendance was £69 16s. 6d., up to the 31st ult. This did not include medicines.

Cross-examined by Mr. Gardiner: There had been serious developments since witness gave his last certificate on the 17th October. No medical man could say, in plaintiff's present condition, whether he would recover or not.

Dr. Sidney Wm. Richardson also gave evidence. In addition to the partial loss of control of the leg, and of the arm, plaintiff had apparently suffered a loss of sensation in parts of the body. Witness considered plaintiff's recovery was uncertain, and that his progress was not likely to be rapid.

Mr. Upington put in the correspondence, and closed the plaintiff's case.

Mr. Gardiner called

Thomas Rushford, street inspector, in the employ of the Woodstock Municipality, who said there was very little traffic on Victoria Walk. In July some excavations were being made there in connection with the laying of drains. The excavation in the footpath was boarded over and the clay was heaped in the road. At the time of the accident it had been there about a week. It was 1 ft. 9 inches high, 2 feet broad, and 4 feet six inches wide. A lamp was hung on a fence pole at night. This was about six feet from the clay, and was 3 feet 6 inches high. This was the usual way in which clay was guarded. Witness had experimented with the lamp in this position, and could see a brick 30 feet away. A watchman was employed to look after these lamps. After the accident witness saw plaintiff, who said he was running to catch the tram, and had just turned the corner of Earl-street into Victoria Walk when he fell. Afterwards, plaintiff said it was down at a lower point that he fell.

Charles Frederick Holman, engine-driver, in the employ of the Woodstock Municipality, said he had gone to see if these lamps were lit on several occasions. At 9.30 on the night preceding the accident, all the lamps in the street were burning. The lamp on the railings threw a good light on the heap of clay The lamps burned for 22 hours with one fill.

John Steyn, night watchman, in the Woodstock Council's employ, said he filled and lighted the lamps every night Witness filled the lamp in question, and lit it on the night preceding the accident. He saw that the lamp was alight at 2 o'clock on the morning of the accident.

By the Court: Witness thought the lamp was put there to show the planks over the excavation. There was no danger from the planks. If the clay had not been there the lamp would still have been placed there to show the holes.

Isaac Graham, lamp-lighter, said he remembered seeing this lamp alight as he passed at 2 o'clock on the morning of the accident.

Robert Wm. Menmuir, M.I.C.E., and engineer to the Woodstock Municipality, said he had tested the lighting power of this type of lamp. Ordinary print could be read a distance of five yards. The clay could be seen very distinctly in that position. Witness thought it a reasonable precaution to take. The extreme end of the heap of clay was seven feet six inches from the lamp. There was no need for a lamp to show the planks; the only reason the lamp was there was to show the clay.

Edward P. O'Reilly, manager to the Cape Town Gas Works Co., gave evidence as to the illuminating power of the lamp. The clay would be well shown by the lamp.

Mr. Upington called

George Cornelis Carstens, controller of the Post Office, who said plaintiff drew a salary of £125 a year. By the regulations of the service he would be entitled to full salary until December 23, and thereafter to half his salary for six months. After that he would be entitled to a pension at the rate of one-fifth of his salary.

Counsel were then heard in argument on the facts.

De Villiers, C.J.: Whatever else may have been doubtful in the present case, there can be no doubt whatever that on the morning of the 24th July last the plaintiff sustained a very serious accident, and that the accident was caused by an obstruction in the road. The obstruction consisted in a heap of clay, which was placed there by the defendants; and in my opinion the burden of proving that due precautions were taken to prevent any accident by reason of the obstruction lies upon the defendants. It was their clear duty to take every reasonable precaution to prevent accidents from being sustained by persons who were lawfully using that road, and unless they can satisfy me that such due precautions were used, they should be held liable. The precaution which they say they took was to place a lamp about six feet from the obstruction. But the plaintiff, on his part, denies that there was a light at all, even within six feet. I should have thought that a proper precaution to take would have been to place a lamp, not six feet from the spot, but at the spot, so as to make sure that the light would shine upon every portion of the obstruction. And certainly this precaution was not taken, for, according to the admissions of the defendants themselves, the nearest light was that light at the fence, about six feet away. But I am not satisfied from the evidence that on the occasion when the accident took place that light was actually burning. The plaintiff himself swears that there was no light, and the very fact that an accident occurred supports him in the statement. It seems almost incredible that a man would have fallen over a heap of clay if there was sufficient light to have seen the clay. It is suggested that he might be near-sighted; but I do not remember that any question was put to him on that point. But there is the fact that he fell over this heap of clay, and he says that he could not see this clay; that there was no light in the immediate neighbourhood, and in this statement he is supported by the witness Aldridge, and by the bicycle rider who passed that place on the previous evening, and had an accident at that particular spot. It is suggested we should not believe them, but I do not see why we should not accept their statement more than the evidence given on behalf of the defendants. They speak of a positive fact, whereas the others might firmly believe that the lights were there. Under these circumstances, I am of opinion that the Court is bound to hold that due precautions were not taken by the defendants to prevent accidents there to persons lawfully using that road, and that the defendants are liable for the consequences of the injury done to the plaintiff. On the point of the damages, His Lordship reveiwed the medical evidence, and said he was inclined to think that Dr. Smith had taken a too serious view of the injuries, and that the view taken by Dr. Richards was the more correct one. At the same time, he was not inclined to consider it was any light injury. The man had been laid up for some time, and for some time he would probably be unable to do his work; but he (the Chief Justice) saw no reason to suppose that he would not, in the course of time, recover, and resume his occupation. Of course, it was impossible to say what would take place; but the Court could only be guided by actual evidence, and not by suppositions as to what might take place. Upon the evidence, he

thought there should be judgment for the plaintiff for £400, with costs.

[Plaintiff's Attorney: G. Trollip; Defendant's Attorneys: W. E. Moore and Son.]

GENERAL MOTION.

Ex parte LANGHOEVEN.

Mr. Upington applied for leave to have certain witnesses subpœned before the commission appointed to take evidence in the case of Miriam Cohen v. David Langhoeven, pending in the High Court of the Rand. The commission had been appointed on the application of the plaintiff in the action.

De Villiers, C.J., said it did not appear that there was any authority from the High Court to take the evidence of these witnesses. Defendant should first get an order from the Transvaal Court, and then this Court could assist him.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

VAN DER HORST v. COLONIAL GOVERNMENT. { 1903. Nov. 3rd.

Mr. Searle, K.C. (with him Mr. Benjamin), for the applicant, moved for an order that the affidavit of discovery which the Court had previously granted against the respondent should be filed before 2 o'clock that day. The case was set down for Wednesday, and the documents would be useless if the plaintiffs did not have them in time for consideration.

Order granted, with costs.

CRAMER v. KLEINBACH.

Mr. Benjamin moved as a matter of urgency for an order restraining A. Metska from dealing with a certain draft, and the South African Banking Corporation from parting with any moneys alleged to be stolen by one Hugh Kleinbach, a partner of the applicant. A bill of exchange for £200 had been drawn on the African Banking Corporation at East London, payable at a German bank, and the order was asked for pending an action against Kleinbach for a statement of account. Kleinbach surreptitiously disappeared from Cape Town, and when arrested £100 out of £300, which he is alleged to have taken, was found upon him.

A rule *nisi* was granted calling upon A. Metska to show cause why he should not be restrained from dealing with a draft for £200 drawn upon the African Banking Corporation payable in Germany. The rule to be returnable on November 12, to operate as an interdict. An order was granted on the bank not to honour the draft or part with the money pending a further order of Court, with leave to either party to move to have the order set aside.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and a Special Jury.]

VAN DER HORST v. COLONIAL GOVERNMENT. { 1903. Nov. 4th.

Negligence of servant — Railway regulations — Dangerous goods.

H. and his wife were passengers by rail from S. W. to Worcester. On the way a case of dynamite was negligently delivered by one P., who had been permitted by an official of the Railway Department to carry it with him in the train. Owing to negligent delivery by P., the dynamite exploded, thereby inflicting serious injuries to H. and his wife.

Held, *that the said official had been guilty of negligence by not strictly enforcing the regulations of the department and*

that the department was liable for his tort.

This was an action brought by Even Jean Jacques van der Horst, of Worcester, against the Colonial Government, to recover £5,000 damages for injuries received by the plaintiff and his wife through the negligence of the defendants' servants in October, 1902.

Mr. Searle, K.C. (with him Mr. Benjamin), was for the plaintiff, and Mr. Howel Jones (with him Mr. Nightingale) was for the defendant.

Mr. Searle drew attention to the negligence of the defendants in failing to comply with an order fixing a time for discovery given by Mr. Justice Maasdorp and Mr. Justice Kotzé, the previous day. The Court fixed 2 o'clock on Tuesday, by which the affidavit should be filed, and Mr. McEwen had made an affidavit that the departmental correspondence relating to the case was very voluminous, embracing the departments of the G.M., A.G.M., C.T.M., T.M. of the Western System, Engineer-in-Chief, and the Commissioner of Public Works, and that it was practically impossible to make a complete list of all papers relating to the case. He objected to produce the correspondence between the officials of his department, as it was privileged. Counsel said that he had not seen any of the documents.

[De Villiers, C.J.: On what ground does he object to produce the correspondence?]

Mr. Jones: On the ground that they are State documents passing between officials.

[De Villiers, C.J.: These are not State documents.]

Mr. Jones cited the case of *Fraser* v. *Sivewright* (3 Juta, 375), and contended that the documents passing between subordinate officials and superior officers were privileged.

De Villiers, C.J.: Hasn't it been decided that a responsible Minister should come into Court and inform the Court that they are State documents, and their disclosure against public interest. I think that case does not hold that every letter written by one officer to another is privileged. The Colonial Secretary came into Court and said that he refused to consent to the production of the document on the ground that it would be detrimental to the ublic service.]

I did not know this question was going to be raised, and I think my learned friend should have given us notice that he would raise the question as to whether this affidavit was sufficient. One does not know what this correspondence may contain.

[De Villiers, C.J.: This case of *Fraser* v. *Sivewright* is wholly against your contention.]

Unfortunately, I have not got it here with me, my lord.

[De Villiers, C.J.: If a responsible Minister comes forward and says it is a State document, and against the interest of the State then it should not be disclosed.]

Although that question was raised to some extent the only question was the sufficiency of the affidavit, and in the judgment of Mr. Justice Kotzé he did not think it should be made by the responsible head.

[De Villiers, C.J.: I presume the defendant will produce all the documents bearing upon the case in their possession. They should have the whole of the correspondence here. Has there been any subpœna to produce it?]

No, my lord.

Mr. Searle: The difficulty is that we don't know what the documents are, and I would suggest that all documents be brought into Court.

[De Villiers, C.J.: I think it is clear all the documents should be produced relating to the case.]

Mr. Searle: I suggest the defendant be instructed to bring in all departmental correspondence.

Mr. Jones: We have not got it. No doubt it is in the country, and it is quite clear from the affidavit of the General Manager he has not been able to collect the correspondence.

[De Villiers, C.J.: Whatever the Government has it should be produced in Court.]

Mr. Searle: I take it we should be entitled to see what correspondence they have here?

[De Villiers, C.J.: It is a pity you didn't mention it before the jury was sworn, then we could compel the Government to produce the correspondence.]

Mr. Searle: The reason, my lord, was because we did not want the case put off until next March.

The declaration set forth that the plaintiff and his wife and son were travelling by passenger train from Somerset West to Worcester, and owing to the neglect of the employees of the railway in allowing a parcel of dynamite into a passenger train contrary to the laws of the railway, they received serious injuries. The dynamite exploded near Artois Siding, and, as a result, plaintiff sustained permanent injuries to both legs and feet. Plaintiff was unable to attend to his duties, and his wife also suffered permanent injury to one of her feet. Both were seriously injured, and had been put to considerable expense. Wherefore plaintiff prayed for £5.000, with interest and costs.

The plea admitted the formal allegations, but denied that dynamite was carried and exploded owing to the neglect of any employee of the railway. The dynamite exploded owing to a breach of the law on the part of one Pearce, who was not employed by the Railway Department. The injury was admitted, but not to the extent of £5,000.

Mr. Searle proceeded to narrate the principal facts of the case, and said the jury would first of all have to say what the injury was due to, and if there was any neglect for which the Government was responsible, and, if so, what damage had been sustained. Mr. and Mrs. Van der Horst were travelling from Tulbagh-road to Worcester with their boy. At Tulbagh-road a man named Pearce got into the train, about four or five compartments in front of the one occupied by the plaintiffs. He had with him a box of dynamite, which he had received by the order of the assistant engineer on the line. The order was signed by Mr. Sparrow, directing the Government Storekeeper at Tulbagh-road to give the case of dynamite to Pearce. It appeared workmen were altering the line near Artois Siding, under a contract with the Government. As the train approached the gang Pearce dropped out a parcel of dynamite to the men, and it exploded under the carriage in which Mr. and Mrs. Van der Horst were travelling, blew a hole through the floor, and caused the injuries stated.

Evidence was then called for the plaintiff.

Even Jean Jacques van der Horst, plaintiff, gave his age as 51, and said he was superintendent of the Industrial School at Worcester. In October last year he was returning from Somerset Strand, and on the main line there were three others in the carriage, beside his wife and boy. Between Tulbagh-road and Ceres-road he was talking to his wife, when he felt a shock, and three others and himself were thrown on to the floor. He looked up, and saw his wife's dress all disarranged. He tried to get up, but could not move, on account of the injury to his left leg, which was smashed in three places close to the ankle. His wife could not move to his assistance. There was a hole in the bottom of the carriage sufficient to see the wheel. Dr. Hugo and Dr. Van der Merwe attended to him at Worcester. For three months he lay in bed, and for another three months he was wheeled about in a chair. Then he was advised to go to Aliwal North, and after three months he returned, and in July he resumed his occupation, with the aid of two sticks. It was impossible for him to carry out his work, and he intended to resign. His salary, in all, would amount to £350 a year. It cost him £34 for a nurse, but he had not yet received the doctors' accounts. He received no salary for a certain period, and had to find a substitute. His trip to Aliwal North cost him £60, and in all he was out about £200. He was constantly suffering pain, and it was with great inconvenience he could move about. The right foot was about an inch longer than the left. His health did not improve during the last few months.

Cross-examined by Mr. Jones: He had not taken any action against Pearce, or his employers, Howard and Co. He just brought an action straight against the Government. The £200 expenses included those of Mrs. Van der Horst, but he had not received the medical expenses yet. He could not stand for any time to explain things on the blackboard to the pupils. No School Committee would take him now.

Helena van der Horst, wife of the last witness, said that she was travelling with her husband when the explosion occurred. There was a shock, and she heard an awful noise. She could not stand on her feet when she tried to go to her husband's assistance. Her right foot was injured, and as a result, she was fourteen days in bed,

and for three months she could not put her foot to the ground. Her foot was always painful, and was worse when she was walking. Her general health had suffered as a result of the injury, and she had been attended by Dr. Van der Merwe for six months.

Cross-examined by Mr. Jones: She would not say she was an invalid. Her real complaint was that she could not do her household work as well as she used to. She would not say she was getting better every day.

Dr. Hugo, railway medical officer at Worcester, said he proceeded to the train on the 7th October, and he saw Mr. and Mrs. Van der Horst. Mr. Van der Horst had a compound fracture of the left leg, just above the ankle, and contusion of the left and right feet. It was doubtful whether the foot would be saved, as the bones were splintered through the skin. He had not examined the plaintiff lately, and would not like to offer an opinion as to whether he would recover. Mrs. Van der Horst had contusions of both feet.

Cross-examined by Mr. Jones: He had been specially paid by the Government for his attendance on Mr. and Mrs. Van der Horst. It was possible Mrs. Van der Horst was still suffering from the contusions.

By De Villiers, C.J.: The understanding was that he was paid by the Government when an accident was due through the negligence of their servants, and in this case he was summoned by the stationmaster at Ceres, and claimed specially from the Government.

Dr. Van der Merwe, of Worcester, who attended to Mr. and Mrs. Van der Horst after Dr. Hugo, said that Mr. Van der Horst's left leg was broken, and he was in a critical state at the time, and he had thought of amputation. In Mrs. Van der Horst's case, the bone that was the key of the arch of the foot dropped down, and in Mr. Van der Horst's case, the right foot was knocked flat. It would have been almost better if Mrs. Van der Horst had had her leg broken, and neither she nor her husband would ever have the same power of their limbs they had before the accident. He had attended them for six months, and his charge would be something between £50 and £60.

Cross-examined by Mr. Jones: Mr. Van der Horst would improve in time. He did not know how a special boot could be made to prevent the pain.

Francis Roux said that he was travelling in the train when the explosion occurred. The man Pearce got into his compartment, carrying a small parcel, about nine inches long. A Kafir boy brought him a case about two feet long. The case was open, and was put on the floor in the centre of the carriage. The lid was loose on the top. Pearce asked witness to change places, as he wished to put out a parcel. Between Tulbagh and Artois, Pearce put his head out of the window, and shouted out to the railway men to look out. Then he dropped the parcel out. When the dynamite exploded, he said: "Oh, God; I'm in trouble." They were just outside the station then. The guard took the box out at Artois. Mr. and Mrs. Van der Horst were five or six compartments behind him.

Cross-examined by Mr. Jones: He did not see any railway officials speak to Pearce. Pearce was arrested, and witness gave evidence against him. Pearce got in from the platform side.

Re-examined by Mr. Searle: The box was labelled "Explosive—Dynamite," and any official could have seen him get in.

Alfred Watson, storekeeper, said that last October he was in Government employ near Tulbagh Station. Mr. Pauling was the engineer in charge of the reductions of the gradients between Tulbagh and Ceres-road. Mr. Pauling's headquarters was at Ceres-road. Mr. Sparrow was assistant engineer. Witness had control of the dynamite. On the 7th October witness was on the Tulbagh-road Station, when Pearce arrived, and handed witness a letter with an order from Mr. Sparrow to give Pearce a case of dynamite. Pearce said he wanted to get back to Ceres-road as soon as he possibly could with the dynamite. Pearce afterwards was talking to the railway officials about getting back to Ceres, and the stationmaster said he could go back by a goods train, which was the first train due for Ceres, but it did not arrive up to time. Witness proceeded to bring up the dynamite, which was clearly marked, and left the case on the seat. Pearce could not be found for fifteen minutes, and

when witness saw him, he said that he had taken the dynamite. The dynamite was Government property for the works. In other cases witness handed over the dynamite to the railway officials for transit. He never knew of dynamite being sent by passenger trains. In some cases they had special trucks, made of iron, for the carriage of dynamite. The explosion took place about three-quarters of a mile on this side of Artois Siding. Howard was contracting at that spot, but two weeks after the accident, the Government took over the work.

Cross-examined by Mr. Jones: Witness knew Pearce was manager for Howard. Witness was not in the habit of supplying dynamite to Howard. Howard had to supply his own material, and it was only because he ran short of dynamite that he got that case. The stationmaster did not say a word about a passenger train. Pearce was found in the hotel, and said that he had taken charge of the dynamite.

Re-examined by Mr. Searle: He would not have given the dynamite to Howard without the signature of the Government Engineer. The stationmaster suggested that Pearce might put the dynamite in the van, which was in readiness for the next goods train.

Subject to his right to put in certain correspondence, Mr. Searle closed his case.

Evidence was then called for the defence.

Wm. Sparrow, assistant engineer of the Tulbagh-Ceres-road section, said that Howard and Co. were doing work at Artois under a contract with the Government. Witness had absolutely nothing to do with Howard's men, his duty merely consisting of seeing that the work was properly done. Howard had his own store. Howard and Co. had a permit for a small weekly supply of dynamite from the Colonial Secretary, and on the day in question, the work was stopped, owing to their supply not having arrived. Witness lent Pearce a case of dynamite to facilitate the work. On a previous occasion Howard had powder conveyed by road in charge of a native.

By de Villiers, C.J.: Pearce had not a free pass.

Cross-examined by Mr. Searle: According to the contract, witness had to supervise the work. He had nothing to do with Howard's men, and if anything was wrong, he spoke to Howard or his manager. He could call upon Howard to dismiss any man that was inefficient. He had heard that Pearce had since got a railway contract. He did not know that the dynamite would come back by train. Witness tried to hurry Howard on with the work. Pearce would have got back much quicker had he walked. Shortly afterwards Howard left for Johannesburg, and the Government took over the work. He had heard that Howard would not pay his men. If dynamite was sent to the Government works, it was always booked. The small quantity referred to was sufficient to blow up a whole train.

John Robert Reid, relieving stationmaster, said that on the 7th October he was at Tulbagh-road, and saw Pearce. Witness did not give him permission to travel by the passenger train. Witness did not see Pearce again.

Cross-examined by Mr. Searle: He knew Pearce was taking dynamite to Ceres-road. Witness told Pearce he could travel by passenger train, but the dynamite would have to go by the goods train. Witness was on the station when the train left, but he did not see Pearce leaving. He would stop anyone with a dynamite package.

By De Villiers, C.J.: He did not tell him that 24 hours' notice in writing was necessary, or that he must give the name and address of the proposed consignee. Witness suggested that it would have to be put in the dog-box. Wednesday was the day fixed for the conveyance of dynamite from Tulbagh, but he thought 56 lb. was a small quantity.

By Mr. Searle: The fact of it not being booked was purely a contravention of the rules. He took no further steps after he saw Pearce.

Re-examined by Mr. Jones: The only question he asked was about the first train, and the dynamite would have been perfectly safe in the dog-box.

Chas. Brown, guard in the employ of the C.G.R., said he was in charge of the train on which the explosion took place. A man asked to get into the van, but witness said there was plenty of room in the compartment. He had not a package in his possession at the time, and he

mentioned nothing about dynamite. When the explosion took place, witness thought it was blasting, but when he looked out he saw the passengers signal to him to stop. The train was brought alongside Artois Siding, and witness handed Pearce over to the police.

Cross-examined by Mr. Searle: It was possible the boy with the box was standing behind Pearce when he attempted to get into the van. It did not strike witness as strange that the man wanted to get into the van. There was no mention of dynamite. All the windows of the carriage were smashed.

This closed the evidence.

Counsel having been heard in argument,

De Villiers, C.J., said that in deciding the question as to whether it was through the negligence of the railway employees the accident occurred, they would have to be satisfied that negligence had been clearly brought home to some official of the department. The Government had no such control over Pearce as to justify them in finding Pearce was a servant of the Government, and as such servant rendered the Government liable. The stationmaster at Tulbagh-road knew that Pearce was returning with dynamite, and he actually suggested that it might be put in the dog-box. In his opinion, Pearce would have been justified in putting the dynamite into the dog-box himself, and in concluding that he would be justified in taking dynamite on that precluded day, Tuesday. It was essential that every precaution should be taken with dynamite, and by the stringent regulations of the Railway Department they fully appreciated the danger. According to the regulations, it was imperative that a person should not wear boots with steel or iron nails, nor carry matches. Further, a special day was provided, and as Wednesday was fixed for Tulbagh-road, the stationmaster raised no objection to convey it on Tuesday. In his opinion, the stationmaster was the only person on the railway to whom negligence could be traced. If he had said to-morrow was the day on which dynamite could be received, Pearce would probably not have taken the dynamite into the train. If all the precautions had been fulfilled, the accident could not possibly have occurred. That was the simple ground on which the case rested. If the jury considered there was an absence of those precautions which ought to be used in the case of the carriage of such a dangerous article as dynamite by a responsible person at the station, then there was proof of negligence. If the explosion had taken place a little sooner, and the rest of the dynamite exploded, there was no telling what might have happened. It had been said that the Government was generous in such cases, but he had known of several cases where juries found the Government liable after they had refused to pay. If they found negligence, they should award such damages as to afford a warning to the department, and the officials of the department, as to the care to be exercised in the carriage of such dangerous materials as dynamite.

The jury retired, and after fifteen minutes' consultation found for the plaintiff in £2,500 damages, with costs.

Judgment was entered for that amount, and the plaintiff and his wife were declared necessary witnesses.

[Plaintiff's Attorneys: Van der Byl and Van der Horst; Defendant's Attorneys: Reid and Nephew.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

Ex parte COHEN. { 1903. Nov. 4th.

Mr. Upington said that he desired to mention an application which he made to the Court on the previous day for leave to issue subpœnas to take certain evidence in the matter of Cohen v Langhoeven, before a commission of the High Court of the Transvaal now sitting in Cape Town. The difficulty arose that in this copy of the order of the Court of the Transvaal, there was an important omission, viz., that the plaintiff was given leave to call witnesses on her behalf at the commission. He understood that the commission was really joint. He now applied on behalf of the plaintiff.

Mr. Alexander opposed on the ground that notice had not been given to the defendant, at whose instance the commission had been appointed, and no par-

ticulars had been supplied as to the nature of the proposed evidence.

After hearing an explanation from Mr. Close, the commissioner in the matter,

Maasdorp, J., said that an order would be issued for the witnesses mentioned in the affidavit to be subpœnaed before the commission.

SMIT V. BRINKMAN.

Principal and agent.

This was an action brought by Gideon Andries Smit, a farmer, residing in the division of Fraserburg, against L. B. Brinkman, who is an attorney residing and practising at Victoria West to recover £105, the price of certain sheep supplied to the defendant through his agent, one Murray.

The declaration set out that on the 29th November, 1902, the defendant, through his duly-authorised agent, one H. T. J. Murray, purchased from the plaintiff at his farm certain sheep for £105. The sheep were delivered by the plaintiff to the defendant, but, though frequently requested to pay the said purchase price, the defendant neglected, and refused to do so. Plaintiff claimed £105, with interest and costs of suit.

The defendant, in his plea, said that on the 27th November he, through one Murray, sent an order in writing to the plaintiff to sell to him (the defendant) certain sheep. The plaintiff sold and delivered the said sheep to Murray for £105, and gave credit to Murray, and took a promissory note for the price. Thereafter the said Murray delivered the said sheep to the defendant, and returned to him the said written order, and received from the defendant the price of the sheep, £105, for and on behalf of the plaintiff. He denied the allegations as to the sale, and said that the plaintiff still held the promissory note of the said Murray.

The plaintiff's replication admitted the order, which was signed by the defendant, for the purchase of the sheep, and as to the promissory note, he admitted that he accepted it from Murray, but said that it was given by Murray as agent to, and acting for and on behalf of the defendant. He said that the sheep were delivered to the defendant. He had tendered and again tendered the promissory note pending receipt of the money.

Upon the foregoing pleadings issue was joined.

Mr. Burton (with him Mr. C. W. de Villiers) for plaintiff; Mr. Buchanan (with him Mr. Gardiner) for defendant.

Mr. Buchanan said he should like it not to be understood that the replication was admitted to the effect that Murray was not the agent of the defendant for the purpose of giving the promissory note. He was agent for buying the sheep, under certain conditions, but not for giving the promissory note.

Evidence was called for the plaintiff.

Gideon Andries Smit (the plaintiff) said that in November, 1902, Murray came to his farm with a man named Pepler. Witness knew Murray, and he knew that he had no means. Murray produced an order from the defendant for some sheep. The defendant was to pay for the sheep. Witness sold 112 sheep at £1 each to defendant, and seven of the sheep were paid for at the time, leaving a balance due to witness of £105. He knew the order, because of the stamp, and the defendant's signature. Murray gave him a promissory note, which he (Murray) signed. Murray undertook to let him have the money in fifteen days, but witness did not receive payment. In January last witness wrote to Mr. Brinkman, applying for payment for the sheep. Brinkman replied by letter, saying that he gave Murray the money to hand over to witness, that he asked Murray afterwards about it, and that the latter said he had given the money to witness. Murray was away just then, but he (Brinkman) would speak to him again. Witness's attorney, Mr. Bolers, of Fraserburg, then sent a demand for the capital and interest, and enclosed a copy of the promissory note. Brinkman, replying on the 20th February, said that the only explanation he could give was that he paid the money to Murray to hand to Mr. Smit. Witness had since tendered the promissory note to Brinkman, but the latter declined to pay.

Cross-examined by Mr. Buchanan: Murray produced a letter from Brinkman. The letter did not say anything about a promissory note. It said that the sheep were to be sold to Murray for Brinkman, who would pay. The order did not mention a particular number of sheep. Pepler gave Murray the £7 that he paid to witness on account. Witness

waited a time before he let Brinkman know that the money had not been paid, but as soon as he suspected that there was something wrong, he communicated with the defendant. The arrangement was that Murray should return and pay the money to him in fifteen days. Witness heard from his neighbour that Murray had called at his farm, and had only paid him part of the money that he owed him. Witness only got a post once a fortnight. He had not seen Murray since the transaction.

This closed the plaintiff's case.

Mr. Buchanan called

Lambert Hendrik Brinkman, the defendant, who said he was an attorney, and resided at Victoria West. In November he sent out Murray to buy certain sheep. Murray told him he could get ewes from Smit, and witness sent him there, limiting the number to be bought to 200. If he could not get the sheep from plaintiff, his instructions were to go to any neighbouring farms. For this reason the order was not addressed to any one individual. Witness gave Murray a written document, authorising him to buy sheep for him, and stating that he (witness) would settle all accounts for sheep bought by him. Witness's practice was to pay these accounts two or three days after, when the seller came to him.

Mr. Buchanan was proceeding to question the witness relative to what Murray told him about taking the money.

Mr. Burton objected.

The Court decided that the evidence was not admissible, unless agency was established between Smit and Murray.

Mr. Buchanan said he would call evidence later as to agency.

Continuing, witness said he did not give Murray authority to come back and fetch the money. He did not consider Murray was witness's agent, when he came for the purpose of getting the money. Mr Murray came back to witness, who gave him a cheque for the full amount of the sheep, and for £10 extra—£122 in all. Murray was a transport rider. This cheque was given immediately on receipt of the sheep, and of a certain message. Witness got back the order for the sheep from Murray; otherwise he would not have given the cheque. Witness saw Pepler, who came with Murray, and in consequence of what they told him he paid the money. Witness did not pay Murray's expenses out to take the money. The moment Murray brought the sheep, he had nothing more to do with witness, except to receive payment for his services in buying the sheep. Witness received a letter in January from plaintiff, and replied. After this transaction witness employed Murray for another deal. He questioned Murray, who said he had paid the money to Smit.

Cross-examined by Mr. Burton: Witness considered Muray became Smit's agent after he delivered the sheep. Murray showed him no authority from Mr. Smit to receive the money. Witness considered that in giving the money to Murray he was paying Smit.

By the Court: Witness gave no authority for the promissory note. Witness would not have given the money to Murray if what the latter said had not been confirmed by Pepler, and if he had not brought the order back.

Abraham Johannes Pepler said he bought sheep in November for Mr. Brinkman. He went with Murray to Smit's. After a price had been agreed upon, Murray showed Smit the order he had from Brinkman. Smit read it, and gave it back. He said to Murray: "I have no reason to go to the village; you must bring me the money here." Then the promissory note was drawn up. Murray did not write it. Smit gave Murray a time (15 days) in which to bring the money, and Murray left to fetch the money. Witness went with Murray to Brinkman, and heard the former ask Brinkman for the money. Brinkman gave a cheque, which Murray went to the Bank and cashed. Murray told defendant what Smit told him. He said he had given a promissory note, and must take the money to Smit.

Mr. Buchanan said that the defendant had made efforts through the Deputy Sheriff to find Murray, but had been unable to trace him.

Mr. Buchanan was then heard in argument on the facts.

Mr. Burton was not called upon.

Maasdorp, J.: The plaintiff in this case claims from the defendant payment of the sum of £105 as the purchase price of sheep sold and delivered by him to the defendant. It is stated in the declaration that this sale was effected through the agency of a man called Murray, who acted in the transaction as the agent of

the defendant. It is not quite easy to follow the drift of the plea that has been put in by the defendant, but, on the whole, it may be said to amount to this: that the purchase is admitted through the agency of Murray, and the defendant alleges that payment took place by the delivery of the money to Murray on behalf of the plaintiff. The issue between the parties, therefore, now is whether Murray, when he received the money from the defendant, accepted it as the agent of the plaintiff or not. We need not go further, and inquire what the relationship was between the defendant and Murray. The defendant, upon his plea, has to prove that he paid the money to Murray, as the agent of the plaintiff. Now, I may say at once that there is no evidence at all in this case that the plaintiff appointed Murray as his agent to receive this money. The effect of the evidence as to what took place at the time of the sale seems to be this: that after the parties had agreed upon the number of sheep that were to be sold, and upon the price to be given, the plaintiff said to Murray: "The purchase price for the sheep must be paid on this farm"; which would naturally convey the idea that the plaintiff insisted that the defendant should come and pay him on the farm, or that the defendant, through his agent, should pay on the farm; and it cannot possibly be construed to amount to an appointment of Murray as agent to go and fetch the money. When we refer to the promissory note—upon the legal effect of which I wish to say nothing more than in so far as it bears upon the agency of Murray—this promissory note is given by Murray as agent for Brinkman. He promises that the money shall be paid on account of Brinkman, and in this promissory note it is provided that the money shall be payable at the plaintiff's farm. The effect of this is that Murray, as agent of Brinkman, promises, as such agent, to come and pay plaintiff the money on the plaintiff's farm. It appears then that Murray delivered the sheep to the defendant, and made certain representations to him. What these representations were, in detail, does not quite appear, but if we take Mr. Pepler's evidence it would amount to very little more than what the plaintiff himself has told us: that he told Murray the money was to be paid on the farm. Pepler says that that was the representation which was made. What more was said by Murray, and what more Mr. Brinkman might have been able to tell us, was said by Murray, we cannot go into, because the conversation between Murray and Brinkman was not evidence, the agency of Murray in relationship to the plaintiff not having been established. Upon the delivery of the sheep by Murray, he makes certain representations, and receives the money. Mr. Brinkman seems to have been under the impression that upon paying that money he was paying it to the plaintiff, which must mean that he thought he was paying Murray as the agent of the plaintiff. If he did so he must either have misunderstood Murray's position, or he must have been misled by Murray, and that may be for him a very unfortunate circumstance. The only question we have to decide is: Was any authority given by plaintiff to Murray to act as his agent to receive the money from the defendant? And I can only say again there is not a tittle of evidence to support that allegation. Under the circumstances, the payment to Murray was not payment to the plaintiff, and the plaintiff is entitled to recover this money, and judgment must be given for £105, with costs.

Kotzé, J., concurred.

[Plaintiff's Attorney: V. A. van der Byl; Defendant's Attorney: G. Trollip.]

VAN DER WESTHUYSEN v. LOCHNER. { 1903. Nov. 4th. „ 5th.

Building contract.

This was an action brought by Hendrik Jacobus van der Westhuysen, builder and contractor, of Moorreesburg, against George Philip Lochner, also of Moorreesburg, to recover £100 for work and labour done and materials supplied.

The declaration set out that on the 1st February, 1902, the plaintiff entered into a contract with the defendant to build for him a house at Moorreesburg for £100. The plaintiff carried out his part of the contract, and built the said house, and delivered the same to the defendant on the 30th June, 1902. The plaintiff claimed £100, being the contract price of the erection of the said building; or in the alternative,

£100 for work and labour done and materials supplied. The defendant had paid £20 on account of the said building, leaving a balance owing of £80.

The defendant, in his plea, admitted that the plaintiff had been allowed to use and occupy gratuitously certain erven in Moorreesburg, the property of the defendant, during the defendant's pleasure, and said that the plaintiff had erected thereon for his own use and benefit a certain building. The plaintiff was given notice by the defendant that after the erection of the building, in the event of the said erven being sold, the plaintiff would not be entitled to or receive any compensation or payment for the said building. Thereafter the plaintiff proceeded with the erection of the said building, subject to the said condition. Defendant denied that he ever entered into the said contract, or that he had paid £20 on account of the said building. He admitted that he advanced the said sum of £20 to the plaintiff in September, 1902. The defendant sold the said erven to the Kerkraad of the Dutch Reformed Church at Moorreesburg, and the said use and occupation thereupon terminated. He claimed in reconvention for the sum of £20 for money lent.

Upon the foregoing pleadings, issue was joined.

Mr. Burton (with him Mr. C. W. De Villiers) for the plaintiff; Mr. Upington (with him Mr. Alexander) for the defendant.

The plaintiff, Hendrik Jacobus van der Westhuyse, a contractor and builder of Moorreesburg, said the defendant was his brother-in-law. He erected a building on certain property belonging to the defendant, who asked him to put up the building on 1st February, 1902. Witness agreed to erect a building for £100, and supply the materials. It was to be a two-roomed, plain building, for coloured people to dwell in. The site was a bare erf, where there was no camp or fence. He began building on the 26th April; he employed men and supplied material, completing the work on the 30th June. He produced an account showing his payments. He actually expended £95 on the structure. When the building was completed, it was let to two families of coloured people for 15s. a month. When the defendant gave him instructions to build, he said he intended to sell the place. Witness let the property on behalf of Mr. Lochner. On the 21st October, 1902, Mr. Lochner paid him £20 on account at his farm. Witness had asked him several times for the balance, but the defendant asked him to wait until the transfer to the Dutch Reformed Church was passed. The place was disposed of in August, 1902, the defendant telling him that he had sold it for £600. He saw defendant afterwards, but the latter told him he could not pay yet, as he had only received £15 on account.

Cross-examined by Mr. Upington: The house where he lived was built on an erf belonging to his wife. There was ground between the erf and the Dutch Reformed Church property. He had not been anxious to obtain this particular piece of ground. Mr. Lochner desired it. He did not know that the defendant was well off. He believed he was a "middle man." He had not received any rent from the tenants of the building. He told them to pay Mr. Lochner. He denied that he went to Mr. Lochner and asked him for the use of the three erven. He put up the building because the defendant asked him to do so. The defendant did not tell him that if he put up the building, it would be at his own risk and expense. He did not want the Kerkraad to exchange their property with the land in front of his wife's property. Mr. Lochner's erven were in front of the Dutch Reformed Church parsonage. It was not witness's desire that Mr. Lochner should effect an exchange, so that witness could get hold of the piece of land between his wife's property and the railway-station. He did not remember going to Mrs. Lochner to borrow £15 to pay wages. He might have sent a message to Mr. Lochner. He did not get a refusal from Mrs. Lochner. Mr. Lochner gave him £20 on account of the building. He had not had a loan from Mr. Lochner. Lochner told him that if they built a house on the land the Kerkraad would soon buy the land, or he would be able to effect an exchange for the land near the station. Lochner was anxious to obtain the land near the station.

Hendrik William Olivier said he was the chief mason employed on the building in question. He could not have put

up the building at less than £100 if he had to supply all the materials and cart them to the spot.

Cross-examined by Mr. Upington. Plaintiff paid him 5s. and 6s. a day for his services. Another mason was employed there who received 4s. a day. Lochner told him that he should push on with the work. He was now employed by Mr. Albert Kotze, and was receiving 8s. 6d. a day.

Willem Laaker, brick contractor, Moorreesburg, said the house consisted of burnt bricks on the outside and raw bricks on the inside. He should not give an estimate of what the building was worth. His own house cost him £60, and he supplied his own bricks.

Cross-examined by Mr. Upington: The house, if well-built, should be worth £90 or £100. He did not know whether there were holes in the walls. He did not know whether the house was well built. His own house was built of raw bricks.

Floris Smit, farmer, said he went to the defendant's place last month to borrow £2 from him. He saw the defendant, who told him that he himself was in difficulties about money matters with Van der Westhuysen. Lochner told him that he owned money to Van der Westhuysen.

Albert Coetzee, building contractor, said he did not think the building, if well-built, could be put up for less than £100.

Cross-examined by Mr. Upington: He had not examined the building from the inside. He thought it would take about thirty days to erect the building if three masons and four labourers were employed upon it.

Mr. Burton read correspondence which had passed between the attorneys of the parties, in which the defendant, while denying all liability for the cost of the building proposed to settle the matter by paying the plaintiff £20, in addition to the £20 already lent to him. The plaintiff declined this offer.

Mr. Burton closed his case.

George Philip Lochner, the defendant, said he formerly owned three erven opposite the Dutch Reformed Church parsonage at Moorreesburg. Witness's sister owned land abutting upon ground belonging to the Dutch Reformed Church's property. Witness had a conversation with the plaintiff, who asked him to exchange the back erven for the erven in front of his wife's house. The ground of the Dutch Reformed Church was between the plaintiffs' wife's property and the station. The erven on which the plaintiff built had been occupied by the plaintiff. There was no truth in the statement that witness entered into a contract with the plaintiff for the erection of the house. He had not ordered the plaintiff to let the house to coloured people He had not received any rent for the building. He was approached by Mr. Krynauw, a member of the Kerkeraad, but nothing came of the negotiations. Mr. Basson came and saw him. In August Mr. Koch, of Malmesbury, came and saw him and at his request he sold the three erven to the Dutch Reformed Church for £600. He had tendered the sum of £40 in respect of the building He did this on account of the family relationship. The plaintiff was married to witness's sister, and witness's brother was married to plaintiff's sister. He only saw the house on the day that he sold it. For £40 a good building of that size could have been put up. After receiving a report upon an inspection by Mr. Kotze, he made the offer of £40 to the plaintiff.

Cross-examined by Mr. Burton: He bought the erven in 1895, and paid £27 for the three. The erven were situate opposite the D.R.C. parsonage. Witness had had no idea of forcing the hands of the Kerkeraad by erecting a house to be occupied by coloured people. He thought £600 was a fair value for the property. He believed the Kerkraad would have been prepared to pay £100 for the ground. The railway was not running to Moorreesburg when he bought the erven. He did not tell the mason Olivier to hurry up with the erection of the building. Smit did not come to his farm in order to borrow money.

Re-examined by Mr. Upington: Since the railway had been carried to Moorreesburg the value of the erven had considerably increased.

By the Court: He had three erven of his own opposite the D.R.C. parsonage Next to the property of the plaintiff's wife's there was another erf adjoining, which was ground of the D.R. Church, close to the station. The plaintiff wanted him to arrange an exchange with the D.R. Church of the erven near the parsonage for the land near the station, and witness was then to let plaintiff have a

portion of the ground close to the station. The reason why the Kerkeraad bought the ground was not entirely because of the little building that was on it. Four years previously the minister himself wanted to buy it. No mention was made of forcing the hands of the Church by the erection of the little building on the erf close to the parsonage.

Louis Jacobus Kotze, builder and contractor, residing at Moorreesburg, said he knew both of the parties and the erven that formerly belonged to the defendant. He examined the building, and the foundation was not of the best of stone, and was of an average of twelve inches deep. It would take about fifteen cart-loads of stone to build the foundation, and the walls consisted of indifferently burnt bricks. The roof was flat and made of galvanised iron. The doors were of a common description. Witness considered plaintiff's account excessive. The whole place could not have cost more than £38 5s. Had he contracted for the place he would have made £10 out of an estimate of £40.

Cross-examined by Mr. Burton: At first he looked at the quality of the house in passing, but subsequently he entered the house without being asked. The building was bad enough even for a Hottentot. He would allow £10 profit.

Adrian Basson, general dealer, residing at Moorreesburg, said he had some knowledge of buildings, and calculated that the one in dispute would cost about £40.

Cross-examined by Mr. Burton: He considered the price put down far too high.

By Maasdorp, J.: It was only when the house was erected that the Church offered to buy the erven.

Christian Mostert, builder and contractor, of Moorreesburg, said that the walls of the house were partially washed out

Johannes Jacobus Kotze, farmer, of Moorreesburg, said that he bought the building for £4, on condition that he would cart the stuff away. The walls were washed out, and only about 2,000 of the bricks could again be used.

Cross-examined by Mr. Burton: He only took the best bricks.

Helena Lochner, wife of the defendant, said she remembered a letter in which the plaintiff wanted to borrow £15.

This closed the evidence, and counsel having been heard in argument on the facts,

Maasdorp, J.: In this case, the plaintiff sues the defendant for the recovery of £100 as the contract price of a building erected by the plaintiff for the defendant, less the sum of £20 received on account, or, in the alternative, he claims £100 for work done and materials supplied upon this building, also less the sum of £20 received on account. The defendant states in his plea that the plaintiff, at the time he erected this building, was enjoying the use and occupation of certain erven belonging to the defendant, and he erected this building for his own use and benefit, and that it was erected upon the express condition that no compensation was to be paid in respect of it by the defendant to the plaintiff. The defendant also says in respect of the claim for work done and materials supplied that the work and the materials were not of the value claimed in the declaration, and, although he does not admit liability, he tenders the sum of £40 in respect of this building as the value of the work and the materials. Now, with reference to the defence set up by the defendant that the plaintiff was in use and occupation of this ground, and that while enjoying such benefits he erected the building for his own use, I may say at once that there is no evidence set up to support that allegation in the defendant's plea He himself has given no evidence that there was any agreement between him and the plaintiff that the plaintiff was for some reasonable time allowed the use and occupation of his ground. The ground seems to have consisted of three erven not fit for cultivation, and, consequently, without any building upon it, it could have been of no use to the plaintiff at all. In my opinion, therefore, the defendant has failed in the defence that the plaintiff put up this building for his own use and benefit on the ground of which he was then enjoying occupation. We have therefore to look for the motive on the part of the plaintiff for erecting this building, or, for the consideration he was to receive, in respect of it in some other direction. Now, as a matter of fact, the building was erected by the plaintiff on the defendants' ground, and, under the circumstances, when a man

knowingly erects a building on the land of another, of which land he does not enjoy the use and occupation, one would draw the conclusion that the building was to be put up for the owner of the land. In this case the question arises whether there are circumstances to the contrary in the evidence which was given. It appeared that in the erection of this building there was a motive which moved either one or both of these parties, and whether in that motive we will find the consideration which induced the plaintiff to build for his own benefit we have now to inquire. It appears that these erven belonging to the defendant were situated opposite the Dutch parsonage at Moorreesburg, and that there certainly was a wish on the part of the defendant to dispose of these erven to the Dutch Church; but up to the time the building was erected, he had failed to do so. The plaintiff gives direct evidence that the defendant said to him that he wished to have a building put up upon the ground, which should be of such a character that it might be objectionable to the Church authorities, and they would be thereby induced to buy this ground. The plaintiff says it was suggested to him by the defendant that in that way they could bring pressure to bear upon the church. The defendant on his part says that he suspected such a motive to exist, but that it only existed in the mind of the plaintiff, and that he was displeased with that motive, and was certainly not a party to giving it effect. Now, upon the whole, we must gather from this evidence what both these parties contemplated as the object for which the house was being put up. I find no difficulty in coming to the conclusion that both of these parties had agreed to put pressure upon the Church, and, when we come to the conclusion that both were actuated by that desire, then it is not difficult to dispose of this case. There was an object, therefore, in the minds of plaintiff and defendant for the erection of this building; both of them were interested to some extent; and the question is, to what extent we think they were interested. The direct benefit of the disposal of this erf to the Church would have been for the defendant. There may have been some indirect benefit to the plaintiff, for I am inclined to think he had in view some indirect advantage. It is said if the ground was disposed of by the plaintiff, by way of exchange for some other erven, belonging to the Church, the plaintiff would gain some advantage promised him by the defendant. Consequently, both had something to gain; but the greater amount would be that of the defendant. With that object in view, I come to the conclusion upon the evidence that the defendant instructed the plaintiff to erect this building, but the circumstances under which he so instructed him, and the other evidence, leads me to the conclusion that it was to be built for a consideration, and the advantage expected by the defendant was sufficient to induce him to expend some money on the building. I feel convinced that the advantage to be gained by the plaintiff was not such that he would have expended such a sum on this building. The object of the parties was to erect a cheap and nasty building, and the instructions were given that a building was to be put up. That leads me to the conclusion that when the parties came to an agreement that a building should be erected, they did not agree that consideration should be given to the plaintiff in the sum of £100. It strikes me that that would be rather a large sum to be paid by the defendant for the benefit he was to gain, and that it would rather have taken the gilt off the gingerbread if he had paid so large a sum as £100 for a building that was to be destroyed afterwards for the purpose of inducing the Church to come to terms. The agreement to my mind amounted to a request on the part of the defendant that the plaintiff should erect a cheap building, and a promise to pay him for the work and material. The question, therefore, arises, what has he to pay the plaintiff, who, having failed in proving that the contract was entered into for the sum of £100, is now entitled to some consideration for work done and material supplied. He has put in a claim for the sum of £95, and the Court has now to decide whether he is entitled to receive it. Evidence has been given on the part of the defendant that the material and work could not have reached that high sum, because the material was of a very poor description, and the work ought not to have taken a very long

time. Anyhow, this amount has been questioned, and in some respects successfully; for instance as to the value put by the plaintiff upon the timber supplied, and the stones and bricks supplied and plastering done. I come to the conclusion after listening to that evidence, that the sum charged by the plaintiff, is excessive, and, consequently, this amount must be reduced. The defendant contends that it should be reduced to £40, and upon that basis he makes his tender. We have the evidence of Mr. Kotze, who went into the items, that the work done and the materials supplied, would amount to about £38. Now, I do think, when he made that estimate he had forgotten to take into consideration remuneration to the plaintiff himself for his services, and he says if he put up a building of this description he would expect £10 profit. Consequently, upon that estimate the price should be fixed at something like £48. But I feel convinced that Mr. Kotze rather cheapened it on the one hand unduly in the same way as the plaintiff exaggerated it on the other, and something more should be allowed than £48. After considering all the circumstances, we have come to the conclusion that if we allow the plaintiff the sum of £60 he will be fairly compensated for the work done. Defendant has tendered £40 in respect of the building, less £20, money lent, consequently, the tender amounts only to £20. The plaintiff has admitted the receipt of £20, consequently, upon that estimate of the work, he is now entitled to the further sum of £40. The tender made by the defendant is, therefore, insufficient. The defendant has put in a claim in reconvention, which would not affect the figures in this case, because it would not matter now whether that sum was paid in respect of money due or whether it was money lent. It may have been important in this respect to consider whether he had paid it as money due upon the contract, because that would have proved that a contract had been made, but, as we have already decided, an agreement was entered into without fixing the price, it is unnecessary in that respect to decide on the claim in reconvention. We come to the conclusion upon the evidence that there was no money lent. This vague statement by the defendant that he made this advance of £20, is wholly insufficient, and the evidence of his wife is also of a very vague and uncertain character. We therefore find for the plaintiff for the sum of £60, with costs, and for the defendant in reconvention in the claim in reconvention.

[Plaintiff's Attorney: D. Tennant; Defendant's Attorneys: Walker and Jacobsohn.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.].

ADMISSIONS. { 1903. Nov. 5th.

Mr. Searle, K.C., moved for the admission of Peter Edward de Wet as an attorney and notary.

Application granted and oath administered.

Mr. Buchanan moved for the admission of Daniel Patrick Blanfury as a notary.

The matter was ordered to stand over.

PROVISIONAL ROLL.

HENDRICKS V. KEYSER.

Mr. Greer moved for provisional sentence on a promissory note for £165.

Order granted.

BRUEGER V. LOXTON.

Mr. Rowson moved for provisional sentence on a promissory note for £584 10s.

Order granted.

HANAU V. BUCHANAN.

Mr. M. Bisset applied for this matter to stand over.

De Villiers, C.J.: They had all better stand over *en bloc*. What is the ground in this case?

Mr. Bisset: I don't know the ground.

De Villiers, C.J.: The defendant might have something to say.

Mr. Bisset: The original application was for the discharge of the order. Negotiations are apparently going on between the parties with a view to a settlement.

The Chief Justice assented to the application.

At a later stage, Mr. Bisset moved for the provisional order for the sequestration of the defendant's estate to be superseded and discharged.

Application granted.

DENBIGH V. EDWARDS.

Mr. Sutton moved for provisional sentence for £16 18s. 2d., on a promissory note, with interest from the 4th February, 1903, and costs.

Order granted.

MALAN V. SMITH.

Mr. De Waal moved for provisional sentence on a promissory note.

Order granted.

STEYTLER V. KAHN.

Mr. J. E. R. de Villiers moved for provisional sentence on a mortgage bond for £400, with interest at the rate of 6 per cent.

Mr. Williams, for the defendant, said that the person who held the defendant's general power of attorney had called on the plaintiff's attorney, and offered to pay the interest due and the costs of proceedings. In case provisional sentence were granted, Mr. Williams asked for execution to be stayed six months, until the defendant returned to this country from India.

De Villiers, C.J.: I must give judgment as prayed. The debtor should be here to protect himself, and to pay his debts. There is no sufficient ground shown for staying execution. Judgment will be granted, the property to be declared executable.

BROWN LAWRENCE AND CO. V. RAGOSIN.

Mr. Russell moved for the final adjudication of the defendant's estate as insolvent.

Order granted.

BAM AND OLIFF V. BLOOM.

Mr. Alexander, for the defendant, moved for the provisional order for the adjudication of the defendant's estate to be superseded and discharged. Counsel said he was instructed that the defendant had settled the debt, and the costs had been paid. The defendant was away in the Transvaal.

Application granted.

SIVERTSEN V. HAYWARD.

Mr. Smith moved for provisional sentence for £143 6s. 8d., instalment of purchase price of land sold to the defendant, and for interest at the rate of 6 per cent. from the 9th February, 1903, and costs of suit.

Order granted.

HURITZ V. BRAUDE.

Mr. Gardiner moved for the confirmation of a writ of arrest and for provisional sentence for the sum of £40, due upon and by virtue of three promissory notes, each of which was for £25, and upon which £35 had been paid.

The defendant said he owed the money.

De Villiers, C.J., said that confirmation of arrest and judgment would be granted, but defendant was not to be kept in custody.

ILLIQUID ROLL.

HUXHAM V. BAKER. { 1903. Nov. 5th.

Mr. Van Zyl moved for judgment, under Rule 329d, for £46 10s., goods sold and delivered and costs of suit.

Order granted.

WILSON SON AND CO. V. LEW.

Mr. Buchanan moved for judgment, under Rule 329d, for £125 17s. 1d., balance of account for goods sold and delivered by the plaintiff to the defendant at his request during July, August, and September of this year, also for interest and costs of suit.

Order granted.

ZEEDERBERG AND DUNCAN V. BOSMAN.

Mr. Benjamin moved for judgment, under Rule 329d, for £81 12s. 10d., goods sold and delivered.

Order granted.

ESTATE DU PLESSIS V. GREEFF AND WALTER.

Mr. De Waal moved for judgment, under Rule 329d, on a claim that the defendant should give a true and full account of the administration of the estate of the late Mr. Du Plessis, and should produce all papers and so forth belonging to the estate. Counsel said that the plaintiff also had a claim for £100 damages, but this would be dropped.

Judgment in terms of the first part of the prayer, account to be rendered within one month.

AFRICAN AND UNITED COLONIES SUPPLY CO. V. FINLATOR.

Mr. Buchanan moved for judgment, under Rule 329d, for £325, being the final call of 10s. per share upon certain shares in the African and United Colonies Supply and Cold Storage Co., together with interest.

Order granted.

ESTATE WEIDNER V. BRAND. { 1903. Nov. 5th.

Practice — Action for account— Reference to an accountant as referee.

The plaintiff obtained judgment for an account against the defendant who paid the costs of the action. The defendant rendered an account verified by affidavit in which he also stated that he claimed the balance shewn in such account to be in his favour. The Court referred the account to an accountant as referee who found that there was a large balance in the defendant's favour.

Held, *an application to confirm the finding of the referee that the defendant was entitled to judgment for the amount of such balance with costs of the reference without any fresh proceedings.*

This matter had been before the Court on several occasions (see 13 C.T.R., 616 and 726). In the first instance, the plaintiff, Mr. Masterton, who was the assignee in the estate of Weidner, applied for judgment under Rule 329d. The matter was before the Court two or three times, for contempt of Court by defendant, in failing to hand over the papers and to give a full account. The defendant prepared an account, but he was afterwards directed to send in an amended account, which showed a balance due from the plaintiff to the defendant of £745 15s. 2d. The Court ordered that the accounts should be referred to an accountant, and Mr. Maynard Nash was appointed to go into the matter. He now made his report, in which he found that an amount was due by plaintiff to the defendant Brand, against whom judgment was originally given, and that the balance was on the side of the defendant, as he had claimed. In the first instance, judgment was allowed by the defendant to go by default, but on the matter being gone into, the defendant was found to be entitled to the money. Mr. Brand had paid all costs of previous proceedings. Mr. Close moved for judgment, in terms of the referee's report, for £745 15s. 2d.

[De Villiers, C.J.: This is the most extraordinary case I have seen.]

Mr. Benjamin, for the respondent Masterton, said he did not know what the position of his learned friend was now. No claim had been made in reconvention.

[De Villiers, C.J.: No, but then your client asked for an account, and he has got his account. The account shows that he owes the money to the other side.]

Mr. Benjamin said that the plaintiff had been compelled to bring these proceedings, in order to ascertain the real position of the estate, and that it was defendant's duty, in the first instance, to have furnished the required information.

De Villiers, C.J.: There is no doubt, up to a certain point, the defendant (Brand) was in default. He ought to have rendered the account at the proper time, and for his delay he has already paid the costs of the previous proceedings. Ultimately an account was rendered, and that account was referred by the Court, apparently with the consent of both parties, to Mr. Nash. Mr. Nash, after going fully into the account, has come to the conclusion that, so far from the defendant owing anything to the plaintiff, the plaintiff was indebted in a large sum to the defendant. The defendant gave notice that he claims this amount in respect of which the balance has been found in his favour. I think that the plaintiff had sufficient notice in the previous case that an application would be made for judgment. The ordinary practice, no doubt, is that a summons is issued for judgment, but that is not a hard-and-fast rule where, as in a case like the present, the Court has referred the question of an account to an accountant, and the accountant has found a balance in favour of the defendant, and the plaintiff had fair notice that an application would be made to the Court for confirmation of the finding of the referee. I think it would be really reducing technical rules to an absurdity to hold that, under the circumstances, the defendant is not entitled to judgment. The plaintiff must have known that the object of the present application is to obtain judgment for that amount. In my opinion, therefore, there should be judgment in favour of the defendant for £745 15s. 2d., with costs, including the costs of the reference.

[Applicants' Attorneys: Godlonton and Low; Respondent's Attorney: G. Trollip.]

REHABILITATION.

Mr. Benjamin moved for the rehabilitation of Wm. Patrick Rattray, who, he said, had formerly applied, and was then told to apply again in three months.

Application granted.

Ex parte WINTERBACH. { 1903. Nov. 5th

Derelict Lands Act—Opposition to rule.

A Municipality, within the jurisdiction of which derelict erven are situated, has a locus standi *to bring to the notice of the Court any valid objection to a rule issued under the 7th section of Act 28 of 1881, for the registration of title to such erven being made absolute.*

This was an application for a rule *nisi*, under the Derelict Lands Act, to be made absolute. The rule called upon all concerned to show cause why the petitioner should not be registered as the owner of certain five lots of land at Rietvlei and Scholefontein in the division of Tulbagh.

The affidavit of the town attorney to the Ceres Municipality stated that certain lots in question had been the subject of search by the Municipality, in order that the rates could be collected, but they had been unable to trace the owner, and the land had fallen to the Municipality as unclaimed.

Mr. Gardiner (for the applicant) submitted that the Municipality of Ceres had no *locus standi* to appear before the Court to show cause. Section 10 of the Derelict Lands Act gave Municipalities power to apply to Court and get the lands sold for rates in arrear. But here the petitioner had tendered to pay the rates, and was prepared to do so. Counsel thought the best course would be to ask the Registrar of Deeds to make a report on the matter.

Mr. M. Bisset (for the Ceres Municipality) submitted that the Municipality had ample *locus standi* in this matter, because, apart from their duty as custodians of the public interests, and the expense they had gone to in tracing the land, they had under the Act 45 (secs. 134 and 143) of 1882, power to lease derelict lands, and if no person came forward and paid the arrear rates after a certain period the land became the property of the Municipality. Counsel proceeded to urge that certain of the lots claimed had been dealt with, and submitted that so far from the applicant having established a *prima facie* case in

support of his claim to these lots, it was perfectly clear, that, with regard to two lots, at all events, he had not a shadow of right, and that, with regard to the other three lots, they were actually deducted before the remaining extent was laid down.

De Villiers, C.J.: It would appear that these lots have for many years been practically derelict. The Municipality had notice of this application, I presume, seeing it advertised. They now oppose the application to have the rule made absolute. In my opinion, the Municipality has a sufficient interest in the matter to raise these objections. The derelict erven are within the jurisdiction of the Municipality, and although the Municipality may not claim title to the erven, it should not be debarred from bringing to the notice of the Court any valid objection to the rule being made absolute. Now, in the present case the applicant should prove that he has a *prima facie* right. In my opinion he has not made out such a *prima facie* right. The whole of the proceedings seem to me wholly unintelligible. If the applicant's statements are correct, I should have expected declarations of purchaser and seller, to have been annexed bearing out the statements he makes, but no such declarations are produced, and the one which is here is wholly inconsistent with the statements made by the applicant. The only declaration put in is a declaration made by Mr. Stamper. In that he alleges he bought the property from Brink for £1,700, and he declares that he bought the property jointly with the applicant from Brink on the 16th September, 1879. But he declares that the sale, as far as Winterback is concerned was cancelled. And yet this is the document applicant relies upon to establish his title to this property. Possibly there may be other declarations to show the sale was only partially cancelled as far as concerns applicant, and that he has a right; but I am not satisfied from the evidence that the lots in question were included in the property, which he says he purchased. It lay upon the applicant to establish this fact, and upon the evidence the whole thing is in the greatest obscurity. The rule will be discharged with costs.

[Applicant's Attorneys: Herold and Gie; Respondent's Attorneys: Tredgold, McIntyre and Bisset.]

Ex parte STEWART.

Mr. Benjamin moved for leave to the executors to mortgage certain property for the purpose of improving buildings thereon. Applicant had the life usufruct of the property, bequeathed to her by her mother, the property being willed to the children of applicant. It was provided in the will that applicant should not sell or mortgage the property.

[De Villiers, C.J.: You ask the Court to set aside an express provision of the will.]

The restriction was in favour of the children, and it is on their behalf the application is made. The provision in the will is that the applicant shall not alienate or mortgage her interest. The major children consent, and the Master, for the minors, reports very favourably. Counsel read affidavits by the executors to the effect that the improvements would be for the benefit of the heirs.

The application was granted in terms of the Master's report.

BARTRAM AND SON V. ATKINS AND LOVET, CHRISTMAS AND CO.

BARTRAM AND SON V. CAMPBELL, SHEARMAN AND CO.

Agency—Attachment of registration of trade mark rights *ad fundandam jurisdictionem.*

Mr. Searle, K.C., moved for an order on the first respondents (Atkins and Lovet, Christmas and Co.), compelling them to keep a statement of account of the sale of certain goods; and against the other respondents for leave to attach *ad fundandam jurisdictionem*, and to sue by edictal citation.

Mr. Benjamin appeared to oppose on behalf of Lovet, Christmas and Co.; the other respondents were not represented.

It was alleged that the respondents were wrongfully using a certain trade mark, "Golden Churn," the rights in regard to which the applicants alleged had been assigned to them in terms of certain agreements. The trade mark was registered by Henry Atkins in the name of Campbell, Shearman and Co., in the Colony, in 1895. The application was for authority to attach the rights of Campbell, Shearman and Co., under the registration of the trade mark *ad fundandam jurisdictionem*, and for an order on Atkins to keep an account of all sales

of goods bearing the trade mark, pending proceedings being taken to compel Campbell, Shearman and Co. to assign the rights under the registration to the applicants.

Mr. Benjamin put in the affidavits of the respondent. Henry Atkins stated that he had had an agreement with the applicants conferring upon him the sole agency of the Golden Churn butter in South Africa, but this agency was subsequently cancelled in March, 1902, on the ground that the profits on the goods shipped to the South African market were too small. Subsequently, Campbell, Shearman and Co. entered into an agreement with another firm. At a still later date deponent received a further offer of the sole agency for five years.

Mr. Searle, having read an answering affidavit, submitted that the applicant had made out a *prima facie* case of their right to sue Campbell, Shearman and Co., and to an order against Atkins to keep an account.

De Villiers, C.J.: It is unnecessary to hear Mr. Searle further. At this stage I do not wish to say anything that will prejudge the case between the parties, but I consider that the applicants ought to have an opportunity of bringing their action against Shearman. It would be impossible to bring that action unless somewhere or another jurisdiction is founded because Shearman and Co. reside outside the jurisdiction of the Court, and, without the attachment of some property by the Sheriff, plaintiffs could not bring their action, and it is only in order to enable plaintiffs to bring that action that I consider it my duty to grant this order for attachment as prayed. If I refuse the order plaintiffs will be wholly without remedy, whereas by granting the order, though the respondents may be put, possibly, to temporary inconvenience, it will not last beyond the February term. Then in regard to the application for an account, I consider it will be impossible to prejudice the respondent to have to keep an account of what he sells. He would have to keep an account for himself, and it is not much to ask him to keep an account for the applicants. The Court will grant both applications as prayed, citation to be served upon Shearman personally, and to be returnable on the 1st February next, the question of costs of both applications to stand over.

Ex parte ATTRIDGE.

Mr. Searle, K.C., moved for an order authorising the Registrar of Deeds to amend a title deed of certain property, held by the petitioner (who resides in England), at Green Point, on the ground that the remaining extent of his land, which was in occupation, was incorrectly described. Counsel read several affidavits in support of the application. The Registrar declined to amend the deed without an order of Court.

Order granted as prayed.

TRIAL CAUSE.

BRYANT V. HENDERSON.

Principal and agent.

This was an action brought by Percy Barnes Bryant, of Cape Town, against Thomas Robert Henderson, also of Cape Town, to recover £36, for which the plaintiff had rendered himself liable to a third party as agent of the defendant.

The plaintiff's declaration was as follows:

1. The plaintiff resides at Cape Town. The defendant resides at Komgha, in this colony.

2. On or about January 27, 1902, defendant employed the plaintiff as his agent to purchase a certain gold ring from one Seale for the sum of £36 sterling, and requested plaintiff to become personally liable for the said sum to the said Seale, and agreed in consideration of the premises to pay to the plaintiff the said sum within a reasonable time thereafter.

3. The plaintiff, acting as such agent, duly purchased and the defendant received and accepted the said ring, and the plaintiff became personally liable to the said Seale for the said sum, payment whereof had been demanded from the plaintiff by the said Seale, but the defendant did not pay the said sum to the plaintiff within a reasonable time as aforesaid or at all.

4. All times have elapsed, all things have been done, and all conditions have been fulfilled necessary to entitle the plaintiff to claim payment of the said sum of £36 sterling from the defendant, but the defendant, after lawful demand duly made, refuses to pay the said sum, or any portion thereof.

Wherefore the plaintiff claims:

(*a*) Judgment for the said sum of £36 sterling, together with interest *a tempore morae*.

(*b*) Alternative relief.

(*c*) Costs of suit.

To this declaration the defendant pleaded as follows:

1. Defendant admits the allegations in paragraph 1 of the declaration, and says that at the time of the transaction hereinafter referred to, the parties were commissioned officers in the Cape Colony Cyclist Corps, then stationed at Middelburg, in this Colony.

2. Defendant admits that in or about the month of January, 1902, the plaintiff, at his request, obtained certain gold rings on approval from one Seale, a jeweller, of Cape Town, by pledging his (plaintiff's) credit; that defendant thereupon chose, purchased, and received a certain ring for the sum of £42, less 10 per cent. discount, or £37 16s. nett, which sum he undertook to pay to plaintiff, who was personally liable therefor to the said Seale.

3. He says that thereafter in the said month and at Middelburg, he duly paid the said sum to plaintiff. He admits that he has subsequently been called upon by plaintiff to pay for the said ring, and that he refused.

4. Subject to the above, he denies the allegations in paragraphs 2, 3, and 4 of the declaration.

Wherefore he prays that plaintiff's claim may be dismissed, with costs.

The plaintiff's replication was general.

Mr. Upington for the plaintiff. Mr. Buchanan for the defendant.

Mr. Upington said the defendant pleaded payment.

[De Villiers, C.J.: It will be for the defendant to prove his statement.]

Mr. Buchanan said that he accepted the onus of proof and called evidence.

Thomas Robert Henderson, a civil engineer (the defendant), said he had been in the employ of the C.G.R. as district engineer at Touw's River. He knew the plaintiff. Witness held a captain's commission in the Cape Colony Cycling Corps during the late war. Plaintiff was paymaster in the corps. He remembered being at Middelburg in January, 1902, and entering into an arrangement about the ring. Witness was engaged to be married at that time, and he wanted a ring. Witness had been on trek for some months. He met Captain Bryant and other officers at Middelburg, where the headquarters of the Cape Colony Cycling Corps were fixed. He told the plaintiff and the other officers that he could not get a ring, and Bryant thereupon told him that he knew Seale down in Cape Town, and that he would get a ring for witness. Three rings were sent up from Cape Town in the early part of January to the plaintiff, who handed them over to witness. Witness took the rings to his fiancee, who was living at Aberdeen, and, after she had selected one of the rings, witness took the other two back to Middelburg, and handed them over to the plaintiff. He received some cash from the corps, and was paid with an Imperial cheque for £86 12s. 6d. He sent an orderly to the Standard Bank to cash the cheque, and the messenger brought him the money. The cheque was handed to witness by Captain Bryant on the 28th January. He afterwards went into Captain Bryant's office, and paid him £42, less 10 per cent. Witness also paid Captain Bryant 12s. 6d., which he had paid on witness's account for washing in Cape Town.

[De Villiers, C.J.: Did you get a receipt?]

Witness: No, I did not. Continuing, witness said that on the 29th January he left Middelburg, and came down to Cape Town on ten days' leave. On returning to Middelburg, he saw the plaintiff the day after his office had been burned down. The headquarters of the corps were removed to Cape Town on the following day. A Board of Inquiry sat with regard to the fire. Witness came down with Bryant and the other officers, and the plaintiff made no mention on the way down about the purchase money of the ring. Captain Bryant, he understood, was suspended from the corps after that. The corps had to wait some time before they could be disbanded, in consequence of the destruction of the papers in the fire at Middelburg. Witness was afterwards about town for a while, and was within access, but the plaintiff made no application to him for payment for the ring. Subsequently he went into Seale's shop, and he was then asked to whom the ring was to be charged. He told him that he had

already paid Captain Bryant for the ring. Later, witness saw the plaintiff at the Grand Hotel, and asked him about the payment to Seale for the ring. Witness was accompanied by a man named Bradley. Bryant shrugged his shoulders, and said he had forgotten, and he supposed it was all right.

[De Villiers, C.J.: Where is Bradley?]

Witness: Bradley absconded. He is doing five years on time, I understand. He was assistant paymaster to the corps. His attorney, Mr. Trollip, wrote to the plaintiff stating that he had proof that the money had been paid to him by witness. The proof consisted of a letter sent by Bradley, in which he said that he saw the defendant pay the money to the plaintiff at Middelburg.

Cross-examined by Mr. Upington: Witness did not ask Bryant for a receipt after the interview with Seale.

You were suspicious?—I was.

Then why didn't you get a receipt?—No answer.

In further cross-examination, witness said he never received a letter on November 14 from Bryant, asking for payment for the ring. He did not receive a letter again asking for payment in December. Witness received the registered letter, dated the 26th January, and handed it over to his attorneys for reply. When witness made the payment, Captain Bryant, Lieutenant Bradley, and the office orderly were present. Witness believed there was another person present. The ring cost £42, less 10 per cent. Witness asked Bradley to write a letter to Bryant for fear something would happen. Bradley handed him a letter, addressed to Bryant, in March, at the Grand Hotel. Witness gave this letter to his attorneys; he did not forward it to Bryant. Bradley left about October. Captain Bryant told witness that Major Owen-Lewis had written him (Bryant) a letter suspending him. This was in March. After seeing Mr. Seale, witness saw Bryant, and "had it out with him." Witness told him that Seale had said the money had not been paid, and that Bryant had told him (Seale) to charge the amount to witness. Bradley was present, and said he saw witness pay Bryant the money. Bryant said he supposed he had forgotten it, and that it was all right.

Why didn't you get a receipt from him there and then?—It never dawned on me.

Cross-examination continued: Bryant never asked witness for the money when in Cape Town.

Mr. Buchanan closed his case.

Mr. Upington called

Percy Barnes Bryant, the plaintiff. At the time of the ring incident, witness was adjutant and paymaster. Witness undertook to get the rings, and made himself personally liable to Seale. He never told Seale to debit Henderson. Defendant never paid witness for the ring. After February, 1902, when the headquarters were removed to Cape Town, witness asked Henderson casually whether he did not think it time that he paid witness for the ring. Henderson did not answer. Witness spoke to him on another occasion, but did not press for payment, knowing that Henderson had pay to draw. In November he wrote and posted a letter, which had not been returned through the Dead Letter Office. He wrote again in December, 1902, and January, 1903, the latter letter being registered. Witness was South African manager for G. and J. McLachlan, Glasgow.

Cross-examined: Witness did not remember Henderson paying him for washing. He had no recollection at all of any washing transaction. There was trouble about the fire. Witness was not suspended. He asked to be suspended. He was not worried at the time. He was ill for about a month with an affection of the head. In January witness was quite well. Witness was taken ill on the way down, on about the 17th February. The fire occurred a few days previously. Witness had not paid Seale, but acknowledged his liability. He had no recollection of the conversation in the Grand Hotel.

Henry Francis Seale, jeweller, deposed to having received a letter from Byrant relative to a ring. The letter asked witness to send up some engagement rings on approval for a friend; witness believed Henderson was the name. The letter had been destroyed by fire. Witness did not tell Henderson that Bryant had instructed him to charge Henderson for the ring. Witness remembered Hen-

derson saying he had paid Bryant. Witness told Bryant of this, and Bryant replied, "No, he has not." This was a few months after the purchase of the ring—early last year.

Mr. Bryant (recalled) stated, in answer to the Court, that Seale mentioned to him at the beginning of this year that Henderson had told him he had paid witness for the ring. Mr. Seale must be mistaken in saying it was last year. If Seale had told him so this year, witness would have immediately written to Henderson. Seale told him this in about February or March of this year; witness remembered the occasion, because it was when he went into Mr. Seale's shop for a cup for competition at the sports.

[De Villiers, C.J. (to Mr. Seale): When did the fire occur at your premises?]

On the 27th June, 1902.

Was this before or after the fire?—Oh, before the fire, I think.

Mr. Upington closed his case, and counsel were then heard in argument on the facts.

De Villiers, C.J., intimated that he would like to have produced to-morrow (Friday) the carbon copies of the letters which plaintiff stated he had sent to defendant demanding payment for the ring.

Postea (Nov. 6th).

Mr. Upington informed the Court that a search had been made for the original carbon copies of the letters sent by the plaintiff to the defendant demanding payment of the debt, but the copies could not be traced.

[De Villiers, C. J.: That is very unsatisfactory.]

Mr. Upington said that he had a clerk in court who would be able to give evidence.

Algernon Basil Clarke, formerly a clerk in the plaintiff's employ, said that he made carbon copies of letters sent by the plaintiff to the defendant with respect to the debt. There were two letters written on November 14 and December 26, 1902. He made copies also from the carbon duplicates. He did not know what became of the original carbon copies; he believed Mr. Bryant took them away, and left them with his solicitor.

De Villiers, C.J.: This is an extremely painful case, for it affects the credit of two young gentlemen, who have been officers in His Majesty's Army, and to all appearance seem to be moving in respectable society. The case arose out of the purchase of a ring by the plaintiff on behalf of the defendant. It appears that both of them were officers in the Cyclist Corps, and were stationed at Middelburg in January, 1902. The defendant got engaged to a young lady, and, being anxious to purchase a ring for her, he mentioned the matter to the plaintiff, who offered to obtain a ring for him from Seale, in Cape Town. He accordingly wrote to Seale, holding himself responsible for the price of any ring that might be purchased. Seale sent out three rings to the plaintiff, who handed them over to the defendant. The defendant took them to his fiancee, who selected one of them, and, according to the defendant's version, he gave back the two rings—that is not denied—but, as to the ring which he purchased he swears positively that he paid the amount, which was £40, less 10 per cent. discount. He says that he had just received the sum of £86 from the plaintiff as paymaster of the corps, and that he paid the purchase price of the ring out of the proceeds of the cheque. He says, moreover, that a fellow officer (Bradley) was present when this payment was made. The plaintiff, on the other hand, positively denies that any such payment was ever made, and the painful duty rest upon the Court now to decide which is to be believed. The onus of proving payment certainly lies upon the defendant, and, accordingly, the defendant was asked to give his evidence before the plaintiff was heard. The defendant, in his evidence, stated, as I have already said, that Bradley was present. He does not, however, produce Bradley as his witness, and his reason is that Bradley subsequently went to England, and has there been convicted of fraud or forgery and sentenced to a long period of imprisonment. But he stated that he had a document of Bradley's in his possession, a letter written by Bradley, not to him (defendant), but to plaintiff, to the effect that the ring had been paid for. It would appear that this letter was obtained by the defendant from Bradley after the defendant had come to Cape Town. He went to Seale's, and being informed by Seale that the plaintiff had not yet paid him for the

ring, he says he wanted some evidence to prove that he had paid for the ring, and accordingly he requested Bradley to write this letter. He says also that he subsequently met the plaintiff at the Grand Hotel, and there he spoke to the plaintiff about the payment for this ring, and informed him that the ring had not been paid for, and the plaintiff said, "Oh, it will be all right; I will settle up," or words to that effect. But the surprising thing, to my mind, is that the defendant did not at any time inform the plaintiff of this document which he had in his possession from Bradley. I am not sure whether Bradley was still in the Colony then or not—that is not perfectly clear—but if Bradley was still in the Colony, I should have thought that the first thing the defendant would have done would have been to take his friend—they were all fellow-officers—to take his friend Bradley to the plaintiff, and convince him, in the presence of Bradley, that the money had been paid; but he does nothing of the kind, nor does he produce to the plaintiff the letter which he says Bradley had written to him (the defendant). Now the object of Bradley writing the letter must have been to convince the plaintiff of this money having been paid, and yet the defendant does not show the letter to the plaintiff himself. That is a circumstance in the case which has not been explained, and which certainly needs explanation. The next circumstance is this, that on the 26th January of the present year, the plaintiff wrote to the defendant the following letter: "My Dear Henderson,—I am very much surprised that you have not yet replied to my repeated letters with reference to the ring I purchased for you, but for which I have not received payment. It is now over fourteen months since I did you the favour of getting the ring for you. Therefore, unless I receive payment for the same within fourteen days from date, I will take action in the Supreme Court without further delay." In this letter there is a statement that he (plaintiff) had repeatedly written to the defendant, and had received no answer. Well, what is the reply to that? Not a friendly letter from one officer to another, saying, "I have never received your letters"; nothing of that kind is said. Some question was raised whether previous letters had been sent, and the plaintiff said that he had taken carbon copies, which he had kept, and an opportunity was given to the plaintiff to produce those carbon copies, and he does not do so, and this circumstance is against the plaintiff; but it is not conclusive at all, because those letters, if what this clerk says is correct, were written. Now, in this letter of the 16th January, the plaintiff said he had written a number of letters, and the defendant in his answer does not deny it, though he now denies it in the box. He says this was the first intimation he had had from the plaintiff that he had not been paid. If it was the first letter—the two were friends, they had been fellow-officers—I should have thought what he would have done would have been to write saying, "I have never received your letters; you are entirely mistaken. I have paid the money, and meanwhile you should not proceed." But what is the answer? The answer to that is a letter from his attorney, on the 6th February, 1903, saying that he is instructed by Mr. Henderson to reply to his (the plaintiff's) letter, and that he repudiated the statement that he had not paid him for the ring. "My client," he added, "has witnesses to the payment, and does not intend paying the amount twice. Any action taken against him will be resisted. I have proof of payment in my possession, which you can see by calling at the office." As I said before, there is not a word about not having received the letters. But where is the proof? Bradley is not here, and the defendant must have known that he was not here. It does look very much as if there was an intent to make the plaintiff believe that defendant had witnesses which he had not at the time, and which he must have known that he had not. Bradley was not in this colony at the time. I asked him what he meant by that. What he said he meant was that he had that letter in his possession from Bradley to the plaintiff saying that the money had been paid, and yet in his letter he says, "I have proof of payment in my possession, which you can see by calling at my office." It seems to me that that was a kind of what is vulgarly known as "bluff" on the part of the defendant. That is the impression on my mind, I am sorry to

say. Well, then, there is this further circumstance, which I cannot lose sight of, that the defendant says that when he went to Seale, Seale told him that the plaintiff had told Seale that he (Henderson) was responsible for the ring. Now Seale was called, and he denied that absolutely, so that Seale's evidence on this point was against the defendant. Unfortunately, however, on another point, Seale's evidence does not support the plaintiff's version, and that is the circumstance that I have carefully to consider in coming to a decision, because, according to the plaintiff, he was not aware that the defendant repudiated his liability until this year. He says he did not know early last year that the defendant ever alleged that he had already paid the money, whereas Mr. Seale says it was early last year when the plaintiff went to his shop, that he informed Seale that the defendant had told him that he (the defendant) had paid for it. That is a circumstance certainly against the plaintiff. But still, taking all the circumstances into consideration, I am of opinion, as I am forced to come to a decision, that on the whole the balance is in favour of the plaintiff, and, therefore, the judgment of the Court will be for the plaintiff, with costs.

[Plaintiff's Attorney: J. F. Bernard; Defendant's Attorney: G. Trollip.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

FRIER V. DIVINE, GATES AND CO. { 1903. Nov. 5th. „ 6th.

Shipping agent — Negligence — Measure of damages.

Defendants, a firm of shipping agents, having received and accepted instructions to forward certain goods with all possible speed by passenger train to plaintiff at V., neglected for more than a month to do so.

Held *(1) That defendants had been guilty of negligence and that plaintiff was entitled to damages.*

(2) That the measure of such damages should be the difference in value at V. of the goods between what it would have been had they been timeously forwarded and their value when they actually arrived.

(3) That as there was no evidence on this point only nominal damages could be awarded.

This was an action brought by James Frier, of Victoria West, against Divine, Gates and Co., to recover the sum of £150 damages by reason of the defendants' delay in forwarding certain imported goods.

The declaration set out that in September, 1903, certain goods, the property of the plaintiff, arrived in Cape Town by the Carisbrook Castle. The shipping documents were forwarded to the Standard Bank, Cape Town, on September 30. The plaintiff paid in his cheque, and the bank delivered the said documents to the defendant, who was to forward the said goods to the plaintiff. The defendant was acting as shipping agent, and it was his duty to forward the goods immediately. On November 22 the plaintiff refused to accept the goods, and claimed £150 as damages sustained.

The plea admitted the first paragraph, but the defendant says that he knew nothing of the goods having been despatched from England and of the documents having been deposited with the bank. The defendant denied that on presentation of the draft to the bank the plaintiff paid the same. The Standard Bank at Cape Town handed to the defendant a bill of lading to clear and bond certain goods pending further instructions of the said bank The defendant denied that he was acting as shipping agent, and stated that the congestion on the line was the cause of the delay.

Mr. Close (with him Mr. Sutton) for plaintiff; Mr. Benjamin for defendants.

James Frier, plaintiff, said that in September last year he wished to set up business in Victoria West, and, with a

view to that, he ordered certain goods from Bowman and Co., of England. He wanted the watch glasses and tools for the purpose of a jewellery business at Victoria West. In September last he received notice from the bank that the goods were in Cape Town. A cheque was lodged for the amount of the draft. On the same day, September 13, he wrote the defendants to forward the goods, and stated that he had paid the draft at the Standard Bank. In Beaufort West he had dealings with the defendants. Subsequently he received a letter from the defendants that the bank had no trace of the transaction. On October 5 he again wrote, pressing for delivery, and again stating that he had settled with the Standard Bank. On the 20th November the defendants wrote, saying that they had much pleasure in forwarding goods by passenger train. Witness immediately replied to the effect that he had pointed out to the importers that the goods had not arrived, and cancelling the order. On November 26 the goods arrived, and witness despatched them back at once. On December 27 the Railway Department again forwarded the goods, and witness sent them back again. When the goods arrived again he wrote the defendant that he would not accept them. In February the defendants wrote, saying that the goods were being stored for plaintiff. When the goods did not arrive he looked like a "fool."

Cross-examined by Mr. Benjamin: He did not know that Legg and Co. were acting as agents for Messrs. Divine, Gates and Co. He knew nothing of what happened in December last.

Gilbert Richard Maltravers, of the Standard Bank, produced the correspondence between the Bank and Divine, Gates and Co. On October 8 the defendants were again written to that they were to hold over the goods for the consignee's disposal. After Frier had paid his cheque there would have been no difficulty in releasing the goods if the Bank had the plaintiff's instructions.

Cross-examined by Mr. Benjamin: The bank received the bill of lading from their London office. The goods were not released until October 8. It was possible the defendants had inquired about the goods at the Bank, but he did not notice that the invoice was made out to "J. Frier, Cape Town."

By Kotzé, J.: It was not until October 8 that Cape Town received notice from Victoria West that the goods were to be released.

By Maasdorp, J.: He was positive he acted on instructions from Victoria West, and not from Divine, Gates and Co.

Horton Jenry, managing clerk to the defendant firm, said that on the 6th September he remembered receiving an order from the Standard Bank, and at the same time the shipping documnts to clear the goods. The invoice was made out to "J. Frier, Cape Town." There were no goods in their custody at the time the plaintiff first wrote. Enquiries were made at the time, and as a result he noted "No trace." A letter was written to the plaintiff to that effect on September 30. No notice was taken of the second letter. At that time there was a great congestion on the railway. He had complained repeatedly to the railway officials of the difficulty in procuring trucks. The case was still at the stores. The offer of £25 was conjointly with the bank, without admitting any liability whatever. He would not forward goods by passenger train except he received special instructions.

Cross-examined by Mr. Close: The case arrived on January 6, and he wrote to the plaintiff a month later.

Re-examined by Mr. Benjamin: His instructions were not to release the goods until October 8. In the ordinary course he would send an order to the storeman, who would complain if he could not get facilities from the Railway Department. Very often they were supplied with three wagons after asking for twenty. He did not make a sudden rush to clear the goods.

By Kotzé, J.: When he got the letter from Frier, and the bank told him they had no documents, he looked on the matter as closed. Frier originally issued summons against the bank, and as they did not want to go to court they offered a compromise, but he could not say why Frier did not insist on his action against the bank.

James Lebraunt, storeman to the defendants, said that in the ordinary course of things he would see goods went forward to the railway. He did not remember the case in question. There was a great rush at the time at the railway, and goods were only received for

certain stations on certain days.

Cross-examined by Mr. Close: He had no record to show how often cases were sent to the railway, but it was a common practice to send small consignments by passenger train.

Walter Powis, in the employ of the defendant firm, said he remembered seeing Mr. Maltravers in November. Mr. Maltravers instructed him to send the goods by passenger train, and on the 19th they were forwarded to Victoria West. The storekeeper had complained to him that he could not get wagons.

Gilbert Maltravers, recalled, stated that he told the defendants on October 8. to send the goods forward as speedily as possible, but he could not say whether he specified goods or passenger train.

Mr. Close said that the agency had been clearly established by the letters of instruction sent on various dates in September and on October 1 to clear the goods and forward them by passenger train. The letter of October 1 must have reached the defendants by October 3 or 4, and been fresh in their mind when the bank informed them of the release on October 8.

[Maasdorp, J.: Then do you only claim that the delay began on October 8, or do you say it was on September 13?]

Mr. Close said that in view of the distinct order of the bank to hold the goods till further order, he must leave the delay before October 8 in the hands of the Court.

[Maasdorp, J.: When the agency began on October 8, all instructions had been given before that. Was he not bound to wait for further instructions?]

The instructions had been received from plaintiff, and became operative as soon as the bank gave informations of the release.

Mr. Benjamin argued that the defendants were bound to await instructions after the bank had released the goods. They had no relation with the plaintiff up till that time. When notice was received, the goods were dispatched with all attainable speed.

Maasdorp, J.: In this case the plaintiff alleges in his declaration that the defendant undertook as his agent to despatch certain goods from Cape Town to Victoria West on or about 13th September, 1902, but that through negligence the defendant failed to despatch these goods until about November 19. The plaintiff says, in consequence of this delay, he has suffered damages, which he seeks to recover in this case. It seems that the goods in question were consigned by Messrs. Bowman and Company from England to the plaintiff, who resides at Victoria West, and they were consigned upon a bill of lading accompanied by other necessary documents, which were sent to the Standard Bank, and the bill of lading was made out to order. This bill of lading and other documents were to be held by the Standard Bank until the consignee honoured or paid a draft drawn upon him by the consignor for the price of these goods. Upon the arrival of the goods the Standard Bank instructed the defendant to place the goods in bond, to be delivered up only upon the written order of the bank. The defendant, acting upon behalf of the bank, placed the goods in bond. On the 13th September, when the draft was paid by the plaintiff he became entitled to receive all the necessary documents, which he required in order to obtain possession of the goods. He wrote to the defendant, instructing him to obtain the necessary documents, and obtain delivery of the goods and despatch the goods for him to Victoria West. That letter was dated the 13th September on the same day upon which the draft was paid. Upon receipt of this letter by the defendant someone on his behalf proceeded to the bank in order to obtain the necessary documents, and I think it is quite clearly proved that at that time the bank informed the defendant that the goods could not be traced and they were not in a position to hand them over to the defendant for despatch to the plaintiff. The defendant on the 30th September informed the plaintiff of this, and the matter remained in that position until the 8th October. On the 8th October the bank for the first time gave the necessary written instructions to enable the plaintiff to obtain his goods. These written instructions were sent to the defendant, who was authorised to hold the goods at the disposal of Mr. Frier. Up to that time it was clearly impossible for the defendant to deal with the goods on behalf of the plaintiff as the plaintiff's agent. The bank had failed upon the

request of the plaintiff's agent to put the defendant in possession of the documents which he required in order to do his duty in despatching the goods. Consequently, whatever the position of the defendant was as agent up to the 8th October, it was certainly not owing to his delay that the goods were not sent forward, as the bank was unable to comply with his request to deliver up to him the necessary documents. On the 8th October the goods were placed at the disposal of the defendant, on account of Mr. Frier, and it then became the duty of the defendant to forward the goods, if he was acting as the agent of the plaintiff; but I think he is precluded from raising that question upon the pleadings, where it is admitted that on the 8th October the defendant became the shipping agent of the plaintiff. I think, however, there is sufficient before the Court to show that the instructions given to the defendant to send forward the goods by the letter of the 13th September, and again by the letter of the 1st October, must have been in the contemplation of the parties when the goods were placed at the defendant's disposal, for Frier, and, although they might not have had inspection at the time, they were aware of the instructions given them, and they were prepared to act upon these instructions. If we refer to a letter written by the defendant to the bank, when the question arose between the bank and defendant, it appears the defendants admit that they received instructions on the 30th September to forward goods by passenger train; but, as they then found no goods in the name of Frier, he looked upon the matter as closed. Here they admit having received instructions, and when the goods were placed at their disposal they proceeded to act as agents under those instructions. The question now is whether they were guilty of negligence in forwarding the goods after the 8th October. It seems that the instructions given them in both the letters of the 13th September and the 1st October were that the goods should be forwarded by passenger train. Now, if we once hold that these were the instructions under which they became agents, we must take the instructions to the full extent, and conclude that they were instructed as agents to forward the goods by passenger train. The defendants say that they made the best efforts to send the goods by goods train, but owing to the congestion of traffic, they failed for more than a month to find carriage by rail from Cape Town to Victoria West. Now, it is almost admitted by the counsel for the defence that the evidence on that point is very unsatisfactory. No one in the employ of the defendant was able to state whether they made any efforts to send these particular goods, or to get accommodation for that particular case. The conclusion I come to is that the case was really lost sight of, and that it was no one's special duty among the clerks to see to it; but whatever the defendants may have done with a view to forwarding by goods train, it was the duty of them to send the goods by passenger train. This was ultimately done, and in that way the goods reached Victoria West, and, consequently, there was delay on the part of the agent in despatching the goods after the 8th October. That delay would be of some five or six weeks, and if an agent fail in performing his duty, and cause any loss to his principal, he is bound to make good that loss. The plaintiff claims damages, and bases his damages upon the value of the goods which should have been delivered, together with the profit he might have made if the goods had arrived in time. The measure of damages generally when goods in trade are despatched from one place to another, and where negligence has prevented the delivery in time, is the difference between the market value of the goods at the time they should have arrived and at the time that they did arrive. That general rule is only departed from when there is special evidence that the parties had something else in contemplation. The defendants could only be aware they were sending some goods in connection with a watchmaker's establishment. The plaintiff would therefore be entitled to the difference between the value of the goods when they should have arrived and the value when they did arrive shortly after the 19th November. There is no evidence before the Court as to this value, consequently the Court cannot measure the damages or estimate the damages by the guidance of such evidence. The conclusion we therefore come to

is that the amount of damages has not been proved; but there is no doubt there has been a breach of contract, and that the plaintiff was put to a great deal of inconvenience, and that some loss was incurred by him. Under all the circumstances, he is entitled to damages for breach of contract, but the Court can only allow him nominal damages, and judgment will be entered for the plaintiff for £5 damages, with costs.

Kotzé J.: Two questions arise for decision. The first is the liability of the defendants as agents of the plaintiff. Quite apart from the plea, which admits that the defendants acted as agents for the plaintiff, it seems clear to me upon the facts that, on and after October 8, the day on which the Standard Bank informed them that the case of goods was released and that they would therefore hold the goods for and on behalf of the plaintiff, the defendants became and acted as the plaintiff's agents. It appears that Bowman and Co., of London, sent out the case of goods, consisting of watchmaker's tools, to the Standard Bank under a bill of lading to order, accompanied by a draft on the plaintiff. The bank sent the draft to the plaintiff at Victoria West, who duly paid it by cheque on the 13th September, 1902. On the same day the plaintiff wrote to the defendants, who, as shipping agents, had cleared some goods for him on a former occasion, informing him of the consignment of the case of goods, and that he had paid the draft, and requesting them to forward the case without delay by passenger train to Victoria West. The defendants thereupon made inquiries at the Standard Bank, Cape Town, and were told that the bank had no trace of the case of goods. This the defendants communicated to the plaintiff by letter of 30th September. On the 1st October the plaintiff again wrote from Victoria West to the defendants referring to his former letter, and requesting the despatch of the case of watchmaker's tools by passenger train to Victoria West. For some reason, which does not quite clearly appear, the letter was not posted for two or three days. At any rate, it was received by the defendants shortly before the 8th October. It is contended on behalf of the defendants that they are not bound by any instructions contained in these two letters, which were written and received at a time when the defendants were not yet the agents of the plaintiff. But if such a contention is to be allowed, it will follow that, if a consignee who lives in the country were to write to shipping agents at a port with instructions how they are to deal with or forward his goods, and such instructions are received a day before the bank notifies to the shipping agents the release of the goods, the shipping agents who thereupon agree to hold the goods for the consignee may with impunity disregard his instructions, and if damage is suffered in consequence by the consignee, may successfully plead that the instructions, having been received a day before they undertook the agency, are not binding upon them. I think, therefore, that we must hold that as the defendants untook the agency they were bound by the express instructions given by the plaintiff. It consequently became the duty of the defendants to forward the case of goods by a passenger train instead of by a goods train. Owing to the congested state of traffic on the railway in October, 1902, the case could not be forwarded by a goods train, although it was quite possible and an easy matter to have sent it on to Victoria West by a daily passenger train, as directed by the plaintiff. The defendants are therefore liable to the plaintiff for the loss and damage suffered by him in consequence of the delay.

The next point is to what amount of damages is the plaintiff entitled? He adopted the unusual and extraordinary course of sending the case back by rail from Victoria West to Cape Town, intending to re-ship it to England. It would have been more correct to have sold the goods, for which he no longer had any use, and to have notified the defendants that he held them responsible for the difference in price. This course was, however, not adopted; nor do we know the market value of the goods, and whether at the present moment they are not of greater value than in October, 1902. The plaintiff also claims for loss of profit and business which he might have had and made had he received his watchmaker's tools in proper time. Even assuming that this is a case in which loss of profit can be taken into account, a matter which is certainly open to doubt, then there is no satisfactory evidence of such loss of profit on business before us.

There is the general statement of the plaintiff that he made a working profit of £20 per month, but this is not supported by the production of any books, nor is it substantiated in any other way. The plaintiff also says that in October and November, 1902, there was a large number of troops, amounting to several thousands, stationed at Victoria West, and he could reasonably have made up to £40 a month profit as a working jeweller and watchmaker, if he had possessed the necessary tools, which were in the case of goods in question. But a mere vague and general statement of this kind is not enough to justify the Court in awarding anything substantial by way of damages. I, therefore, agree with my brother Maasdorp in holding that only nominal damages can be awarded to the plaintiff to the extent of £5 and costs.

[Plaintiff's Attorney: G. Trollip; Defendants' Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

ILLIQUID ROLL.

HARDY V. WILKES. { 1903. Nov. 6th.

Mr. Benjamin applied for judgment for the sum of £60, upon a dishonoured bill of exchange, or, in the alternative, money lent, and costs.

No appearance was entered for the defendant.

Judgment entered as prayed.

VAN HEERDEN V. SCHOLTZ.

This was a motion for judgment in default of plea against one Scholtz, who resides in German West Africa, for transfer of certain two plots of ground at the top of Longmarket-street, Cape Town, purchased by the plaintiff on a broker's note from the defendant's broker, Pfeiffer, in July, 1899, and also for £100 damages. Mr. J. E. R. de Villiers was for the plaintiff. The defendant was barred from pleading.

Daneel Cornelius van Heerden (the plaintiff) said he bought the property from the broker, under the broker's note. He paid £10 in cash, and afterwards sent a cheque for the balance of £60. Witness received a letter from Mr. Pfeiffer, returning the cheque, and saying he could not give witness transfer then. Further correspondence ensued between witness and Pfeiffer. He had repeatedly demanded transfer from Pfeiffer, who always told him that he could not get hold of Scholtz. On the 17th August witness's attorney wrote to Freeman, who held defendant's general power of attorney, demanding transfer of the land. Witness re-sold the lots in August of last year. He had other three lots as well, and he sold the whole for £340. His attorney had been asked for transfer.

By the Court: The reason why he had only brought the action now, four years later, was that he had been promised transfer. He had got occupation of the land. He had sold the property to Combrinck. Combrinck had not threatened him with a claim for damages. He should be satisfied if he got immediate possession of the ground.

Judgment for the plaintiff, with costs. transfer to be passed within two months.

GENERAL MOTIONS.

MUSICAL COPYRIGHT COMPANY V. SIMMONDS.

Mr. Gardiner moved on notice for an interdict restraining the respondent from selling, exhibiting, or disposing of certain pieces of music, which were alleged to be the copyright of members of the plaintiff association, pending an action to be brought. Counsel read an affidavit in support of the application.

Mr. Greer, for the respondent, contended that the applicants had made out no *prima facie* case on the affidavit put before the Court to grant an interdict. There was no allegation that the pieces of music were copyright in this colony. The plaintiffs admitted, in their affidavit, that the pieces were not already

registered in this colony. According to the law of this colony, the importation of books, which were not registered under section 3 of Act 2 of 1873, was prohibited, but there was no prohibition attached to pieces of music that were not registered.

Mr. Gardiner said that there was another case—Boosey and Co. v. Simmonds—in which a similar point was raised, and the question was whether both cases should not be heard together. His learned friend, Mr. Searle, was engaged for the applicant in the other case. He had been under the impression that his learned friend, Mr. Greer, intended to apply for a postponement.

Pending an action to be brought by plaintiffs, an order was granted requiring the respondent to keep an account of such sales as were mentioned in the notice.

FLAUM V. GERHARD AND HAY.

Mr. Gardiner moved for an order against the Bank of Africa, or any other person, firm, or company, in this colony, for the attachment of any funds in their possession belonging to the defendants from the sale of any goods, being portion of the consignment forwarded by the S.S. Rostock, from parting with the same, to enable the petitioner to found jurisdiction for an action to be brought by him against the defendants. It appeared that a dispute had arisen between the parties as to a contract for the forwarding of a cargo of timber from Russia, the amount demanded on the bill of lading being more than the plaintiff said that he agreed to pay.

Rule granted, calling on the respondents to show cause on the 12th November why the money from the sale of the said goods should not be attached *ad fundandam jurisdictionem*, the rule to operate as an interdict in the meantime.

WIENER AND CO. V. VAN DER PASS AND CO.

Mr. Gardiner moved for an order for the attachment of certain goods and money belonging to the defendants, and now in the control of Valentine Dusseau and Co., of Cape Town, in order to found jurisdiction, pending an action to be instituted by the petitioners, and for leave to sue by edictal citation. Petitioners said that the defendants owed them £481 6s. 1d., upon the adjustment of certain accounts with them.

Rule granted, calling upon Valentine Dusseau and Co. to show cause, on the 12th November, why an order should not be granted as prayed.

Postea (Nov. 19):

Mr. Buchanan, for the respondents, said that he did not object to the plaintiff's suing Van der Pass and Company. Counsel put in an affidavit from the manager of Valentine Dusseau and Co. The affidavit of the manager set forth that with the exception of 20 cases of beer and 4 cases of compressed vegetables, they had no *bona fide* property of the respondents. The respondents had paid dues, rent, and other charges, and were willing to hand the goods over on payment of same. They had no moneys in their possession.

Order granted to attach the 20 cases of beer, the property of the respondents, in the hands of Valentine Dusseau and Co., and leave granted to sue by edictal citation, return day fixed for the first of February, costs to be costs in the cause, respondent appearing to pay his own costs.

Ex parte DON.

Mr. De Waal moved for leave, on behalf of the petitioner, who resides in Cape Town, to sell certain landed property situate at Port Elizabeth, without the leave and assistance of her husband, to whom she is married in community. Petitioner was married at Kimberley to Alexander Don; they lived happily together for a time, but subsequently, in 1898, they agreed to live apart, in consequence of her husband's cruel treatment. Since 1898 applicant had had no communication with her husband, and the last she heard as to his whereabouts was that he was in Port Elizabeth about a year ago. Petitioner had had certain property bequeathed to her in Port Elizabeth, and she desired to sell this by auction, and invest the proceeds in landed property, in or near Cape Town.

A rule was granted, calling on Alexander Don to show cause on the 12th December why an order should not be made as prayed, rule to be served personally on the respondent, failing which one publication in a Port Elizabeth newspaper.

Ex parte INGRAM.

Mr. M. Bisset moved on behalf of the petitioner, who is executor dative of the late John Ingram and his spouse, for an order confirming the sale by auction to the petitioner of certain property in the division of George, and authorising the passing of transfer.

De Villiers, C.J., said that the purchase price (£165) was less than the Divisional Council valuation of the land, and he could not make an order upon the present application. If the applicant was prepared to pay the Divisional Council valuation, then he would make an order.

Ex parte HATTINGH.

Mr. Alexander moved for an order authorising the Master to pay out certain moneys standing to the credit of the petitioner, who is a minor, to enable him to purchase stock to the amount of £600, to prosecute his farming operations.

Order granted as prayed.

Ex parte MULDER.

Mr. Van Zyl moved for the appointment of a *curator ad litem*, to represent one of the lower riparian proprietors in a water dispute in the division of Oudtshoorn.

Order granted as prayed.

Ex parte RAGMAR.

Mr. Van Zyl moved for the petitioner for leave to raise £200 on a mortgage on property at the corner of Pepper-street, Cape Town, belonging to an estate of which he is executor testamentary.

Order granted as prayed.

Ex parte FOUCHEE.

Mr. Burton moved for leave to sell certain property in the district of Wode house, of which petitioner's eight children are heirs. The children are entitled to a tenth share in a certain farm, and as it would be impossible for them individually to utilise their share, and petitioner had been offered £400 for the said portion, he asked for authority to accept the offer. Counsel admitted that there were difficulties as to the division of the farm, raised by the will of the testators.

The matter was ordered to stand over and notice to be given to all interested as to the application.

GROOM V. HERMAN.

Mr. Alexander moved for leave to attach certain money standing to the credit of the defendant, Charles Herman, in the Bank of Africa. Petitioner went into partnership with the defendant, advanced £50 upon a promissory note, defendant had left the Colony, and petitioner had obtained judgment in the Magistrate's Court. A warrant of execution was issued, but a return of *nulla bona* had been made. A sum of £16 14s. 6d. was standing to the defendant's credit in the Bank of Africa, which petitioner asked to be allowed to attach.

Order granted as prayed.

BANGEE V. DUSTAY.

Mr. Burton (with him Mr. Upington) moved for a rule *nisi* to be made absolute, restraining respondents from disposing of certain goods at Lady Grey, in the division of Aliwal North, pending an action to be brought by the plaintiff.

Mr. Alexander, for the respondents, Whitaker, Pattison, and Brooke, assented, but asked that they should be relieved from all obligations as to costs.

Rule made absolute, no order as against the respondents, Sali and Whitaker, Pattison and Brooke, costs as against the defendant Dustay to be costs in the cause.

Ex parte KOHNE.

Mr. Pyemont moved, on behalf of the petitioner, for leave to raise £500 on mortgage upon land at Claremont Flats to enable him to build two houses. Minors were interested in the matter.

The Mater's report was favourable.

Order granted in terms of the Master's report.

TUROK V. CHRISTOPOULUS AND ANOTHER.

Mr. Alexander moved for leave to alter and amend a certain contract of lease so that in the preamble the description of the premises let by the applicant for a term of three years to the respondents should read "165 Commercial Buildings, Albert-road, Woodstock." instead of "161, Commercial Buildings, Wood-

stock." The petitioner said he was the owner of the property in question, and that he had by mistake described the shop he intended to lease to the respondents as No. 161, whereas he now found that it was No. 165. The respondents pressed to have the right to occupy No. 161, and threatened an action in the Supreme Court for damages unless the terms of the lease were observed. Petitioner supposed that the reason why the respondents wanted No. 161 was because it was a corner shop. This shop was occupied by an Indian coolie.

Mr. Pyemont, who appeared for the respondents, who are Greeks, read their answering affidavit, which was to the effect that No. 161 was the shop intended to be leased, and that they had been promised the corner premises by the applicant. They had occupied the shop No. 165 for some months, but they only went there temporarily, the applicant informing them that at the end of the tenancy of the present occupier they should be allowed to have No. 161, and that No 165 would not be let to anybody engaged in the fruit trade. Respondents had tendered the rent of No. 161 to Messrs. Silberbauer, Wahl and Fuller, attorneys to the applicants, with a demand for possession.

Mr. Alexander read the replying affidavits of the applicant, denying several of the statements made by the respondents.

After hearing counsel in argument on the facts,

De Villiers, C.J. said that the probabilities seemed to be in favour of the applicant, but as the respondents seemed to wish the case to be tried by action, he would order the applicant to proceed by action, costs to be costs in the cause.

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

WELLS V. DELBRIDGE. 1903. Nov. 6th. „ 7th. „ 10th.

Negligence — Servant — Scope of employment — Independent contractor.

The defendant had contracted with one I. to do certain work, and he gave his foreman D. general instructions to do "any little job" on the premises which I. might require. Pursuant to these instructions D. cut down a certain tree and left a portion of it lying across a public footpath. The plaintiff fell over this in the dark and sustained serious injuries.

Held, *that D. had been guilty of negligence, and that as he was a servant of defendant (an independent contractor and not a servant of I.), and had in cutting down a certain tree acted within the scope of his employment, the defendant was liable for his negligence.*

Semble: *If an employer instructs his servant to do any service for another and the servant is guilty of negligence in the performance of that service, his ordinary employer must be held liable, unless he can show that at the time the work was done his servant was under the direction and control of such third person.*

This was an action for the recovery of £4,000 as and for damages. The declaration set forth that the plaintiff now resides at Beaufort West, and was postmaster at Lower Paarl at the time the cause of action occurred. The defendant was a builder and contractor, residing at Wynberg. On the 5th December, 1902, the defendant cut down certain trees in front of the premises of the Standard Bank at the Paarl. These trees were allowed to be in the public footpath, and at night time the plaintiff, while lawfully using the footpath, came into violent collision with a tree, and was seriously injured. He alleged that the injuries were due to the negligence of the defendant or his servants, and claimed the sum of £4,000 as damages. The defendant in his plea admitted that the trees referred to were cut down. He denied that he allowed the trees to lie across the footpath. They lay within

the boundary of certain private property belonging to the Standard Bank, and defendant alleged that the injuries were caused by plaintiff's own negligence when trespassing on the said private property. He denied that he or his servants were guilty of any negligence.

Mr. Benjamin (with him Mr. Gardiner) for plaintiff; Mr. Searle, K.C. (with him Mr. Upington) for defendant.

Kotzé, J. (to Mr. Searle): Do you admit that the trees were cut down by you?

Mr. Searle: No; we deny that. We say that the trees were cut down by a man, who was not in our employ, but who, at the time of cutting them down, and in cutting them down, was acting for someone else. We did not know of it until about a year afterwards. We say the man who cut them down was acting for one Green, whom we shall prove paid him for cutting down the trees, and who had the benefit of the trees.

Kotzé, J.: That is not your plea.

Mr. Searle: Our plea denies that we did it. I am only stating this in order to explain the position we take up.

Frederick Wells, the plaintiff, said he was formerly postmaster at the Lower Paarl, but at present lived at Beaufort West. On the evening of the 5th December witness was going from his residence to the Library. In front of the Standard Bank there was an open piece of ground, belonging to the bank, contiguous to which was the pathway. The Standard Bank ground was somewhat lower than the pathway. Between the path and the road there was a small furrow. The night was dark, but there was a gleam of light from a chemist's shop opposite, immediately in front of the tree. This was at 8.30 p.m. Witness suddenly collided with the tree. He was not on the Standard Bank property at the time; he did not notice the position of the tree then; but he noticed on coming back from the Library that it was placed right across the pathway. When witness collided with the tree he lost consciousness. He recovered afterwards, and proceeded to the Library, where he rested. He informed the librarian. He managed, with difficulty, to get home, and went to bed. He resumed duty next day, but was unable to work, and called in medical assistance. Dr. Retief examined witness. He was in bed for nine weeks, and when he got up he could only walk with the aid of a stick. He was not able to work at present. He was now working at Beaufort West as a telegraph operator, but was not able to perform the work properly. The salary was the same. He was paid his full salary while he was ill up to the 29th August. He was transferred to town, but could not do the work there. The service doctor ordered him a month's rest. Witness's right arm and leg were numb. Dr. Retief's account up to the end of last year was £20; witness expected to have to pay more than that for the doctor's attendance during the present year.

Cross-examined by Mr. Searle: Witness was certain the tree was in the footpath; he did not go off the footpath. Witness did not strike the trunk of the tree. He came into a branch of the tree. He inspected the tree going home that night with the light of a match. He went to see the manager of the bank next day. He afterwards put the matter in the hands of Mr. Van Eyk, attorney. Witness did not know whether there was any communication with Mr. Green on the matter. Green, who was the contractor for the gaol, was now dead. Witness came to Cape Town in July. His salary was now £230 a year, which would shortly be increased by £10. Witness believed the telegraph wires were between the footpath and the road, and not between the footpath and the Standard Bank ground. He was walking inside the telegraph wires. He was walking very fast at the time.

Re-examined by Mr. Benjamin: Wherever the telegraph wires were, he was sure the tree was over the footpath.

Isaac Davis said he was in the employ of the defendant. He was foreman in charge of the works at the Standard Bank, Paarl, for which defendant was contractor. Defendant instructed witness to carry out the work according to the plan, and to oblige the manager in any way he could. The manager asked witness to cut the trees down. Witness ordered the men to cut them down. He subsequently disposed of the trees as they stood. Witness cut them down for Mr. Green, who agreed to cut them down as they stood. Mr. Green gave witness £1. Witness kept part of this, and divided the rest amongst the boys.

Mr. Benjamin: Have you always made that statement?

Witness: On oath, I have.

Have you given any different statement at any other time?—Yes, I have.

Did you make any other statement to Messrs. Faure and Zietsman?—No.

Have you made any other statement to Mr. Moore?—I have.

A different statement to what you are now making?—No.

Did you not tell Mr. Moore that you had got £2 for the trees, and that you had given it to the defendant?—No, I never said £2.

A few pounds? And that you had entered it in the book which you had given to Mr. Delbridge?—No; I said I received a sum, and I didn't know exactly how much it was, as it was so long ago.

And that you entered it in the book? —Yes.

Do you produce that book?—No.

Mr. Benjamin pointed out that the witness had been subpœnaed to produce that book.

Witness said, in answer to further questions by Mr. Benjamin, that the book belonged to his employer. Witness never made any entry regarding these trees. He entered in the time-book the wages paid to the men who cut down these trees. Mr. Moore asked witness questions, and he answered them. Mr. Moore wrote down witness's statements. Witness told Moore that Delbridge would not deny he was paid by witness. Witness paid the boys for cutting down the trees and for other work with this money. He got the price of cutting down the trees from Green, and paid the boys with this. He entered the money received from Green in the time-book. That book was destroyed when it was filled.

Cross-examined by Mr. Searle: The cutting down of the trees had nothing whatever to do with Delbridge's contract. Witness was asked by Mr. Irwin (the manager of the bank) to cut the trees down, and witness asked if, as a personal favour, he would allow witness to sell them if he could. Mr. Irwin told him that if he could make a profit, he was at liberty to do so. Witness saw Green, who was the firewood contractor at the gaol, and Green agreed to cut them down, and said he would give witness a box of cigars. Afterwards Green told witness that he could not get any men to do the work, and asked witness to allow his men to do the work, saying he would pay the cost of the labour. Witness received a sum from Green—he did not know how much—and entered it as wages for the work the men did in cutting down the trees. Green afterwards removed the trees. The tree did not lie in the footpath. It was impossible. Witness cut off all the branches, and after this the tree could not have been more than 12 or 13 feet long. The tree which Wells spoke of as lying across the path was not cut down at that time. That particular tree was still standing on the night of the 5th, and stood for a week afterwards. It was quite a different tree to that indicated by Wells that was cut down that day. If the tree which fell on the 5th had been long enough to fall across the footpath, it must have broken the telegraph wires in falling. A clerk from the office of Messrs. Faure and Zietsman had given witness a sovereign to go into town to the office. When witness went there, there was no one there. Witness had previously cut down trees at the back for Mr. Irwin.

By the Court: If Green had sent men to cut down the trees, witness would have seen that they were felled properly. He would have done this because of Mr. Delbridge's instruction to him to do all he could to oblige the bank manager.

Henry Philip van Eyk, attorney, Paarl, said he had not written certain letters to the Municipality or the Standard Bank with regard to this matter. Witness's office was part of the Standard Bank Buildings. The inside row of trees was cut down. They were lying with their points towards the street. Some of the trees projected over the sidewalk. On the 5th December Mr. Faure (an attorney) and himself went to his office late in the evening. Afterwards they went to the cafe, and had to pass the trees on the way. They got clear of one tree, and witness had a narrow escape from running against another, which was lying across the footway.

Cross-examined by Mr. Searle: He had no correspondence between the

plaintiff and the Municipality or the Standard Bank. Witness spoke to the Mayor about the matter on behalf of the plaintiff a few days after the accident. Witness did not see the manager of the Standard Bank, because he had never considered the Standard Bank liable. He should think that it was about three months since Green died. The tree was across the path the morning following the accident.

Re-examined by Mr. Benjamin: The trees had been lopped. The loppings were lying about.

By the Court: He was positive that there was more than one tree there.

Andreas M. Moll, merchant, Paarl, said that he heard of the accident the morning after it had occurred. On the previous day he noticed that the loppings of the trees were lying about, and that one tree was across the path. He reported the matter to the police. In his opinion, the tree was very dangerous. That was the only tree lying across the path.

Cross-examined by Mr. Searle: The tree was across the footpath, and he had to go into the main road to pass it. He did not know how many trees were down. There was a beam of light from the chemist's shop, and anyone coming along the road would have been unable to see the trunk. The trunk was behind the beam, and was not visible to those passing through the light.

Alexander John Lewis, attorney, Paarl, said his office was close to the Standard Bank, on the Lady Grey Bridge side, and he noticed a tree lying across the footpath. He heard of the accident, and he noticed the tree the day after the accident had occurred.

Cross-examined by Mr. Searle: His attention was not directed by anyone to the matter. He should say that the tree was lying on the Lady Grey Bridge side, between the third and fourth tree, about the same place as had been indicated by Mr. Van Eyk on the plan.

Jacobus Christian Faure, attorney, said that in December last he was at the office of Faure and Zietsman, at the Paarl, at a late hour on the night of the accident. On coming out, they rounded one of the trees, and as they went along, he felt Mr. Van Eyk's hand on his chest drawing him to one side. Mr. Van Eyk told him to look out, as there was a trunk in the way. Earlier in the evening he had noticed that a tree was lying right across the pavement. He did not remember whether there was more than one tree cut down, but he noticed a good number of branches lying about.

Cross-examined by Mr. Searle: He was absolutely certain there was not more than one tree lying across the pavement. In his opinion, the tree was the third from the Lady Grey Bridge side.

Dr. Pieter Jacobus Retief, of Paarl, said that the plaintiff called at his surgery on the night of the accident. Witness found that three of his ribs had been fractured, and his right lung, diaphragm, and liver had been injured. Witness did not think plaintiff would recover. He was extremely sensitive on his right side. He could not use his right leg properly. The plaintiff had becoming worse lately. The plaintiff had great pain in the back and the lower dorsal region. The medical charges, he thought, would be about £50 or £60. He thought the plaintiff would now require special treatment.

Cross-examined by Mr. Searle: Plaintiff was now suffering from traumatic neurosis. He thought the nervous organ of the spinal cord was affected. The case was one for a specialist in nervous diseases.

By the Court: The plaintiff had been a very steady, sober man, as far as he knew.

Dr. Fritz W. Weeber said he saw Wells in March, and found him suffering from a complex of nervous symptoms. The right side was over-sensitive in one part, and numb in other parts. Witness had made two or three examinations since. There was no improvement. In his opinion, there was no immediate chance of improvement.

Cross-examined by Mr. Searle: In his opinion, Wells should have quite a year's rest. There might be an improvement, but not for years.

Mr. Benjamin closed his case.

John Delbridge (the defendant), said he was a builder and contractor, of Wynberg. He had a series of contracts to do at the Standard Bank Buildings at the Paarl last year. The first contract was to do the necessary repairs to the bank itself, and the next was to generally renovate and repair the manager's house, and the third

was for the offices occupied by Mr. Van Eyk. There was also a contract for doing the ceiling inside the bank. None of his agreements had anything to do with the cutting down of trees, either in front of or behind the bank. As to the trees at the back, there were two which interfered with the building. He had a conversation with the bank manager, and offered to let his men cut down the trees. Witness used to go to the Paarl at that time once a week. His foreman (Davis) was in charge of the work. Work, he believed, was commenced in October. Witness instructed Davies to cut down the two trees at the back. That was done. Witness received no payment. He did not know what became of the trees. He did not remember having any conversation with the bank manager about the trees at the front. He went to the Paarl on the 6th December, the day after the accident. When he arrived there, he found that one of the trees adjoining the manager's residence was cut down. Witness had measured the trees. The first one cut down at the back was 21 inches diameter; another was 24 inches; the third was 12½ inches; the fourth, 26 inches; while the one still standing was 19 inches diameter. At the front, the tree cut down was 24 inches diameter; while the other two were each 24 inches diameter. The stumps of the trees which had been cut down were 18 inches high. The tree at the front was not across the footpath when he saw it on the following morning. He did not receive the slightest intimation that he was liable for the accident until he received the letter from plaintiff's attorneys in August of this year. After he had finished at the Standard Bank, he executed two other jobs at the Paarl. It was true that he had told Davies that if there was any little job the bank manager wanted done, he was to do it. Witness got no benefit whatever from the trees. Witness saw Mr. Van Eyk after he had received the letter, and asked him what he meant by sending him such a letter. Mr. Van Eyk said: "Can't we settle it now?" Witness told him that he would not pay a penny. Mr. Van Eyk told him that he had always held that Mr. Green was responsible.

Cross-examined by Mr. Benjamin: His workmen were paid by the day, and received their wages weekly. He had not his original time-book. Witness had destroyed that book, and transferred the items into his cash-book. He would not deny that he might have had conversations with the manager about the removal of the trees from the front of the bank.

B. Marais, Government land surveyor, swore to the accuracy of a plan prepared of the Standard Bank and trees in the vicinity.

Edward Irvine, son of the Standard Bank manager at the Paarl, said he remembered Mr. Davis cutting down the trees at the front of the bank. Witness helped to pull down the corner tree nearest the dwelling-house on the Paarl side. Mr. Du Toit (a clerk), Mr. Davis, two coloured boys, and two carpenters, he believed, were present. They drew down the tree at an angle. Witness did not remember assisting in pulling down other trees. They were simply standing about, and they gave Mr. Davis a hand. There was a chemist's shop almost opposite the bank, and the lights from the lamps were reflected right across the road. Witness produced a sketch indicating the direction and course of the beams.

Jacob Petrus du Toit, clerk at the bank, also gave evidence as to the position of the trees.

William Koch Irvine, manager of the bank, said that his intention was to have the trees cut down by woodcutters, but their prices were too high. He mentioned the matter to Mr. Delbridge, who said, "Oh, I will have it done for you," and witness understood that remark referred to all the trees. The back trees were first cut down, and sold by witness to Green. As to the front trees, witness told Davies that he could have the trees for himself. It transpired that Green wanted the trees for the gaol, and then Davies said that Green could have them if he would give him a box of cigars. Witness could not say whether the tree cut down at the front projected over the footpath.

Cross-examined by Mr. Benjamin: He thought the understanding with Mr. Delbridge included the cutting down of all the trees. The trees at the back were used for the improvement of the bank's property. They did not get anything for the trees at the front. Witness pointed

out to Davies the trees which were to be cut down.

Re-examined by Mr. Searle: The bank's property extended to the outer row of trees.

By the Court: He had no doubt in his own mind that the arrangement with Delbridge was that he should point out to Davis which trees were to come down. The portion between the bank and the footpath was frequently used by people, but they were trespassing.

Cornelius Rosslyn, a painter, said he was working at the bank at the Paarl for the defendant last December. He saw the trees cut down. He saw the tree at the corner nearest the manager's house removed. It fell slightly towards the Paarl. The tree was about four feet away from the footpath. He was sure no portion of the tree was across the footpath.

Cross-examined by Mr. Benjamin: He sat on the tree after it had fallen in the evening until 9 o'clock.

Dr. Alfred Edward Thompson stated that he examined the plaintiff two or three days ago, and at the beginning of July. Witness was medical officer for the Post Office. The plaintiff, in his opinion, was not suffering from any organic disease of the spine, but was suffering from nerve weakness following shock. He thought the plaintiff should have several months' rest for recovery. He saw no difficulty in the plaintiff's ultimate recovery. If the plaintiff had been thrown out of a wagon it would aggravate the complaint.

Cross-examined by Mr. Benjamin: When witness saw the plaintiff in July he recommended him to go to the hospital, and after resting with a friend for a month witness recommended him for a change up-country. He would recommend a complete cessation of work for some time. Very often when the legal proceedings were over, and the mind relieved from litigation, the patient recovered rapidly. He would recommend massage treatment, but he would not say that the plaintiff could not be properly massaged in this country. A wagon accident or running against a tree might bring on his present condition.

The plaintiff (recalled) stated, in reply to Mr. Searle, that in March last he slipped from a wagon, and received a shock to his nervous system.

Re-examined by Mr. Benjamin: He would not say that he got any worse from that day.

Mr. Searle closed his case.

Counsel having been heard in argument on the facts,

Maasdorp, J.: The plaintiff in this case seeks to recover from the defendant the sum of £4,000, as damages suffered by him through injuries sustained because of the negligence of the defendant's servants. The plaintiff alleges that the servants of the defendant were engaged in felling a tree next to the main street at the Paarl, and that the tree was allowed to fall across the footpath adjoining the main road, where it remained until the darkness of the evening at which time the plaintiff was passing along this footpath. The plaintiff says he came in collision with a snag projecting out of the trunk of the tree, with such violence that he was seriously hurt. The defendant denies that the trees were felled by his servants, or that the injury was occasioned through the negligence of his servants. He also says that at the time the plaintiff was hurt he was actually trespassing upon private property, and that it was upon that private property that he came into collision with this branch, and got injured. The first fact we have to ascertain in this case is with respect to the actual position of that portion of the tree with which the plaintiff collided, and I must say that there seems to me no difficulty upon the evidence in this case to arrive at the real facts. It may almost be said that the evidence is wholly in favour of the plaintiff. The witnesses who gave evidence on behalf of the plaintiff in this case were almost all of them disinterested. They were very intelligent men, and I think we must also say they were very respectable gentlemen. Their evidence agrees in the main, though there may be some discrepancy in some particulars. The plaintiff says that in passing along the footpath adjoining the street in the darkness of the evening he was suddenly struck a blow, but he was unable at the time to ascertain from what it proceeded. He ascertained afterwards upon examining the spot again that there was a branch of a tree lying across this footpath. He positively states he was not upon the adjoining private ground, but was walking on the public footpath,

where he had a right to be. As to the position of this branch, he is corroborated by four other witnesses, and in such a manner that we cannot doubt the accuracy of their evidence if we take it that they are truthful witnesses. It appears that Mr. Moll saw the top branches of the tree, which had been felled during the afternoon lying across the footpath, and he was so struck with the dangerous character of that obstacle that he at once proceeded to the police. Now, I have no doubt that Mr. Moll's evidence in that respect is truthful, because I can see no reason for suspecting that he had any bias in favour of the plaintiff in this case. That same afternoon the branch was observed by Mr. Faure, and when Mr. Faure and Mr. Van Eyk, in the darkness of the evening, passed up that road Mr. Van Eyk drew the attention of Mr. Faure to this branch, and Mr. Faure then recollected he had observed this obstacle already in the afternoon. Then there is also Mr. Lewis, an wholly disinterested witness—and being an attorney, we must take it that he is an intelligent and observant man—he saw this branch lying across the road the next morning, and Mr. Van Eyk, who had seen it the evening before, observed it again next morning; so that it was not only in the darkness of the evening that this branch was observed, but also in the light of next day. Upon the whole, then, I find no difficulty in coming to the conclusion that the tree had fallen across the footpath. It was lying across the footpath in a very busy thoroughfare, in which there was constant passenger traffic up and down. and, being close to the bank, I should say this branch must have been lying across the footpath in a very busy portion of that street. To allow an obstacle of this kind to obstruct the thoroughfare in this way is an act of negligence. This tree had been felled by Davis, and had been allowed to remain there by him, consequently, the negligence was negligence on the part of Davis. We have next to ascertain whether the defendant was responsible and liable for that negligence of Davis. To ascertain that, we must inquire whether Davis was the servant of the defendant, and was acting under his control or not. The question has been raised in this case whether he was not the servant and acting under the control of Mr. Irvine, the manager of the bank, or a Mr. Green, who had purchased the trees. We have now to decide in whose service Davis was. Now it is quite clear he was in the general service of the defendant, working for him in the repairs to the bank building; but it doesn't follow from that that when he performed this particular work, he was acting within the scope of his duties. We have to ascertain that from the rest of the evidence. Mr. Irvine says that the defendant, who had entered into a contract with him for repairs and alterations to the bank, had observed that he was negotiating with someone for felling these trees, and when he discovered that, he voluntarily came forward to Mr. Irvine, and said it would be very much better that he should fell the trees himself, because he could do it carefully with his workmen. Mr. Delbridge admits that he made use of these expressions, but he says they were confined to two trees behind the bank, and not to the particular trees felled in the front of the bank. Mr. Irvine, on the other hand, says that it had general reference to all the trees, and that Mr. Delbridge knew it was necessary that all these trees should be taken down. But, however that may be, this much Mr. Delbridge admits: that he gave Davis instructions that if there was any little job which Mr. Irvine might want to have done on the premises, Davis was to do it, and in giving these instructions, he gave them to Davis as his servant, and if they were carried out, they were carried out by Davis as his servant. I wish to remark at this stage that when he gave that evidence, Mr. Delbridge gave it very frankly, because it was certainly a damaging piece of evidence against himself, and he gave it without the slightest hesitation. What the legal effect of that statement may be, we have to decide. Davis says that, though he did the felling, he cut down these trees to oblige Mr. Irvine, because he had been told by the defendant to do anything which might oblige Mr. Irvine. If we take only that statement of Davis, then it is clear proof that in cutting down these trees he cut them down under instructions from the defendant. It is said that in one portion of his evidence he makes the rather contradictory statement that he was working for a man named Green

It may be that that is not a direct contradiction, because it appears that after he had arranged with Mr. Irvine to cut down these trees, and was acting under the general instructions he had received from the defendant, the question arose as to the disposal of the timber, and the result of the discussion between Davis and Mr. Irvine was that he could dispose of the timber, and the timber was then disposed of to a man named Green; but from the evidence generally, I conclude that the felling of the trees was not in consequence of the agreement with Green, but in consequence of what had already been agreed upon, that the work should be done for Mr. Irvine under the direction of Mr. Delbridge, and that, after the trees were felled, Mr. Davis could dispose of them. Under these circumstances, therefore, I must come to the conclusion that Davis was acting as the servant of the defendant. Defendant himself was not the servant of Mr. Irvine; he was an independent contractor, over whose work Mr. Irvine had no special control. I come to the conclusion, therefore, that neither Mr. Irvine nor Mr. Green had any control over Davis, and that the work he did was under the direction and authority of defendant. It follows, therefore, that the injury which was received by the plaintiff was in consequence of the negligence of the servants of the defendant. The defendant is, therefore, liable to make compensation, and the next question arises, what the amount of that compensation should be. The medical evidence is very uncertain, and speculative in its character, but it is quite clear that the plaintiff has suffered a serious injury, which has caused such an affection of his nerves that he is suffering some spinal injury. The doctors say that that has not caused any organic disease, and, on the whole, they seem all to agree that it is merely a matter now of serious nervous affection. Mr. Retief has some doubts as to whether he will recover. Mr. Weeber thinks he might recover, but he cannot form any opinion as to the period, and Mr. Thompson, who gave evidence for the defendant, also looks upon his sufferings as of a serious character. The difference between them is whether he will require a longer or a shorter rest to recover from the effects of this injury, and the period that they mentioned seems to range from six months to two years, that he would require a rest of about that period in order to thoroughly recover. He has proved that he has already incurred expenses in the sum of £60. The salary he receives from the Government amounts to £230 a year. If, therefore, we come to the conclusion that he would require a year's rest that would amount to a sum of £300, but I think we cannot limit the period to twelve months considering that two of the doctors think that it would take a considerably longer period, and that after a rest of eighteen months is allowed for, there might, perhaps—though there is still some doubt—be a perfect cure in this case. During that eighteen months he will require to go to some expense for further treatment, and we come to the conclusion that we should allow him the sum of £450 as damages. Judgment will, therefore, be given for the plaintiff for £450, with costs.

Kotzé, J.: I am of the same opinion. There is, unfortunately, some discrepancy or contradiction in the evidence with reference to the facts. For instance, the witnesses contradict each other with reference to the particular tree which was cut down, and had fallen on the afternoon of the 5th December. Some say that it was the tree nearest the Paarl Station, and others that it was the tree nearest Lady Grey Bridge, but, be that as it may, it is clear that a tree had been cut down, and now the next question is whether that tree lay across the public footpath. There, too, there is some contradiction, but, after weighing the evidence carefully, I am satisfied in my own mind that the tree did lie across the public footway for some little distance. I see no reason whatever not to accept the evidence of Mr. Faure and Mr. Van Eyk and Mr. Moll on that point, who corroborate the plaintiff, and therefore we have a tree lying in a dangerous position across the public footway in the Paarl, a footway that the public were in the habit of using night and day, and the plaintiff coming into contact with that tree was injured. That the plaintiff was very severely injured is clear from the evidence. Now the principal point is whether the defendant is liable for the injury sustained by the plaintiff? Well, that will depend

upon the question whether he is liable for the negligence of Davis, who cut down the tree in question. The evidence is that Mr. Delbridge had a contract for repairing the Standard Bank Buildings at the Paarl, and that he went there some time last year, and had a conversation with Mr. Irvine, the local manager of the bank. Mr. Irvine spoke to him about some trees standing at the back of the premises, and said that he was anxious to have them removed, and that someone was willing to remove them, but wanted payment for so doing in addition to the timber. Mr. Delbridge, the defendant, then said to Mr. Irvine. "Why not wait until my men are here, because work of that kind requires some amount of care?" Mr. Irvine has told the Court that Mr. Delbridge made an arrangement with him that Davis (the foreman) was to cut down such trees as Mr. Irvine (the manager) desired. Mr. Irvine wished certain trees to be cut down in front of the premises, and Davis cut down the particular tree which fell across the footpath. There is no doubt that in so cutting down this particular tree, he was guilty of negligence by allowing it to fall across the footway, and to remain there during the night. It seems to me, if Mr. Delbridge had given direct instructions to his foreman to cut down the trees, he would have been liable, and so, in the way, by agreeing with Mr. Irvine that Davies should cut down whatever trees he might point out, if Davis acted on the request of Mr. Irvine, he was actually in law acting on the instructions of Delbridge himself. I can see no distinction between the two cases. Of course, the material question is whether Davis, in cutting down the tree, was acting as the servant of Delbridge? This depends upon the further question: who controlled Davis at that moment of time? The trees were cut during working hours; they were cut upon instructions given by Delbridge to Davis that he was to carry out the wishes of Mr. Irvine (the manager) in that respect, and it cannot be said that Davis was at the time under the control either of Green, who eventually got the timber, or of Mr. Irvine. He was the local foreman on the spot, acting in the absence of Mr. Delbridge, and he was really acting in the same way as if he had got direct instructions from Delbridge himself to cut down the trees. As a matter of law, I think that if an employer instructs his foreman or his servants to undertake or do any service for another, and in the carrying out of this work the foreman is guilty of negligence, the employer must be held liable, unless the employer can show that at the time the work was carried out his foreman was under the control and direction of the person for whom the service or work was performed. That seems clear, from the case of *Donovan* v. *Laing* (1893—1 Q.B. 629), cited by Mr. Searle, for, although the circumstances in that case may not be quite parallel, at the same time I think the present case falls within the same prinoiple. At any rate, what I have stated is not inconsistent with the decision in Donovan's case. Consequently, I have arrived at the conclusion that Mr. Delbridge must be held liable for the injury which has been sustained by the plaintiff. As to the amount of damages, I agree, after considering the evidence of the two doctors on the one side—Drs. Retief and Weeber—and Dr. Thompson on the other, that the plaintiff is entitled to substantial damages, and the amount mentioned, viz., £450, is a reasonable amount. I therefore concur in the judgment, for £450 damages and costs.

Mr. Benjamin applied for the plaintiff's witness expenses as a necessary witness.

Maasdorp, J. intimated that these would be allowed.

[Plaintiff's Attorneys: Faure and Zietsman; Defendant's Attorney: G. Trollip.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

HILLS V. COLONIAL GOVERNMENT. { 1903. Nov. 10th.

This was a motion for notice of appeal to the Privy Council against a judgment of the Supreme Court on the 3rd

August, 1903, in which judgment was given for the plaintiff in the sum of £75,000. Mr. Searle, K.C. (with him Mr. Close), was for the applicant, and Mr. McGregor was for the respondent.

Mr. Searle said the question raised would involve the sum of £60,000.

Mr. Justice Maasdorp: What is the urgency of this?

Mr. Searle: The three months' notice is up to-morrow, but, of course, if that is waived, the case might be left in the hands of the Court.

Mr. McGregor said if the judgment was given on the 6th March, instead of in August, he did not know whether it would be competent to give the leave to appeal.

The case was ordered to stand over.

SUPREME COURT

FIRST DIVISION.

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and a Special Jury.]

RIES AND OTHERS v. WILLETTS. { 1903. Nov. 11th.

Slander.

This was an action brought by H. M. Ries and Others, of East London, against H. N. Willetts, also of East London, to recover the sum of £2,500 each as damages for slander at a public auction sale in April last.

The declaration was as follows: The first-named plaintiff is an hotel proprietor and dealer in land, residing in East London. The other plaintiffs are potato, grain, and produce merchants, carrying on business in East London. The defendant is an auctioneer, carrying on business in East London.

Prior to dates hereinafter mentioned plaintiffs have on several occasions jointly bought land, which they sold through defendant.

Prior to 11th April, 1903, plaintiffs were jointly interested in certain land purchased from a certain Mrs. Klein, and they entered into negotiations with defendant for the sale thereof, and on 6th April, 1903, plaintiffs informed defendant that they would not sell the said land through him as auctioneer.

Thereafter, on 11th April, and at a public auction at East London of other land, not the plaintiffs', and in the presence of E. Cordner and a large number of persons then and there attending the sale, the defendant, who was acting as auctioneer at the said sale, wrongfully, unlawfully, maliciously, and with intent to injure the plaintiffs, spoke of and concerning the plaintiffs the following false and defamatory words: "You may have seen advertised another sale, which is Mrs. Klein's property, by my friends the Ries party (meaning thereby the plaintiffs). I don't like their mean tricks. I told them they could go elsewhere with their dirty underhand business." The defendant meaning and was so understood to mean by the said words that the plaintiffs had been guilty of mean, dishonest, and dishonourable conduct, and that the sale advertised by the plaintiffs was a dishonest and underhand business.

By reason of the premises each of the plaintiffs has suffered damage to his good name and character and in business to the extent of £2,500. Wherefore the plaintiffs claim: (a) For each of them the sum of £2,500 as and for damages aforesaid; (b) alternative relief; (c) costs of suit.

To this declaration the defendant excepted as follows: Before pleading to the plaintiff's declaration, the defendant takes exception thereto on the ground that, even if he used the words therein complained of, the said words are not defamatory, and cannot support the plaintiff's action in law. In case the above exception be overruled, and not otherwise, the defendant says, for a plea to the declaration: He admits paragraph 1 of the declaration, save that he says the first-named plaintiff is not an hotel proprietor, but the manager or one of the managers of the National Hotel at East London. As to paragraph 2, he admits that he has sold land for the firm of H. Ries and Co., the partners of which are the second and third-named plaintiffs, but the defendant has not known the first-named plaintiff in connection with any of the said sales. As to paragraph 3, the defendant admits that prior to the 11th of April, 1903, the said firm of H. Ries and Co. entered into

negotiations with him for the sale of the land in the said paragraph referred to, and that on the 6th of April, 1903, the said firm informed him that they would not sell the said land through him, but otherwise he denies the third paragraph. The defendant denies the allegations in paragraph 4, and says that he did not make use of the words therein set forth. He also denies the innuendo contained in the said paragraph. The defendant denies paragraph 5 of the declaration. Wherefore the defendant prays that the plaintiffs' claim may be dismissed with costs.

Evidence was then called.

Sir H. Juta, K.C., for plaintiffs; Mr. Burton for defendant.

Michael Joseph Ries, part proprietor of the Hotel National, East London, said that he and his brothers had dealt in property. Mr. Willetts had acted in a couple of joint transactions for him. In August last they bought Mrs. Klein's property for the purpose of disposing of it in building lots. Mr. Willetts was approached with regard to the disposal of this property. His brothers and himself had an interview with Mr. Willetts, who knew that the brothers were interested in the property. In April they decided not to employ Mr. Willetts. A sale took place on April 11, and the auction-room was full. After Mr. Willetts had sold a couple of lots, he said, "Gentlemen, you may have seen advertised another sale," etc., of which witness took a note at the time. Witness and his brothers were well known as the "Ries party," in East London. Witness borrowed a pencil from Mr. Cordner, and the remarks were shown to several others, who corroborated them. Several people left the room, and he was repeatedly spoken to about the statement. He had constantly to explain what it was all about. His business, he believed, had fallen off as a result of the statement.

Cross-examined by Mr. Burton: The Hotel National belonged to his mother, but, by a special arrangement, he was a part proprietor. When he was brought before the Magistrate at East London for a contravention of the liquor laws, he stated that he was "manager." The defendant must have known that witness was part owner in another property. It was more convenient to have the property transferred to his brothers. The Wilsonia property was a mile from Mrs. Klein's property. The defendant must have known that witness was interested in that property. The defendant had asked witness if he would be one in giving him the sale of the property. Witness was positive that he discussed the sale of the property with Mr. Willetts along with his brothers. They wanted defendant not to advertise any other property, while he was selling theirs. He was positive that his brother did not make remarks threatening to spoil the Wilsonia sale to the defendant. The interview took place a day or so after the second letter, but he did not think that the advertisement appeared until after the interview. Between April 11 and the middle of July no further advertisement appeared. From a business point of view they put in the advertisement on the day the "Wilsonia" sale was taking place. He would swear positively that the name of Ries was mentioned in the defendant's statement. Rendle made an excuse when the note was shown to him that he was rather deaf. The defendant did not say that it would be a low, mean trick if he let the Wilsonia sale fall through. Mr. Paterson said to witness, "It serves you right." There was a rumour that bubonic plague had broken out in the hotel a fortnight after the sale.

Edward Cordner stated he was present at the sale of the Wilsonia Estate. After two plots had been sold the defendant stopped and used the remarks attributed to him, with the exception of that before he said, "I don't like their dirty tricks," the defendant said, "I don't do such dirty tricks."

Cross-examined by Mr. Burton: Witness was not a greater customer at the Hotel National than any other hotel, and he was not given to intemperate habits, although his clothes had been left on the beach, and he was reported dead, as the result of a practical joke. He was sober at the sale. He did not hear the defendant say it would be a low, mean trick on his part to throw up the Wilsonia sale.

George Baker corroborated the other witnesses as to the remarks attributed to the plaintiff. Mr. Ries borrowed a pencil, and wrote down the remarks on one of the plans of the sale. He understood the "Ries party" to mean the three brothers. He did not know what was the dishonest thing referred to.

Cross-examined by Mr. Burton: The defendant never made any reference to a low, mean trick on his part.

Re-examined by Sir H. Juta: When the defendant said he had correspondence in his office to prove it he made the statement after he had completed all his remarks.

By De Villiers, C.J.: Witness did not understand what was meant by "I don't do such dirty tricks," which was uttered after the reference to the abandonment of the Wilsonia sale.

Henry Jelly, who was also present at the sale, confirmed what was written down by the plaintiffs.

Cross-examined by Mr. Burton: The remarks gave witness the impression that by the correspondence the defendant could prove all he said. He heard something about "striking below the belt," and he would swear that the name of Ries was referred to. Witness impressed on Michael Ries the necessity of clearing his name at once.

By De Villiers, C.J.: He would not consider it honourable of the defendant to give up one sale for another.

Edward Stewart stated that when he heard the remarks he thought the Ries brothers had done something dishonourable. When the paper was shown to him he would not look at it, as he did not want to have anything to do with a law case.

Cross-examined by Mr. Burton: When he got his subpœna he began to think seriously of what had been said. He did not remember the defendant mention "Klein's property."

Alfred John Ries, one of the plaintiffs, stated that he was not present at the sale, but the charge of the defendant was the subject of general conversation in East London. The defendant must have known that the three brothers were interested in the property.

Cross-examined by Mr. Burton: He did not remember his brother saying that he would have the sale on the same day as the Wilsonia property. Several people had spoken to him about the statement.

Re-examined by Sir H. Juta: The auctioneer put the advertisement in the paper himself.

Henry Ries, one of the plaintiffs, stated that the defendant's statement was a general topic of conversation. He had heard the remarks in England and Germany. A day or two after March 31 Mr. Willetts was in witness's office, and Michael was sent for. The defendant knew perfectly well that Michael was interested in the property. It was absurd to think that he threatened to have the sale on the same day as the Wilsonia property, even should he give the land away.

Cross-examined by Mr. Burton: He met Mr. Carl Malcolmess in Berlin, and he made mention of the remarks, as also did a commercial traveller in England. He did not tell the defendant that he would do his best to spoil the sale. He had nothing to do with the advertisement which stated that the property was part of the Wilsonia township.

By De Villiers, C.J.: He did not know that the defendant had the Wilsonia sale before he offered his.

Sir H. Juta closed his case.

Mr. Burton called the defendant,

Henry Willetts, who stated that the sale of the Wilsonia township was placed in his hand in November last year. He was first spoken to about Klien's property about the end of January. Henry Ries knew that he had the Wilsonia sale in hand. Witness had no instructions prior to the correspondence. At the interview, witness pointed out that it was ridiculous to expect him to throw up the Wilsonia property, but Henry Ries said, "We will have ours first," and threatened to spoil the Wilsonia sale, and witness reminded him that the result of it would be a failure for both. At the sale, witness explained why he did not have the plaintiffs' sale, and made no use of the words "Ries's party." "Low, mean trick" referred to himself if he had thrown up the Wilsonia sale.

Cross-examined by Sir H. Juta: He had been giving out that he was going to have the plaintiffs' sale, and he was in a perfectly amiable manner when he made the statement. The public only knew about putting off the sale when he told them, and he referred to no one when he said "dirty trick." He was speaking generally when he said "they can take that sort of work elsewhere." He meant to inform the public that he would not try to do anything that was not above-board. The "dirty work" referred to was the request of the plain-

tiffs to put their sale in front of the other. He did not see a number of people go out with Mr. Ries. He did not think two sales of that sort at the same time would come into conflict.

Arthur George Rendle stated that he was present at the sale, but he did not know anything about the Klein property. The defendant in his remarks said "that would have been a dirty act on my part," and he was positive no names were mentioned. Arthur Ries asked for a pencil, and commenced writing. He then read a few words to witness, and asked him to sign it as being correct, but witness refused to sign it, as he had heard nothing about the "Ries party." He did not recognise the words in the declaration as those which Ries read out to him at the time.

Cross-examined by Sir H. Juta: He unfortunately signed the statement produced in Mr. Wynne's office, when he was in a hury for a train. Mr. Gately wrote down the statement, and witness read it over and signed it. Nearly all the words were put to him by Mr. Michael Ries, and he did not think anything would come of the case, although he had given a different statement to the other side.

Edmund Bryant said that all he heard was, "Gentlemen, I could have had that sale if I would forego this one I am now holding. That I could not do. That would be a mean action on my part." Only Mrs. Klein's name was mentioned, and he never heard the name of "Ries."

Cross-examined by Sir H. Juta: There was nothing said about dirty work.

Dr. Rolston said that what he heard was: "No doubt, gentlemen, you have seen in the paper about the sale of Mrs. Klein's farm. I could have had that sale if I had foregone the present sale, which I consider would not be an honourable thing or a straightforward thing for me to do. I have been in practice for twenty years here, and I don't do dishonourable things of that sort, and persons who want me to do work of that class may take it elsewhere." There was no mention of "Ries."

Cross-examined by Sir H. Juta: He did not know whether there was going to be a row or not, and he did not want to have anything whatever to do with it. He considered there was nothing objectionable in the statement. He feared a lawsuit, as the Ries family were fond of the law. He heard nothing about dirty tricks.

Richard Currie stated that the remarks he heard were: "Gentlemen, you may have seen a large sale advertised, and I could have had that sale if I had liked to give up this one, and I have already had this sale in hand some six months, and therefore I would consider it would have been a dirty trick on my part." There was some reference to "striking below the belt."

Cross-examined by Sir H. Juta: Witness understood that "striking below the belt" meant to apply to the defendant taking up the second sale.

George Beaucamp understood the remarks to mean that the auctioneer would consider it a mean thing on his part to forego the sale. There was no name mentioned.

Cross-examined by Sir H. Juta: He did not think anything of the remarks at all. The defendant might have mentioned Mrs. Klein's property. He heard nothing about "dirty work," but he heard, "God bless them."

Ernest Harris stated that he heard the remarks, and there was no name mentioned whatever.

Cross-examined by Sir H. Juta: "God bless them," he took it, was meant to apply to anyone offering business not on the square. The defendant said he was not in the habit of taking dirty work, and people who offered it could take it elsewhere.

Charles Thompson said he heard only Mrs. Klein's name mentioned.

Cross-examined by Sir H. Juta: He understood by dirty work, something dishonourable. The benediction at the end, he took it, applied to anyone bringing dirty work.

Wm. Patterson, draper, Cape Town, deposed that in April last he resided at East London. He was at the sale, and heard Willetts speak. He did not hear Ries's name mentioned. After the sale, witness was in the hotel. Mr. Michael Ries came in, and asked him if he heard the remarks Willetts had made about them. Witness replied that he had not. Witness told him he could not be bothered about the matter.

Cross-examined by Sir Henry Juta: Witness was quite sure Willetts never

used the word "underhand." He was not certain whether Willetts made use of the word "dirty"; he believed Willetts said "dishonourable."

Mr. Burton closed his case, and counsel then addressed the jury.

De Villiers, C.J., in summing up, said that throughout the great anxiety of the plaintiffs was that their sale should precede that of the "Wilsonia" estate. In his opinion, the defendant acted correctly in refusing to postpone the sale. The question had been raised in the Supreme Court whether the words complained of were capable of a defamatory meaning. The Court held that they were capable of such a meaning, but that did not conclude the question so far as the jury were concerned. It was still competent for the jury to decide whether the words were used in a defamatory sense, and to decide this question, they should consider the context in which the words were uttered. If the defendant merely meant to convey that what he was asked to do would be a dirty trick on his part, the jury would be justified in finding for the defendant. He considered it an improper thing for him to throw up a sale for the purpose of obtaining the lucrative sale offered to him by the plaintiffs, and was quite justified in saying so. To his mind, the difference between the versions of the witnesses was not so great. If they looked at the statement as a whole, it was for them to say whether the words were defamatory or not. Everybody at the sale knew what the plaintiff had asked him to do, and the defendant considered it dirty business. The witness Rendle was confronted with a document which he stated he signed in a hurry, and it seemed extraordinary that the plaintiffs did not subpœna him themselves. It did not follow when he made a statement under oath that they should discredit him. He did not think it was a case where credibility was of great importance, and if they found that the words were defamatory there was sufficient to connect them with the plaintiffs. If they held that the defendant's intention was merely to magnify his own virtues, in refusing to accept a second sale by postponing the other, then they would find for him.

The jury retired, and after about fifteen minutes' absence returned with a verdict for the plaintiffs for one shilling damages.

Sir H. Juta moved that judgment be entered for the plaintiffs, with costs, as that was evidently the intention of the jury.

De Villiers, C.J.: The plaintiffs could not possibly get costs.

Sir H. Juta said that no doubt the jury had considered the question of costs, and had embraced them with their verdict.

De Villiers, C.J.: No doubt they might intend it, but it is not within their province to decide the question.

Sir H. Juta urged that they must have taken that into consideration in fixing the amount. He would ask His Lordship to put it to them, and they might consider the point.

Mr. Burton objected to that course being adopted. The jury had given its verdict for one shilling, which was contemptuous damages. The question of costs lay with his lordship. He submitted the verdict was for one shilling damages.

Sir H. Juta, in reply, said that the jury had brought in their verdict, and it was clearly one of a shilling damages, with costs.

De Villiers, C.J.: The only question submitted to the jury was a question of damages. They have found for the plaintiffs in one shilling damages. As to costs, there will be no order, each party will have to pay their own.

Judgment was entered accordingly.

[Plaintiffs' Attorneys: Silberbauer, Wahl and Fuller; Defendants' Attorneys: Fairbridge, Arderne and Lawton.]

SECOND DIVISION.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

EMBERSON AND SON v. MAXWELL.

1903.
Nov. 11th.
Dec. 1st.
" 3rd.
" 4th.

Building contract—Bill of quantities—Extras and deductions.

This was an action brought by Emberson and Son, plasterers, Woodstock, against James Maxwell, builder and con-

tractor, Cape Town, to recover £107 4s., on a contract entered into in terms of bills of quantities, or, in the alternative, for work and labour rendered and materials supplied at the special instance, and request of the defendant.

The declaration stated that the defendant was the contractor for the erection of certain buildings in Barrack-street, Cape Town for Messrs. Robertson and Co. The plaintiffs said that the defendant entered into a contract with them for the performance of certain work, and the accepted tender was £334, which would, therefore, be the amount payable for the work according to the bills of quantities. The plaintiffs had to do the work in terms of the bills of quantities in which the contract was embodied, but plaintiff for the greater certainty, craved leave to refer to the terms of the written tenders when put in. The contract was entered into in December, 1902, and the work was begun in January, 1903, and finished in May last. In addition to the contract work—the plaintiffs said they had performed the contract, save as to certain portions of work which should, admittedly, be omitted, and for which a deduction was made later on—there were certain extras, and the plaintiffs said that they were entitled to claim in respect to these £83 17s. The defendant, in his plea, said that the amount of the extras should only be £23. While the plaintiffs' declaration said that the extras were extras for which the plaintiffs were entitled to claim at the rate provided in the said quantities, the defendant in his plea said, that extra work was not work set out in the bill of quantities. It appeared that there were no prices at all agreed upon until after the work was finished. There was a lump sum of £334 agreed upon for the work at the outset, but, with regard to the incidentals and other prices, no agreement was made. In the course of the work, two subsidiary contracts were entered into. One was for cement flooring, £127. The defendant took exception to an item of 960 yards of flashing. He said that 60 yards were omitted to be done by the plaintiffs, and he himself took off £7 17s. 6d. for 60 yards. The plaintiffs, on the other hand, said they were entitled to claim £13 2s. 6d. for 35 yards of granite cement flooring, and he set this off, although it was a larger amount, against the deduction defendant said should be made. The other subsidiary contract was for tuck pointing, £57. That item was not disputed. The next point in dispute was with regard to the deductions to be made, both as to values and measurements. The plaintiffs said that the amount of the deductions should be £54 19s. only, and the defendant said that the amount to be deducted was £92 5s. 9d. There was a dispute as to an item for keystones, there being a difference of £4 14s. between the parties under this head. The plaintiffs claimed £107 4s. The defendant said that £6 10s. 6d. represented the total amount owing by the defendant to the plaintiffs. He had tendered this amount in full settlement of the plaintiffs' claim, but plaintiffs refused to accept the tender. The defendant still tendered £6 10s. 6d. The plaintiffs in their replication admitted an error in the deductions to the amount of £4 14s., making a total for deductions against their account of £59 13s. With this amendment they asked for judgment as prayed.

Mr. McGregor (with him Mr. Russell) for plaintiff; Mr. Close (with him Mr. Smith) for defendant.

Evidence was called for the plaintiff.

Henry Emberson (the plaintiff) said he was one of the partners of the plaintiff firm. Witness spoke as to giving tenders to the defendant for the work in question. Nothing was said before work was commenced about extras. Witness did extras from time to time. Mr. Maxwell told him that all the extras would be paid for. Witness worked according to the bills of quantities. The work was finished in May. On the 11th June they sent an account for the balance, treated as contract account, for £83. He had received certain sums on account. He had no intention at that time of charging anything for extras or deductions. The account was sent back, and his son told him that it was not a proper account, and that a lot of deductions were to be made. Witness came to the conclusion that Mr. Maxwell wanted a detailed account. He went into the figures, and on the 13th June sent a further account, in which he brought up all the differences, showing both extras and deductions. Defendant objected that the prices of the bills of quantities were not

shown; he wanted what was generally termed a schedule of prices. Witness sent a full statement on the 22nd June, giving bill of quantities and schedule of prices on which he had originally tendered.

Mr. Close objected that this was merely hearsay evidence, and the witness had not got a proper understanding from his son.

Mr. McGregor said this evidence was merely given in order to show the history of how the second account was sent in.

Witness (proceeding) said that he afterwards saw the defendant's son, and in consequence of what was said to him, he sent in one original schedule. In the tissue bills of quantities produced, on which witness tendered, there appeared prices which witness had not inserted. Up to that time they had not agreed upon any prices as to "extras." They had only made an agreement as to the lump sum. When he sent in the tissue bill of quantities to Mr. Maxwell, he did not receive any answer, and after waiting, he wrote to the defendant on the 8th August applying for a settlement. Mr. Steer wrote on the 20th August, on behalf of the plaintiffs, and the defendant replied that there was a little difference of opinion with regard to certain items, and that the plaintiffs ought to call and see if an agreement could be arrived at. Further correspondence ensued, in which Mr. Steer applied for details as to the items in dispute, and the defendant replied that they were quite willing to go into the matters with the plaintiffs if they called. Witness arrived at the extras by measuring the building and comparing the measurements with the details given in the bills of quantities.

Mr. Close intimated that the contention of the defendant was that the plaintiffs took the work on an inspection of the specifications and the plan, and that they took the responsibility for any difference.

Witness (continuing) gave evidence in support of various items in his claim and his deductions.

Maasdorp, J. (interposing) said it seemed to him that the questions were such as could not be settled by the Court without the assistance of an expert. One party said one price should be allowed, and the other party said another, and it would really be for an expert to decide.

Mr. McGregor admitted that there would be considerable difficulty in arriving at a fair basis.

Witness (continuing) said he got the tissue paper from Maxwell for the purpose of framing his tender, and on that he framed a tender for £334. He made a copy. Witness put down figures on the tissue paper in the money column; but these had reference to another job. He could not say what particular job this was. Witness afterwards rubbed the figures out.

By the Court: When witness returned the tissue paper to Maxwell on the 22nd June, the figures which now appeared on it were not there, to his knowledge.

Cross-examined by Mr. Close: The figures witness sent in on the stouter paper were taken from his book (produced). He made the book up before he sent in the tender. It was not agreed that the 35 yards of granite cement was to be treated as though it were ordinary cement. The cement thickness was an inch; the granite cement was two inches thick. The figures of the tissue were like witness's. Witness's eyesight might have been bad, and he might have thought that he had rubbed the figures out when he had not actually eliminated them from the paper. At all events, the figures on the tissue were not the figures he gave for the work.

Re-examined by Mr. McGregor: Witness sent the account showing extras on the 13th June. Maxwell had not asked for a schedule before this, nor had any prices been agreed upon. The granite cement was outside the 900 and the 960 yards, and witness's contention was that if 60 yards of cement were left undone, this would be covered by the extra granite cement.

By the Court: The granite and cement covered an extent of 960 yards.

Henry Alexander Emberson, son and partner of the last witness, gave confirmatory evidence as to the extra work done and the fairness of the charges. In June witness's father sent him with a short account, showing £83 to be due to Maxwell. The amounts for the deductions were fair.

Cross-examined by Mr. Close: He had not made any of the measurements on

which the account was based. He had seen the tissue bills of quantities previously, but he had not observed the figures which now appeared in the document. He did not know whose figures they were, though he admitted that, in a sense, they looked like his father's. When deductions had to be made for work not done, they were always made on the basis of the prices in the bill of quantities.

Edmund James Sherwood, architect, Cape Town, said he examined the memorandum of extras and deductions in this case. He had looked at the matter from the point of view of values. He thought the flashing should be charged at the rate of 9d. per foot. He could not give a definite opinion as to the charge to be made for the moulding, though he should say, from the description given, that plaintiffs' charge of £5 15s. was reasonable. The charge of £3 4s. for the circular work was very reasonable, and the charge of £6 for four scrolls was also very reasonable. Witness expressed the opinion that the other charges made by the plaintiffs for extras were fair and reasonable. With regard to deductions, the prices in the bills of quantities formed the basis upon which all adjustments of differences were made.

Cross-examined by Mr. Close: He had not examined the building, but had simply looked into the schedule of prices. Anything outside the four corners of the bill of quantities was charged for or deducted at the current trade prices.

By the Court: In a case where a lump sum tender was accepted, the contractor could charge practically anything for extras so long as they were considered reasonable in view of the current trade prices. Where there was no agreed schedule of prices and a dispute arose such as this, he considered that it should have been referred to an expert.

Kotzé, J.: The Court is of the same opinion.

Evidence was then called for the defence.

James Maxwell (the defendant) said that when he arranged with the senior plaintiff about the contract, he showed him the plan and the schedule of quantities. They agreed to a tender of £334. After the work had been done some talk took place about a settlement, and witness asked for the original bill of quantities. After some delay he was supplied with the tissue-paper copy. He had not made any entries on this copy. The figures in the money columns were there when the copy was handed to him. He compared the figures with the account rendered, and found that there was a difference. He had been perfectly willing to adjust the accounts. Witness finally tendered £6 10s. 6d., in accordance with the account annexed to his plea. He arrived at this amount by the prices set out in the tissue-paper copy of the bills of quantities. There was an item of extra circular work in the cornice that he had not been able to take into account. He could not find that any extra circular work had been done. All contracts were lump sum contracts. In some cases the architects called upon the successful tenderer for his schedule of prices. At the end of the work the architect in some cases required the schedule of prices to be produced for the purpose of adjusting extras or deductions. He had been a builder in Cape Town for 20 years. Extras outside the schedule were paid for at current trade prices. Witness was being further examined as to the measurements of the work done by the plaintiffs, when

Maasdorp, J. interposed, and suggested that it would be a very much better if a number of these points could be settled by an inspection of the building by some independent architect, to be agreed upon by the parties. This architect could then present a report for the guidance of the Court.

Mr. Close, after a consultation with his client, said he was prepared to consent to the suggestion. He thought, perhaps, that the architect of the building would be able to render useful assistance.

Mr. McGregor did not approve of this suggestion, and urged that a quantity surveyor of good standing should be appointed for the purpose.

It was agreed between the parties that the items in dispute in the document put in should be referred to Mr. A. D. Babbs for report with a direction to ascertain the measurements and the reasonable value of the work therein referred to.

The case was adjourned pending the filing of the referee's report with the Registrar.

Postea (Dec. 1):

[Before the Hon. Mr. Justice MAASDORP.]

Mr. Smith (for the defendant) intimated that he proposed to call evidence with reference to the prices set out in the report presented by Mr. A. D. Babbs, to whom the matter of the measurements and reasonable value of the work had been referred.

Further evidence was given by the defendant (James Maxwell), Thomas Davis, and Robert Tweedie Horsburgh (two master plasterers), and James L. Maxwell, son of the defendant, and employed as his bookkeeper and clerk.

This concluded the evidence.

Maasdorp, J. said that the case would have to stand over for argument by counsel until Mr. Justice Kotzé, who heard the earlier part of the case along with him (Mr. Justice Maasdorp), was able to be present.

Postea (Dec. 3):

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZÉ.

Mr. McGregor argued that the Court should find in favour of the plaintiff, in accordance with the report of the referee (Mr. Babbs), to whom the question of the measurements had been referred, along with a list of reasonable prices for the extras and deductions. He applied for judgment in terms of the referee's report, which showed a balance in favour of the plaintiff of £62 12s. 5d.

Mr. Close said he was now in the position of having to accept the referee's report, as far as the measurements were concerned. The measurements, he took it, were a matter that was specifically within the province of a quantity surveyor. But the question of prices was quite another point, and belonged to the practical man in the trade. His contention was that the prices to be fixed by the Court were the prices which were set out in the blank form schedule supplied by the defendant to the plaintiff for the purpose of tendering. As far as the items were concerned in which there was provision in the bills of quantities, the defendant would be willing to take the referee's figures of the values. In regard to the deductions, they contended that there were schedule prices for every one.

Postea (December 4):

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZÉ.]

Mr. McGregor (in reply) urged that the Court should not make a schedule of prices where the parties themselves had not made a schedule.

Kotzé, J.: That is quite clear, because the Court cannot make a contract where they have not made a contract for themselves.

Mr. McGregor said that, in the absence of an agreed schedule of prices, the Court should be guided by what was a reasonable and fair valuation. In support of this view, he quoted the evidence of Mr. Sherwood, who said that where there was no agreed schedule of prices, the matter should be referred to an expert. They had had no evidence as to a custom by Mr. Maxwell, although he seemed to suggest some custom. Counsel cited the case of *Small and Morgan* v. *Young* (4 Sheil, 48).

Maasdorp, J.: It appears that in December, 1892, the plaintiff and the defendant entered into an agreement whereby the plaintiff undertook for the sum of £334 to do certain work at buildings which were then being erected by the defendant, in accordance with certain bills of quantities then supplied to the plaintiff by the defendant. While the work was in progress, it was found necessary that certain extra work should be executed, and it was also discovered that some of the work which was mentioned in the bills of quantities would be unnecessary, and it was agreed that such work should be omitted. After the completion of the work the plaintiff sent an account, upon which he claimed a balance of £111 18s. In that account appears an item for certain extra work done, and another item for omissions, which the parties had agreed upon. It also seems that another rather expensive piece of work was agreed upon by the parties while the work was in progress, consisting of the concrete flooring of a yard, and also the performance of some tuck pointing. All these items now appear in the account upon which the plaintiff claims in his declaration. Many of the items are virtually admitted between the parties, and the dispute seems to centre round the value of the extras and of the deductions, with the addition of some trifling items which I may mention

hereafter. The plaintiff, in claiming remuneration for the extra work done, says he is entitled to make his claim "at the rate provided in the said quantities," and at that rate it is stated that the extra work would amount to £83 17s. In going into the figures, it would appear that the bills of quantities throw very little light upon the matter of the extras, because they consist largely of work outside the description of that contained in the quantities, and it is now admitted by the parties that these extras almost wholly consist of work which cannot be estimated according to the rates provided in the quantities. There is only one exception; it is a small item of about £4, which will be allowed for in considering the balance as it now stands between the parties. Consequently, it is unnecessary to consider the question of the effect of the figures appearing upon the bills of quantities so far as the extras are concerned. The plaintiff claims that for the extra work he should receive a reasonable remuneration, and he values that at £83 17s. The defendant, on the other hand, states that a reasonable price for these extras would amount to £23 13s. 11d. It was found necessary, for the purpose of ascertaining the extent and measurement of the extras, and also to arrive at a conclusion as to reasonable prices, to appoint an architect who was disinterested in this matter, and who would give us an opinion as to the measurements and as to the prices, and the estimate he puts on it as a reasonable remuneration for the work is £52 8s. 5d., and I think we must come to the conclusion that we ought to accept the opinion of the architect, both as to the measurement of the work and as to fair remuneration, and to allow for the extras at the rate of £52 8s. 5d. When we, however, come to the deductions, it is necessary to consider another point. With reference to this also, the plaintiff claims that he is entitled to make an allowance for those deductions "at the rate provided for in the said quantities," and at that rate he makes the value of the deductions £54 19s. The defendant admits that he is bound by the figures given in the bills of quantities, and that those figures must decide the question between them; but he says, as to the measurements, he disputes the claim of the plaintiff, and also to the correctness of the figures given upon the bills of quantities. Here, again, for the purposes of measurements, we referred the matter to the architect, and he has given us a correct measurement of the work, and the only question that now arises is, upon what basis we are to value that work? Upon the pleadings, the parties are agreed that the work should be valued at the rates provided for in the said bills of quantities, and the Court has now to ascertain what the prices are upon these bills. When the plaintiff sent in his account to the defendant unaccompanied by the bills of quantities, he was requested by the defendant to supply him with that document in order to ascertain whether the account was correct upon the estimates there given. Thereupon, he was supplied with a document purporting to be the bills of quantities with the correct figures. The defendant, doubting the correctness of the figures as they appeared upon what seemed to be a copy of the original bills of quantities, asked to be supplied with the original bills of quantities, and thereupon the bills of quantities with which he supplied the plaintiff were produced by the plaintiff, and the defendant was then satisfied to have the account settled upon that basis. The Court has now to decide whether the value of the work is to be decided upon the bills of quantities which the plaintiff says is correct, or upon the one which seems to be the original document supplied to the plaintiff by the defendant, and upon which different figures appear. The plaintiff's counsel has attempted to explain the existence of these two different documents, and has argued that when the plaintiff made his claim he made it upon the copy which he considered genuine. Now, I think we ought to decide whether there was a honest belief in the mind of the plaintiff that the document he put in was a genuine document, and we can only test that by the rest of the evidence. He supplies the defendant with a document upon which the price of every single item is specified from first to last. There is a long column of figures, which, being totalled up, amount very nearly to the contract price. The plaintiff says that when he handed that document to the defendant it contained no figures at all, and that the figures must have been placed upon the document after it had got into the defendant's hands, and that would seem to me to

amount to a charge against the defendant of introducing figures fraudulently for the purpose of supporting his case. Upon the whole of the evidence, it is not possible to come to any other conclusion than that those figures were deliberately placed there by the plaintiff himself for the purpose of valuing the work, and when he handed that document to the defendant it contained those figures, and any attempt at explaining the existence of other documents on the faith of the plaintiff's evidence, must fail. I am, therefore, of opinion that we must accept the document purporting to be the bills of quantities upon which the defendant bases his case, and, that being so, we find, instead of the deductions amounting to £54 19s., as stated by the plaintiff, they must be valued at £92 5s. 11d., and upon that basis the balance must be decided between the parties. As I said, there is another large item introduced with reference to the quantity of flooring, and there is some dispute as to the exact amount of work that was done. Here again we had the assistance of the architect's opinion. He has valued the work done, and has made some allowance for the deduction which the plaintiff claimed in that respect, and he puts the value of the work at the figure of £121 12s. 6d., only making a difference of a few pounds as between that and the estimate of the defendant. Upon going through the whole of these figures, I come to the conclusion that the plaintiff in claiming £111 18s. claims too much, and the defendant in tendering £6 10s. 8d. tenders too little, and the balance arrived at is the sum of £37 15s., and for that amount the plaintiff must have judgment, with costs.

Kotzé, J.: I am of the same opinion. I think the sum of £37 15s. upon the whole will be a fair amount to arrive at and to allow. I merely wish to add that I agree with my brother Maasdorp with reference to the tissue paper schedule, that is, I accept the statement of Mr. Maxwell that when he got that document the prices were all marked on it.

[Plaintiff's Attorney: A. W. Steer; Defendant's Attorneys: Reid and Nephew.]

Ex parte REINAUD.

Mr. Buchanan asked leave to move in this petition as a matter of urgency. The petition set forth that petitioner was formerly a partner in a business in Holland, which business had been taken over by the firm of A. van der Laun and Co., of Rotterdam. At the request of petitioner Messrs. Van der Laun and Co., had sent certain goods to petitioner's son in this colony, petitioner having paid £82 on account of the purchase price of these goods. It now appeared that Messrs. Bucknall Brothers, by one of whose vessels, the goods were shipped, had been instructed by cable from Van der Laun and Co. not to deliver the goods to petitioner's son, but to deliver them to Messrs. Jackson and Co., landing agent, Port Elizabeth. Petitioner alleged that by the action of Messrs. Van der Laun and Co., he had sustained damages in the sum of £1.000. He was desirous of instituting an action for damages, and now asked for leave to attach the goods in question *ad fundandam jurisdictionem*. He also applied that, in view of the liability of the goods (cycle parts and accessories) to deteriorate under attachment, and in view of the fact that he had already paid £82 on account of the goods, and had some parts which were useless without the goods now stopped, the Court would grant an order authorising the delivery of the goods to petitioner upon his paying into the hands of the Registrar of the Court the sum of £50, which would make up the total value of the goods.

A rule *nisi* was granted, returnable on December 12, calling upon the Bucknall Steamship Co., Ltd., and Jackson and Co. to show cause why they should not be interdicted from parting with the goods mentioned in the petition, pending proceedings to be taken by petitioner, the rule to operate as an interdict in the meantime.

Postea (December 16): The rule was made absolute.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

ADMISSIONS.

Mr. Benjamin moved for the admission of John Grey Rutledge as an advocate.

Application granted and oath administered.

Ex parte BLAYNEY. { 1903. Nov. 12th.

Admission of Notary — Examiners.

The applicant passed the notary's examination before two advocates of the Supreme Court and a notary duly admitted by the Supreme Court, but the examination took place in Rhodesia. The applicant having been duly admitted as notary by the High Court applied to the Supreme Court for admission to practice in this Colony.

Held, *that as the Act required two notaries and one advocate to be the examiners, the applicant was not entitled to admission.*

Mr. Buchanan moved for the admission of Daniel Patrick Blayney as a notary public. Counsel read the petition of applicant, which showed that he was an attorney of this court, having been admitted under section 19 of His Majesty's Royal Charter of Justice. Formerly he applied for admission as a notary of the late High Court of Matabeleland; he satisfied three examiners, and was admitted. He was subsequently enrolled as a notary of the High Court of Southern Rhodesia.

Mr. Upington said that he appeared on behalf of the Law Society to oppose, but in view of recent decisions of this Court, he did not very well see on what ground one could oppose. It seemed to him to be more or less on all fours with previous applications, also of Rhodesian notaries. See *Ex parte Holderness* (13, C.T.R., 254); *Ex parte Duff* (13, C.T.R., 877). It seemed to him that the three examiners before whom the applicant appeared would be quite competent to act for this Court.

[De Villiers, C.J.: There is a difference between the two cases. The law says there shall be three examiners, two notaries and one advocate, while in the present case the examiners were one notary and two advocates.]

After hearing Mr. Buchanan further in support of the application,

De Villiers, C.J.: If all the examiners who examined the applicant had possessed the qualifications required by the 6th section of the Act, there would be no difficulty in granting this application. The recent decisions of the Court in regard to similar applications would have been a precedent to be followed but it appears that in the present case two of the examiners were advocates of the Supreme Court and not notaries, and only one of the examiners was a notary. The 6th section of the Act, however, is clear that one should be an advocate and two should be notaries. It is true that a certificate under the hand of two or more of the said examiners shall be sufficient, but it is necessary that the examination should take place before three qualified examiners. There is no great hardship in the present case, because if the applicant has already passed the examination before the three examiners mentioned, he will have no difficulty in passing an examination before three examiners as required, but without such examination, the Court is not justified in granting the order.

PROVISIONAL ROLL.

FAURE V. HOOLE AND CO. { 1903. Nov. 12th.

Mr. J. E. R. de Villiers moved for provisional sentence upon two promissory notes of £50 and £100 respectively, with interest at the rate of 6 per cent.

Order granted.

GOURLAY, CAVANAGH AND CO. v. GROMER.

Compulsory sequestration—Deed of assignment.

At a meeting of creditors of G. the creditors present agreed to sign a deed of assignment of G.'s assets for the payment of his debts. Subsequently a large creditor refused to sign the deed of assignment, whereupon the plaintiff on proof of G.'s insolvency obtained a provisional order for the sequestration of G.'s estate.

Held, *that the plaintiff was entitled to an order of final sequestration.*

This was an application for the final adjudication of the defendant's estate. A provisional order had been granted by Mr. Justice Kotzé. The defendant was Alexander Gromer, of 62, Tennant-street, Cape Town, and the deficiency in the estate was computed at £324 11s. 3d. A meeting of the creditors was held, at which it was agreed that the debtor should execute a deed of assignment, but some difficulty arose through one Herman refusing to sign, and, subsequently, as respondent had committed an act of insolvency, application was made to the Supreme Court by the plaintiffs for a provisional order for sequestration.

Affidavits of the defendant and others stated that the said Herman proposed the resolution in favour of the respondent making an assignment, and that, in consequence of this resolution, he handed over all his stock to his creditors. Certain of the creditors then went to 62, Tennant-street, and the said Herman took away about £70 worth of goods. Herman afterwards declined to sign the deed of assignment.

Mr. Upington (for the defendant) contended that it was most unfair that he should be put to extra expense by having his estate sequestrated merely because Herman refused to sign.

Mr. Gardiner (for the plaintiffs) said that Herman might have signed only upon a certain condition being embodied in the deed, and he did not see how they could compel Herman to sign the deed. He contended that the applicant was clearly entitled to come into court and apply for the final adjudication, and that it would be in the interests of the creditors that the estate should be sequestrated.

Mr. Upington said that had it not been for Mr. Herman's action no difficulty would have arisen at all. He submitted that the arrangement entered into between the defendant and his creditors should be carried out.

De Villiers, C.J.: It is common cause that the estate of the defendant is insolvent, and consequently the plaintiffs are entitled to have the estate sequestrated unless they have by their conduct debarred themselves of this right. It is said that there is estoppel, because they have signed a deed of assignment or rather promised to sign a deed of assignment, and undoubtedly if all the creditors had joined and consented to sign this deed of assignment the plaintiffs would have been estopped from claiming sequestration of this estate. It appears, however, that one important creditor, Mr. Herman, refuses to sign the deed. This gentleman was a party to the resolution, but he refuses to sign the deed of assignment, and until it is so signed it is inchoate, and, in my opinion, the plaintiffs are not bound to enter into litigation with creditors. The plaintiffs are justified in saying that if some of the creditors withdraw they will fall back upon the remedy which the law gives them, and that is exactly what the plaintiffs have done in the present case. If we regard the interests of creditors alone, it would seem to me that it is really in the interests of creditors that the sequestration should proceed. It does not appear that all the creditors were present at the meeting which agreed to the assignment, but it is said that there was a resolution passed to the following effect: "That the creditors present (not all the creditors) should at once proceed to the said Alexander Gromer's premises and remove any goods which they had sold to him, and take such goods back at cost price, and give the said William Stephen Cavanagh a credit note thereon." This is a most extraordinary resolution. It does not appear whether these goods had been sold on credit or for cash. If

they had been sold for cash there may have been some justification for creditors going and removing their goods. If they had been sold for credit there would have been no justification whatever for taking such a step. It is said that the creditors consented to it, but it does not appear whether all the creditors were to share in this general raid upon the defendant's property, and looking at all the circumstances, I think it is really for the benefit of creditors that this sequestration should proceed, seeing that an important creditor like Herman refuses to be bound by the deed which he promised to sign. A final order of sequestration will be granted.

[Plaintiff's Attorney: J. G. Harsant: Defendant's Attorney: G. Scanlen.]

UNCOAT V. ADAMS.

Mr. Smith moved for provisional sentence on two mortgage bonds for the sums of £2,600 and £500, and interest according to the terms of the summons, and also for the sum of £18 5s. 9d., being the amount of insurance premiums disbursed. Counsel also asked that the property specially mortgaged be declared executable.

Order granted.

ESTATE OF ANDERSON V. TUROK.

Mr. Gardiner moved for provisional sentence on a certain deed of sale and purchase for £400, with interest and costs.

Order granted.

MANNIX V. CHAIT AND CROOMBER.

Mr. Buchanan moved for provisional sentence on certain conditions of sale for £270, with interest and costs of suit.

One of the defendants (Chait) appeared, and said he knew nothing about the sale. He was a partner of Croomber, who told him nothing about the purchase. They were partners in a bakery business. He had no knowledge of this transaction until he received the summons. Defendant made a declaration on oath to this effect. He did not know where Croomber was now. The partnership was existent when the purchase was made.

De Villiers, C.J., said he thought the plaintiff should have an opportunity of proving that Croomber had authority to sign on his behalf, even if he did not sign the conditions himself. The case would therefore stand over until the 18th inst.

MANNIX V. VICKAR AND CO.

Mr. Buchanan moved for provisional sentence upon certain conditions of sale for the sum of £135, being the purchase price of a certain lot of land situated at Plumstead. There was a clause that if the instalments of the purchase price were not paid, the whole of the amount of the purchase price became due.

The defendant appeared in person, and said that the previous day he had paid £45 on account, and £10 costs, and he understood the matter would not come before the Court.

Mr. Buchanan said that the first instalment was due three months ago and on the failure to pay the instalment, the whole amount became due, and he submitted the plaintiff was within his rights in asking for judgment for the whole amount.

De Villiers, C.J.: You are entitled to judgment, but I would suggest that the defendant should not be pressed at once, because he seems anxious to pay. Provisional sentence granted, less the sum of £25 paid on account.

Mr. Buchanan: Very well, my lord.

FISHER V. ADRIAANSSE.

Mr. Upington moved for provisional sentence on a certain promissory note for £50, with interest and costs.

Order granted.

EATON, ROBINS AND CO. V. VAN ZYL.

Mr. Buchanan moved for provisional sentence on a promissory note, with interest and costs.

Order granted.

BERGL V. CONRAD. { 1903. Nov. 12th.

Provisional sentence — Bill of exchange.

To a claim for provisional sentence against the acceptor of a bill of exchange, the defence was raised that the

consideration for the bill was the delivery of 2,000 bags of oats, each bag containing 150 lbs., whereas the oats were actually tendered in bags containing a smaller quantity. It appeared, however, that the plaintiffs had rendered to the defendant, before he accepted the bill, an account shewing on the face of it that the bags contained less than 150 lbs.

Held, *that as the price of the oats was at so much per 100 lbs. and not per bag, provisional sentence should be granted, leaving it to the defendant to raise his defence in the principal case.*

This was an application for provisional sentence on a bill of exchange drawn by plaintiff upon the defendant and accepted by him for £685 6s., for value received.

The affidavit of the defendant, W. F. Conrad, of East London, stated that in the early part of the present year he entered into a verbal contract with plaintiff, whereby plaintiff undertook to deliver to him 2,000 bags of feed oats at 5s. 7½d. per 100 lb. from America, to be delivered, c.i.f., East London. On the 12th March, 1903, plaintiff wrote confirming the verbal contract, and mentioning that the bags would contain a uniform weight of 150 lb. each. Unless these bags contained a uniform weight of 150 lb. they would be unsaleable. On arrival of the oats, it was found that they did not contain uniform weight, and defendant wrote that unless plaintiff had the oats rebagged he could not accept them. The bags contained, on an average, 108 lb. oz. The bill of exchange was given in spect of these oats. Defendant alleged he had sustained loss owing to this breach of contract, and wished to bring an action for damages. He further stated that there was a breach in regard to the undertaking to deliver c.i.f.

In an answering affidavit, Mr. Bergl stated that he never undertook that the bags should contain a uniform weight of 150 lb. It was stated in the letter that they would contain 150 lb. in order to give defendant some idea of the weight of the bags. In June, before the oats arrived, an account was sent to the defendant, showing that the bags contained on an average 120 lb.

Mr. Buchanan for plaintiff; Mr. Upington for defendant.

After hearing counsel in argument on the facts,

De Villiers, C.J.: The plaintiff is entitled to provisional sentence upon the bill of exchange accepted by the defendant, unless the defendant can satisfy the Court that there is *prima facie* ground for holding that defendant would succeed in the principal case. I do not wish now to prejudice the decision in the principal case, but I will only say this: I am not satisfied that the defence disclosed in these affidavits is one that would finally succeed in the principal case. What the defendant bought was oats—a certain quantity of oats. True, these oats had to be in bags containing a certain quantity, but it does not appear that there is any warranty that every bag was to be of a uniform size, containing 150 lb., and unless there is such a warranty, I do not think the defence raised would be a good one. But, then, there is the further difficulty that the defendant, after he signed, accepted the bill with the full knowledge that the bags did not contain 150 lb. An account was rendered to him which specifies 2,000 bags of oats, containing 240,442 lb., at 5s. 7½d. per 100 lb. Now this works out at an average of a little over 120 lb. a bag. With the full knowledge that the alleged contract that each bag should contain 150 lb. had not been complied with, he accepted this bill of exchange, and I do not think the Court should now withhold provisional sentence. It will be competent for the defendant to enter into the principal case, and the plaintiff will give his security for the amount. The defendant can also claim such damages as he has sustained by any breach of contract he might prove, but at this stage I think provisional sentence should be allowed.

[Plaintiff's Attorneys: Friedlander and Du Toit; Defendant's Attorneys: Walker and Jacobsohn.]

TRIAL CAUSE.

BENDITZ V. BENDITZ.

This was an action brought by Charles William Benditz, a painter, residing at Claremont Flats, against his wife, Annie Benditz, now of Observatory, for divorce, on the ground of her adultery with one Green, and also for custody of two of the children. Mr. Russell appeared for the plaintiff. The defendant had been barred from pleading.

Charles W. H. Smith, clerk in charge of the marriage register at the Colonial Office, produced the duplicate copy of the register of the marriage.

Charles W. Benditz (the plaintiff) said that he was married to the defendant at the German Lutheran Church, Wynberg, on the 27th February, 1893. At the outset, witness and his wife lived with his parents. Subsequently, in 1901, witness left his wife and went to the front, arranging for £4 10s. to be paid out of his wages while at the front. On returning, after an interval of six months, he found that he was without a home, and he was unable to trace his wife. He went to the front again, and afterwards came down; but his wife was still absent, and he went to the front for a third time. He had ascertained that his wife was living at Observatory with a man named Green. Witness applied to have custody of the oldest and youngest of the three children. The other child was in defendant's custody, and she had told witness that he had no right to it.

Charles Blows, driver, said that the defendant was living at the Municipal Stables, Mowbray, with the stable foreman, Green. She gave it out that her name was Mrs. Green. Witness knew that the woman was Mr. Benditz's wife. Defendant and Green were living in the storeroom.

John Brunn, a Municipal employee at Mowbray, also gave evidence as to the defendant and Green living together.

Decree of divorce granted, plaintiff to have custody of the oldest and youngest children.

SUPREME COURT

[Before the Chief Justice (the Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice KOTZE.]

WALKER V. WALKER. { 1903. Nov. 13th.

This was an action brought by George John Walker, of Port Elizabeth, against his wife for divorce on the ground of her adultery, also for declaration of forfeiture of the benefits of the marriage in community.

The declaration set out that the parties were married in community at Graham's Town, on the 3rd July, 1890, that the defendant deserted the plaintiff on the 24th February, 1898, and that thereafter she committed adultery, and gave birth to a child in 1890.

Mr. Benjamin for plaintiff; Defendant in default.

Chas. W. H. Smith, clerk in charge of the Marriage Register at the Colonial Office, produced duplicate of the registry of the marriage.

George John Walker (the plaintiff) said he was married to the defendant at Graham's Town on the 3rd July, 1890, in community of property. They lived together until February, 1898, when defendant deserted him, and he had not seen her since. Witness had a life insurance policy, the premiums on which had been paid by himself.

Mr. Benjamin explained that the two ladies, who were to give evidence as to the birth of a child to the defendant in 1900, had not arrived, owing to a misunderstanding between the attorneys. Counsel applied for leave for their evidence to be taken on commission, or for an affidavit to be sworn under the rules of Court. He suggested that Mr. Advocate Van der Riet be appointed commissioner.

The Chief Justice said that it should not be assumed that the evidence was conclusive. The Court would grant a commission to take the evidence of Ann J. E. Reynolds and Sarah Ann Curran, Mr. Advocate Van der Riet to act as commissioner. He thought that in future if parties knew that witnesses were not present an application should be

made before the case was called. The case would stand over until the evidence taken on commission was given.

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

ESTATE OF LATE BASSON V. LAW ACCIDENT INSURANCE CO. 1903. Nov. 12th. .. 13th.
ESTATE OF LATE BASSON V. UNION INSURANCE CO. .. 30th. Dec. 3rd.

Life insurance—Proof of death.

These were two actions brought by Mrs. Basson, as executrix dative in the estate of her son, Jasper S. F. Basson, to recover £3,500 upon certain policies of insurance issued by the defendant companies. It was agreed that the cases should be heard together.

The declaration in the case against the Union Company set out that the defendant was sued in his capacity as manager for South Africa of the Union Company. On or about the 23rd November, 1901, the said Jasper Basson insured his life with the defendant company for £2,000, and obtained from the defendant a certain policy of insurance in respect of which he duly paid the annual premiums for two years. On or about the 3rd December, 1901, the said Jasper Basson insured his life with the said company for the further sum of £1,000, and obtained from defendant another policy, in respect of which he duly paid the annual premium for two years. On or about the 14th February, 1903, while both the said policies were still in force, the said Jasper Basson accidentally met his death by drowning in the sea, near the mouth of the Steenbraz River (Gordon's Bay), in the district of Stellenbosch. All things had happened to cause the said policies to be payable, but the defendants refused to pay the policies.

The defendant, in his plea, admitted the allegations in paragraphs 1, 2, and 3, of the declaration. He admitted that the policies were still in force on the 14th February, 1903, but he denied that the said Jasper Basson met his death on the said date or any other day. He admitted refusing to pay the policies, but denied that the refusal was wrongful.

The declaration in the case against the Law Accident Company set out that on or about the 19th July, 1902, the said Jasper Basson effected a life accident assurance policy for £500, and paid the premium. The declaration proceeded to set out the death of Jasper Basson on the 14th February, 1903, and the claim for £500

The defendants, in their plea, admitted paragraphs 1 and 2, and denied the allegations in paragraphs 3 and 4, and said that in terms of the policy mentioned in paragraph 2 of the declaration referred to they were not liable to pay to the plaintiffs the sum of £500, or any other or further sum in respect of the said policy, unless and until there should have been furnished to them by the plaintiff satisfactory proof of the death of Japer Basson by violent, accidental, external, and visible means. They said, further, that the plaintiff had failed to produce satisfactory proof either of the death of the insured, or his violent and accidental death, and was wholly unable to do so.

Thereupon there was joinder of issue, the plaintiff, in her replication, stating that on the 5th June, 1903, through her attorneys, she furnished to the defendant such proof of death as was required by the terms of the said policy.

Mr. Burton (with him Mr. J. E. R. de Villiers) for plaintiff: Mr. Searle, K.C. (with him Mr. Bisset) for the Law Accident Co.; Mr. Searle, K.C. (with him Mr. Benjamin) for the Union Co.

Mr. Burton said that in both cases the point at issue was the same. Although the plea in the Accident's Company's case denied the due giving of notice and so on, substantially the issue in both cases would simply be proof of death. Both the companies put the plaintiff to proof of death of the insured. That was a question of fact, which was remitted to the Court now upon the pleadings. Counsel put in the various documents as to presumption of death, and the correspondence which had passed between the plaintiff's attorneys and the companies.

Evidence was called for the plaintiff.

Anna Maria Basson, plaintiff, executrix dative to the estate of her late son Jasper, stated she was a widow, and had three sons. Jasper was the youngest, and was seventeen years of age. The agent of the Union Company (Mr. Murphy) had been to the house several times, and ultimately it was decided to

insure Jasper's life for £2,000, and later on for another £1,000. Witness paid the premiums. At the time of the deceased's death, he was a temporary clerk in the Colonial Office. The boy was rather a careless sort of fellow, and after he had fallen into the hold of a ship, and was again nearly drowned in the Berg River, it was decided to insure him against accident in the Accident Assurance Company for £500. In consequence of Mr. Murphy's persuasion, the whole family were insured. She last saw her son on February 13, at Observatory. He said he was going for a holiday to Gordon's Bay. The other brother (Pierre) had gone to Gordon's Bay the previous day.

Cross-examined by Mr. Searle: Pierre was twenty-three years, Johannes twenty-one, and Jasper was 17½ years of age in January last. The reason she said he was insured was to give him a start in life, in order that he could borrow money on the policy. Pierre arranged the business with the insurance companies. First of all, £1.000 was applied for in the Accident Insurance, but only a policy for £500 was taken out. Her own policy was allowed to lapse before December, 1902. Johannes's policy might also have lapsed, as also did Pierre's. The only policy allowed to run was that of the deceased. She had given up the boarding-house at Observatory.

Pierre Cornaille Basson, brother of the deceased, said he was a speculator in land and scrip and property. On February 13 he saw his brother at Gordon's Bay. His brother was in good health. The next morning, at 4.30, they went fishing, in fairly good light. He had frequently fished in that vicinity, and his brother had also been there about half a dozen times. There was a little breeze, and the sea was fairly calm. It was about low tide. There was a cave called "Sewing Room," and they went down a little on this side of it to cut bait. Witness was standing with his back to the water. When he turned round, his brother was bending forward to cut bait. He then heard Jasper cry out, "Help." A wave dashed against witness, and threw him against the rock. When he turned round, he saw his brother rise to the surface, about 30 paces out. He rose to the surface back upwards, and practically sank immediately, and the body never came to the surface again. Witness could swim a little, but as there was a tremendous current, he could render no assistance. There was no chance of saving him, and it was hopeless to try to rescue the deceased. His brother could swim a little. After waiting about ten minutes, he returned to the hotel, and about the clump of fir-trees he met Dr. Ford, Mr. Deydier, and Mr. Nicholl, whom he told of the accident. Later in the day there was a search made for the body. Efforts were also made from the Strand, where £100 was offered for the recovery of the body.

Cross-examined by Mr. Searle: He did not go down to Holloway's Hotel by arrangement with his brother, although he expected him. He told Mr. Holloway his brother might come down. The night before his brother arrived he did not ask Mr. Holloway for fishing tackle. He had been out with Mr. Holloway in a boat the previous day, and he asked the latter where Le Roux was drowned. He was positive that he did not arrange for fishing tackle for his brother and himself with Mr. Holloway. He usually arranged for bait before he went out, and it was untrue that Mr. Holloway told him he could not possibly cut bait before eleven o'clock next morning. His brother was in the act of cutting bait when he was washed away. He could not say that it was shortly after spring tide and high tide when they arrived at the spot. About 6.15 a.m. they began cutting bait, and the accident would have occurred about 6.30 a.m. He did not remember Mr. Deydier taking out his watch and showing him it was 6.35 a.m., although the fir trees were a long way from the rock. He did not say to Mr. Deydier that he would get some doctor at Wynberg, or Rondebosch, to break the news to his mother. He told Mr. Deydier that he had waited about ten minutes after the accident. Mr. Deydier did not remark to him that it was strange that he went out fishing in his Sunday clothes. He denied telling Mr. Deydier that the wave washed him over and over. He was positive that he was wet through. There was a kind of thick mist when he met Dr. Ford and the officers. Holloway did not tell him to go and get a boat.

He did not point out three different spots as the scene of the accident to Mr. Holloway and Mr. Swart. They never offered to land him until he would get something he had left on the rock. He denied that he offered Swart £50 if the body was recovered, and £5 if nothing was done. In the boat he offered £100 to anyone who recovered the body. He did not say to the barman, "Good morning. I have had some bad luck," when he returned from the accident. He left the hotel the morning of the accident, and returned a few days later, and asked the barman if anyone had seen him leave the hotel. When Cruse said he saw him he did not bring him into the billiard-room, and offer him £25 if he would make an affidavit. He had two declarations ready for Cruse and Mr. Holloway, and the declarations were worded by witness. The declaration stated that Cruse was on the stoep the morning they went fishing, and that witness was dripping wet, and that he had his brother's hat in his hand when he returned. Later on Cruse said the affidavit was incorrect, and that he would not take £25.000 for an incorrect affidavit. The declaration was signed between the billiard-room and the bar. If his brother was a first rate swimmer, he would have competed in races. He did not believe that his brother could swim half a mile. Between 9 and 10 that morning a very rough sea got up. He paid the premiums on the policies for his mother. He had made a proposal to the S.A. Mutual for £1.000 this month. Witness went down to the Strand to tell his uncle about the disaster. He saw his uncle and Mr. Frank Scholtz at the bazaar.

Re-examined by Mr. Burton: He had never fished at that particular rock.

By the Chief Justice: His mother had a little money.

Daniel Hermanus Du Toit, contractor, said he knew the coast to be a dangerous one in the nighbourhood of the Sewing Room Rock. Le Roux and Van Schoor were drowned in that neighbourhood. Their bodies were never found. He remembered meeting the deceased in February last. Holloway told witness that Basson was drowned, and they met Pierre coming to meet Holloway. He seemed to be downhearted, and his clothes were all wet.

Cross-examined by Mr. Searle: He saw Pierre before he went to get the boat. It was not raining at the time. He could not say that he looked as if a wave had washed over him. Pierre was not wearing fishing clothes at the time. It was just before the boat went out he saw Pierre.

By the Chief Justice: He had never himself got red bait at high water at that spot.

Peter Millar, fisherman, Gordon's Bay, said he knew the whole coast, but it was necessary to know it, otherwise fishing would be dangerous. He remembered, when Van Schoor was drowned, hearing his cries for help. He disappeared, and immediately afterwards a large shark followed the boat. Red bait could be gathered at high tide if the water was quiet. He had done so himself, but never at spring tide.

Cross-examined by Mr. Searle: It would have to be very calm to get it at high water, and it would be necessary to have a hook. Witness thought he knew a little more about the coast than Mr. Holloway. At high tide it would be necessary to get up to the waist in water. At spring tide, there were places where it was possible to get the bait at 3 feet. He had cut bait at low tide at the Sewing Room Rock. A couple of weeks afterwards the spot was pointed out to him.

Anthony Robert Edward Nicol, clerk in the Colonial Office, Cape Town, said he was at Gordon's Bay on the 14th February last. He went out fishing. He met Pierre Basson coming from the direction of Steinbras River. Basson told witness that his brother had been drowned.

The Chief Justice: Did he seem very much agitated?

Witness: No, he did not.

The Chief Justice: Was he confused?

Witness: He was a bit confused in his way of speaking. He seemed rather surprised at having met people there. Witness (continuing) said that Pierre Basson's clothes were wet, probably owing to the rain. He did not think the man's clothes were wet as if a breaker had passed over him.

Mr. Burton said that the witness placed him in a very awkward position, because he had stated in his declaration that Pierre was dripping wet, and very much agitated.

Witness (continuing the evidence) said that when he signed the declaration he was very busy, and he simply read through the declaration once. He asked the attorney to wait, but he was pressed to sign, and as he was very busy, he signed it. The declaration was supplied to him. Young Basson had asked him if he would make an affidavit, and witness said he would. He did not make any statements to young Basson. Afterwards Basson brought this declaration round to him ready to be signed. He made this declaration in order to do Basson a favour. He did not read over and study the declaration as he would have done if he had known the case was coming into court. He should have been guilty of false swearing if he had said in court that Pierre Basson was very much agitated, or was dripping wet, as if a breaker had passed over him. He did not realise at first that this was going to be such a serious case. Alterations were made in the second affidavit, the word "dripping" being erased, and the word "confused" substituted for "agitated."

Cross-examined by Mr. Searle: As far as witness knew, it would be quite impossible to obtain bait at that time of the morning during high tide. Pierre Basson did not strike witness as if he were much upset when they met him. After witness had heard his tale, he remarked to Basson, "Well, young man, you don't appear to have realised your loss." His clothes had not the appearance of having been knocked against the rocks by a wave.

Pierre Basson (recalled), said, in answer to the Chief Justice, that the water was over the bait about 18 inches when he was cutting it. He rolled his sleeve up, and cut the bait away. It was a very sudden wave that swept them away. Witness did not desire to break the news of his brother's death to his mother. The Rev. Mr. Pienaar communicated the intelligence to her.

Postea (November 13):

[Before the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice MAASDORP and Mr. Justice KOTZE].

Pieter Behrend Swart, of Gordon's Bay, said he had been practically all his life a fisherman at the Bay, and was well acquainted with the coast between there and the Steenbras River. He was with the boat that took Pierre Basson and Holloway out to search for the body of Jasper Basson. They went to within fifteen yards of the rock where Pierre said that Jasper had been knocked off. It was near the Sewing Room Rock (Naaikamer), about 400 or 500 yards on the Gordon's Bay side. He had fished at the spot pointed out by Pierre. Plenty of bait was to be had there. It was possible to cut bait there at the quarter—between spring tide and neap tide. He should say that it would be possible to cut bait at about 6.30 on the morning in question. There would be a risk to those who were not accustomed to the vicinity of being washed off the rock. All along the coast there was a strong "back draught" from the rock. About a year ago Mr. Roos's son was washed off the rocks, while he was cutting red bait. The current was very strong, and it would be extremely difficult for anybody who was washed into the sea to regain the rocks.

Cross-examined by Mr. Searle: The place pointed out by Pierre as the spot where his brother had gone down was known as Ruigte Vlei. They did not go to the Sewing Room Rock (Naaikamer). The point was about 400 or 500 yards beyond Ruigte Vlei, towards the mouth of the Steenbras River. When they went out the sea was not rough. There was not a stiff breeze blowing. A man might have jumped from the boat to the rock that morning.

Jan Stephanus Roos, fisherman, Gordon's Bay, said he was told by the men who went out with the boat where Jasper Basson had been drowned. He had cut red bait at that spot. He had cut bait two or three hours after high water. It was dangerous to fish off the rocks there. He had been washed off the rocks at a point closer to Holloway's Hotel, when he had been cutting bait.

Cross-examined by Mr. Searle: He was washed off in a calm bay. He managed to swim back to shore. The place was pointed out to him by Swartz and Pierre Basson. He did not recognise Ruigte Vlei by the photograph produced. He could cut bait there when the water was "half." He would not think of going to cut bait there at high tide, but he might do two hours afterwards. He did not always wait until

low tide, but he generally waited until low tide if he could do so. It was not possible to cut red bait during spring tide.

Jasper Albertus van Niekerk, retired farmer, Newlands, and an elder of the Wynberg Church, said plaintiff was his cousin. He recollected Pierre Basson making a report to him one Saturday evening in February last. In consequence, witness advised him to send for Mr. Pienaar.

By the Court: Witness went to see the plaintiff on the following Monday. Pierre seemed very sad when he called at witness's place. He appeared to feel his loss.

This concluded the plaintiff's case.

Evidence was called for the defendants.

Edward Richard Holloway, proprietor of Holloway's Hotel, Gordon's Bay, said he had lived at Gordon's Bay for ten years. Pierre Basson came to his hotel on Thursday, February 12, saying that he would stay for a couple of days. His brother arrived on the Friday night. On Friday, witness and Pierre went out fishing in a boat. While they were out Pierre asked him where Le Roux was drowned. Witness pointed out the place --Ruigte Vlei. Le Roux was drowned in 1882. His name was painted on the rock. Beyond witness's house there was no house of any kind along the coast until beyond Cape Hangklip, 25 miles away. On the Friday night Pierre asked him to lend him fishing rods. Witness asked if he had any bait. Pierre said he could cut bait. Witness told him he could not cut bait before 11 o'clock, because of the tides. Witness had had considerable experience of fishing both from a boat and rock. Witness did not see the brothers leave on the morning. He left two fishing rods outside the hotel for them. About five minutes to seven he saw Pierre. He did not see the brothers set out. On his return, Pierre said he had had an accident. Witness said, "Have you lost my fishing tackle?" Pierre said, "My brother has got drowned." Witness said, "What, your brother got drowned? You had better get a boat. Go down to Swart's and I will follow you." Pierre did not seem to be much upset. There were a few sprinkles of water on his clothes, but his clothing did not appear to have been washed by a wave. A crew was got together with one Swart as skipper. Pierre first pointed to a little island. Witness told him that it was impossible to reach that rock. Then Pierre pointed to another spot, a short distance away, towards witness's house. Finally Pierre pointed out Ruigte Vlei. Pierre did not say anything to witness about the Sewing Room Rock. There was about 6 feet of water from low to high tide. The bait grew under the water. Swart offered to go into the water at Ruigte Vlei. It would have been possible to land there. Pierre said he had left something on the rock, and Swart then offered to put in. Pierre said in the boat it was no good looking for the body, as they would not find it. The wind came up afterwards, and they had to get away. They got back at about 9 or 9.30. When they went out, there was no heavy swell; there were choppy seas. Pierre sent witness afterwards with an affidavit prepared for him to sign. First, a declaration was brought to him in the same terms. The affidavit was correct. At this particular point there was an awkward drawback, which made it difficult to swim.

Cross-examined by Mr. Burton: A swimmer, even if a good one, could not get back, owing to the drawback. Witness agreed as to the probability of a wave suddenly coming up and washing a man away if he did not get back Witness could walk from Ruigte Vlei to the Steenbras River in an hour. Witness was quite sure bait could not have been cut at six o'clock. Witness had heard what Roos had said. Roos could not cut bait with a knife two hours after high water. It could be done with a hook. Witness used a hook 7 feet long.

Mr. Burton: It did not strike you that there was anything suspicious about the behaviour of Pierre or his brother before they went out?—Witness: Nothing at all.

Cross-examination (continued): When witness went out in the boat, they kept about 15 yards from the coast. Pierre was not at first quite certain about the spot, but finally pointed out the locality. Witness agreed with Pierre that it was no good looking for the body. When he said this, Pierre was beginning to get seasick. Witness saw nothing suspicious in Pierre's conduct.

Re-examined by Mr. Searle: They were about 15 yards from the island when Pierre pointed out the first island. Witness told him Jasper could not have got on there. The three islands pointed out by Pierre were not at all alike.

By the Court: The brothers had a double-bedded room at the hotel. They had only two small bags, so far as witness noticed. The elder brother came to the hotel first. The only way in which one could get to the island first pointed out by Pierre was by boat. Pierre wore a light suit, on which water would show. He only saw a few sprinkles on the jacket.

Auguste Joseph Mare de Postle Deydier said he had lived at Caledon for 15 years. He was formerly Mayor of Caledon. On the morning in question witness went fishing with Dr. Ford and another gentleman. They took bait, because he knew they would be unable to get any at high water. They arrived at Holloway's at 5.45, outspanned, and walked on. Witness saw a man coming along slowly with two rods. He saw the man from a distance; he was not running. He met the man about 20 minutes' walk from Holloway's. The man, whom he identified as Pierre, called witness by name, saying "Good morning." He asked witness if he was going fishing, and witness replied it was a queer question to ask, seeing he (witness) was carrying a rod. He told witness not to go. Witness asked why, and he said an accident had happened, his brother having been drowned. Witness asked if he could do anything, and he replied in the negative, saying he had watched for 15 minutes. He was no more agitated than when he was in the box on the previous day. One of the legs of his trousers was wet, and the other was wet up to the knee. He said he was going to get a doctor to break the news to his mother. Witness asked him where the accident had happened, and he indicated a point about 15 minutes' walk away. He told witness that when the accident happened he was standing with his back to his brother, about 15 yards away. A wave came and washed him (Pierre) over and over into the gully. When he got up, his brother had disappeared. He pulled a straw hat out, and said that was all he had of his brother. Witness remarked that it was very strange he did not have the coat, as people who went fishing usually took off their coats. Pierre said that it was a new hat, and his brother put it on the rock, with two stones in it, to prevent it from blowing away. Witness also remarked upon the fact that Pierre was fishing in his Sunday clothes, and he replied that his brother was fond of fishing, and had sent him a letter asking him (Pierre) to meet him, in order to go fishing. They met at 6.35. Witness remembered looking at his watch. Pierre also looked at his, which showed the time to be 6.10.

Pieter Barnard Swart, cousin of the previous witness Swart, said he knew the Bassons by sight. Pierre came to him about 8 o'clock on the morning in question. He told witness his brother was drowned. He was cool at the time. He asked witness to get up a crew and a boat, and try to find the body of his brother. Witness got a crew. Holloway came with them. The witness gave evidence corroborating that of Holloway as to what occurred when they were in the boat. The places pointed out by Pierre were not like each other; he did not think anyone could mistake one for another of the three. It was a calm morning, but by the time they got back there was a good breeze blowing. Witness knew it was impossible to get bait there at high water; he had never tried. Witness only tried to get bait an hour before or an hour after low tide. Pierre changed his clothes before entering the boat at witness's house. Witness gave him a boating outfit.

The Chief Justice: Why did he change his clothes? Were they wet?

Witness: They were wet to the knees; it was raining that morning.

In reply to further questions by Mr. Searle, witness said he heard nothing about £100 reward.

Cross-examined by Mr. Burton: Witness would say the trousers were wet owing to contact with the wet bushes while walking. There were only a few sprinkles on the coat. Witness specially observed the conditions of the clothes, because of Pierre's statement that he had been washed over. Pierre mentioned Ruigte Vlei before they entered the boat. He appeared to be uncertain as to the spot.

Re-examined by Mr. Searle: Witness

had seen Pierre fishing along there three or four times previously.

Pieter Greers, farmer, said that several years ago the Bassons used to live at Somerset Strand, where their father used to keep a boarding-house. Witness had seen Jasper swimming out to meet fishing boats. Witness considered him a good swimmer.

Cross-examined by Mr. Burton: Witness had only seen Jasper swimming in the bay, when it was calm.

Re-examined by Mr. Searle: He considered Jasper one of the best swimmers in the Strand.

Albert Greers gave similar evidence.

Groot H. W. Kruse, barman at Holloway's Hotel, said he remembered the brothers coming to the hotel. He saw them going off on the morning in question at about 4.30. He next saw Pierre at about seven o'clock, when Pierre came up, and said, "Good morning, I had some bad luck this morning." Witness said, "Did'nt you get any fish?" He said, "No; my brother was drowned." He then walked off towards the hotel. He seemed very cool. Witness saw him go away in the boat. Afterwards Pierre came in the bar, and asked for a drink. He asked witness if anyone saw them going away that morning. Witness said he had. Pierre then said he would like to see him privately. They went into the billiard-room, and Pierre told witness he would give him £25 if he would sign an affidavit. Witness said, "Certainly, I will give an affidavit." They then returned to the bar. Some days afterwards Pierre came to the hotel in company with Mr. Robertson, J.P. Pierre showed him an affidavit. Witness read it, and said he could not sign it, as it was not correct. Pierre said, "You remember, I offered you £25," and witness replied, "I would not sign a wrong affidavit if you gave me £25,000." The first statement to which witness took exception in the affidavit was that he was standing on the stoep when the brothers went out. This was not so. The second statement to which he objected was that when he saw Pierre he was dripping wet; whereas he was not wet. Another statement in the affidavit was that Pierre showed witness his brother's hat. He did not do so. Witness had these statements struck out, and then signed the affidavit. A second affidavit was sent to him, and out of this he struck out the statement that Pierre was agitated. He also struck out the statement that Pierre told him Jasper was washed off while trying to get bait.

Cross-examined by Mr. Burton: He admitted that he first signed a declaration in which he stated that about 4.30 a.m. he saw from his window the two brothers leaving the hotel, that he saw Pierre about 7.30, that Pierre was "very much agitated," and his clothes were "dripping wet." He read the affidavit when he signed it before Mr. Robertson, J.P. His only excuse was that he, not being a Britisher, might have overlooked the words "very much agitated" in the affidavit. He did not know the meaning of the word "agitated" at the time; he understood it now. He asked Mr. Robertson to erase several words in the affidavit. He did not think that Pierre told him that his brother had been washed off the rocks; he was not sure; he admitted that he said Pierre had told him so in his first declaration. He remembered seeing Jasper wearing a straw hat on the morning of the accident.

Re-examined: Anything that had been struck out of the first declaration had been struck out at his own request.

Frank Arthur Shephard gave evidence as to taking the photographs produced in the case. The spots were pointed out to him by D. P. Swart.

Cross-examined by Mr. Burton: The photos were taken not from the sea, but the rocks.

Arthur Henry Bullen said his firm were managers in South Africa of the Law Accident Co. In 1902 there was a proposal for £1,000. He declined to accept a proposal for more than £500, because he did not think the position of the assured warranted such a policy. An accident policy of £1,000 provided for compensation at the rate of £6 a week, and as he did not think Jasper Basson would be receiving such a salary, he only issued a policy providing for compensation at £3 a week.

Cross-examined by Mr. Burton: After the accident he saw Mr. Michau, plaintiff's attorney, and told him that they did not consider the proof of death satisfactory. He did not remember saying that it would be necessary to obtain the evidence of the people who saw the brothers go out and Pierre return.

Josiah James Brown, general manager in South Africa of the life branch of the Union Insurance Company, spoke to the issuing of the policies to Mrs. Fasson, and her three sons—Johannes, Pierre, and Jasper. All the receipts were signed by Pierre C. F. Basson, except that Johannes signed his own. Pierre called at the society's office early in 1902, and spoke about his policy. Witness believed the conversation was in some way connected with the irregulars, who went to the front, and how their policies would be affected. Pierre said that unless the company agreed to what he wanted, it was in his hands whether the policies would be continued upon renewal or transferred to another company. Pierre said that he was paying the premiums. In February last Pierre again came to the office, and he said that his brother had been drowned. Only one form was filled; that was as to identity.

Mr. Searle put in the tide tables for January and February of this year, and the receipts for the policies.

This concluded the evidence, and counsel were heard in argument.

Mr. Burton said there was only one question of fact to be decided, and that was as to whether satisfactory proof had been given of death. In the first place, one had to ask what were the terms of the policies. The Union Insurance Co. said that "within one month after death it shall have been duly certified to the directors." The Law Accident's terms were set forth in the plea: "The society will not be liable for any claim unless notice thereof be received within three months after the occurrence of the accident, nor until satisfactory proof of injury, death, or loss is furnished to the society; in all cases the certificates, affidavits, and information to be given shall be such as the society require and shall be furnished at the expense of the assured, or his legal representative." Counsel quoted Porter on Insurance (p. 215), May's Law of Insurance, and the case of *Doyle* v. *City of Glasgow Insurance Co.* (Law Times Reports, New Series, vol. 50, p. 323), on the point as to what constituted satisfactroy proof of death. Counsel went on to say that both the pleas of the defendants only denied the death. The case made out to the Court is a case based upon direct suggestion of fraud. There was no doubt that the case hung upon the evidence of Pierre Basson. The plaintiff's case stood or fell by that evidence. If it were not reliable testimony, then the plaintiff had not established her case. He would first draw the attention of their lordships to the fact that the defendants had not shown that Pierre's character was not perfectly good. He came before the Court with an unblemished reputation. His evidence was good; the story he gave was lucid and straightforward. It was clear that Pierre was not to benefit by this alleged concoction. He was not the heir. The results of the insurance would come to his mother. Pierre had been cross-examined, and counsel submitted that his narrative did not bear the slightest element of improbability. Mr. Burton analysed the evidence, and remarked that the evidence now given by the witnesses Nicol and Kruse, in view of the readiness with which they signed the declarations when they were asked by Pierre, was very strange. Their conduct was inexplicable. Counsel reviewed the various incidents of the morning, when the accident was said to have occurred, and the evidence of the various witnesses in its bearing upon the story told by Pierre, maintaining that in all material details his account was perfectly consistent, and bore every semblance of truth. He contended that reliable and satisfactory evidence, as to the conditions of the locality, the probability of such an accident occurring, and so forth, had been laid before the insurance companies with regard to the death of Jasper Basson.

Mr. Searle said that the question for the Court was whether they were satisfied beyond all reasonable doubt with the story told by Pierre Basson. This was a case where the onus was really upon the plaintiff entirely. Counsel, referring to his evidence, said that witnesses who were called by the defendants were the very people who were originally asked by Pierre Basson to make declarations. That, he contended, was very singular. His learned friend said that his case must stand or fall by the evidence of Pierre Basson. He (Mr. Searle) submitted that the Court could not be satisfied with that evidence, in view of the evidence given by a number of impartial and reliable witnesses, who could have no interest in the case. The

important features of the case were the statements given by Pierre Basson with regard to the circumstances under which the accident was said to have happened. It was very doubtful even yet where Jasper was alleged to have been drowned—whether the Sewing Room Rock or Ruigte Vlei. Counsel commented on the evidence as to Pierre's identification of the scene of the accident, the state of his clothing when he was met coming back again after the accident, his general conduct in view of the alleged loss of his brother, the incident of the cutting of bait, the offer of £25 by Pierre to Kruse to swear an affidavit, and the supplying of affidavits already prepared to witnesses to sign. Counsel submitted that Pierre's demeanour was not consistent with the story of the loss he had sustained. The circumstances which had transpired in the evidence were such, he contended, as to throw the gravest suspicion on Pierre's evidence. He submitted that his evidence was not such as to be regarded as satisfactory proof of the death of Jasper Basson. As to the possibility of Jasper getting away, Mr. Searle urged that it was the easiest thing in the world for Jasper to have got away. As to the question of Pierre's benefit, he might not benefit entirely, but he would be one who would get some benefit.

De Villiers, C.J. (to Mr. Searle): What share can the dead man get? According to your theory, he is still alive?

Mr. Searle: Oh, yes; they must arrange that between them. I don't suppose he is in a very "get-at-able" neighbourhood at present.

Mr. Burton: That is what we say.

[Kotzé, J.: If the other brother, as you say, is still alive, he must be a party to this. Could he ever appear in South Africa again?]

[De Villiers, C.J.: He would be ostracised for life. He can never set foot in South Africa again.]

Mr. Searle: He might come back under some other name, and never be discovered. Counsel (continuing) said that the brother Pierre had a motive, and that was, that he would share in the insurance money.

Mr. Burton: Yes, he would be entitled to one-eighth.

Mr. Searle said that stories of this kind had been concocted for less than £300 or £400. He submitted that there had not been supplied to the insurance companies a reasonable and probable story, corroborated in some important details by impartial witnesses. Counsel also commented on the large amount in which Jasper's life had been insured, and the fact that the other policies had been allowed to lapse.

Mr. Burton (in replying) submitted that the question as to the scene of the accident, arising out of Pierre's evidence, was merely a question of nomenclature.

De Villiers, C.J., after consulting with the Court, asked if the parties could agree upon someone to go with Pierre Basson to the spot where he said his brother was drowned, and also to obtain certain information for the Court.

Counsel agreed to the name of the Resident Magistrate (Mr. d'Olivier).

De Villiers, C.J.: The case will stand over, and in the meantime the Court will be glad if Pierre Basson would point out to Mr. d'Olivier the exact spot where the accident took place, and Mr. d'Olivier is requested by the Court to go there and inspect the place, take the distance from the Sewing Room Rock, and, if possible, to inspect this place at spring tide and two hours after spring tide, and to see also whether there is any red bait growing there, and what depth it would be under water two hours after spring tide. The Court trust that Mr. Pierre Basson won't go there before that time. He is expected to wait till Mr. d'Olivier goes before he goes to the place.

Postea (November 30):

Mr. J. E. R. de Villiers (for the plaintiff) said the Magistrate of Somerset West had been subpœnaed in accordance with the order of Court, and was now in attendance to give evidence. Mr. Searle, K.C. (with him Mr. Benjamin and Mr. Bisset) was for the companies.

J. d'Oliveira, Acting Assistant Resident Magistrate of Somerset West, read the report of the inspection which he had made of the scene of the accident. It was in the following terms: "In compliance with the instructions contained in your letter of the 17th inst. on the above subject, I have the honour to report that I inspected the spot yesterday (November 19) where the accident is alleged to have taken place.

The spot was pointed out to me before, and again at 3.20 p.m. (spring tide), by Mr. Pierre Basson. There were also present at the time Mr. Bullen and Mr. Brown, representing the companies concerned, and Mr. Robertson, a representative of Messrs. Fairbridge, Arderne and Lawton, and some other witnesses, including Trooper Loots and Messrs. Holloway and Muller. The weather overhead was fine. The sea was running fairly high, owing to a south-east wind blowing. From a rock higher and about 40 yards away, I watched Pierre Basson pointing out the spots on which he had stood and his brother. With the exception of my visit to the Sewing Room Rock, I remained in view of the spot. At 5.20 p.m., that is to say, two hours after spring tide, I took observations at the spot. The rock on which the deceased, as pointed out, was standing is a very dangerous one. The sea came sweeping over it, and no person, in my opinion, could or ought to stand there to fish unless he practically intends to commit suicide. The rock pointed out by Pierre Basson as the one on which he himself had stood I watched carefully for eleven minutes after, and not once did the sea go over that rock. There is a great quantity of bait growing at the spot. In a gully between the rock where the deceased is alleged to have stood and another rock, Fisherman Muller cut, with a knife, bait at 5.5 p.m., and did so again twice afterwards. He did not get wet, but he is evidently a man of great experience, and watched the receding waves. The water passes through the gully, and opportunity was then taken by him to get at the bait. Muller had some sprays over him from another rock before he cut the bait. There was no depth of water when the bait was cut. From the spot where the alleged accident took place to the Sewing Room Rock is about 500 or 600 yards. I took five minutes to walk the distance. It was difficult, owing to the nature of the ground, to pace it. Three men tried it, and all varied, viz., 508 yards, 535, and 598 yards, so that it may safely be taken to be not less than 500 and not more than 600 yards. From the spot where the accident took place to Holloway's Hotel, I walked in 55 minutes, without exerting myself."

By the Court: He met Pierre Basson at Holloway's Hotel and they walked towards the spot together. There was no one on the rock when they came in sight of it, though they had been informed that there were two men there when they were on the way. Witness, however, gave instructions that they should go away, and when they came in view of the rock no one was near. Witness saw bait cut there an hour and three-quarters after spring tide. Witness did not cut bait there, because he did not desire to risk his life. Witness afterwards saw men fishing at the spot.

By Mr. Searle: Pierre Basson pointed out the place where he was standing on the day of the accident, and also where his brother was standing. Pierre went to the place without hesitation.

By Mr. De Villiers: Witness did not stand on the rock where the two men had been. He would not stand there for a million pounds.

De Villiers, C.J., said that it was, unfortunately, impossible to decide the matter now, as Mr. Justice Kotze, who also sat when the trial took place, was engaged elsewhere. They would have to consult him before they gave judgment.

Postea (December 3):

De Villiers, C.J.: This is an action brought by the executrix of the estate of Jasper Basson against the Union Assurance Company to recover the sum of £3,000, being the amount of policies of assurance on his life granted by the defendant company. The first policy for £2,000 was issued in November, 1901, and the second for £1,000 was issued in December, 1901, and the premiums were duly paid as they fell due. The plaintiff alleges that on the 14th of February, 1903, while both the policies were still in force, the assured met with his death by drowning in the sea near the Steenbras River Mouth, in the district of Stellenbosch, but the defendant company denies that he met with his death in that or in any other manner. On the 21st of April last Pierre Basson, the brother of the assured, applied to this Court for an order on the Master to accept the notice which had been forwarded to him of the death of Jasper Basson, and to convene a meeting for the election of an executor dative to his estate. The application was supported by several affidavits, including that of Pierre

Basson, who stated that he saw his brother washed from the rocks on the day in question, that his brother rose to the surface once, then sank, and was not seen again. One Kruse stated that he saw Pierre and Jasper going out fishing at 4.30 in the morning of the day in question, that he saw Pierre return alone at half-past seven in the morning from the direction of Steenbras River, and that Pierre was much agitated, and said that his brother had been drowned. Anthony Nichol stated that at about seven in the morning of the 14th February he met Pierre coming from the direction of Steenbras River, that he was carrying two fishing rods, and that he informed Nichol that his brother had been washed from a rock while endeavouring to obtain bait, and was drowned. Nichol added that Pierre was wet, and confused. Edward Holloway, the proprietor of Holloway's Hotel, at Gordon's Bay, stated that Pierre had come to his hotel on the 12th of February, and Jasper on the following day, that he (Holloway) had lived at Gordon's Bay for twenty years, and knew as a fact that several persons had been drowned in that vicinity, and that in no case had the body been recovered. Upon these affidavits, which were uncontradicted, the Court authorised the election of an executor dative with the result that the plaintiff, who is the mother of the assured, was elected. She supplied practically the same information to the defendant company as had been supplied to the Court in proof of the death of the assured, but the company was not satisfied with the proof, and the present action was consequently instituted. The only witness produced at the trial to prove the actual death by drowning of the assured was Pierre, his brother. He adhered to the statements which he had previously made, and if those statements were correct there can be no reason for doubting that the assured was drowned on the 14th of February last. The fact that his body was not found again does not disprove his death, seeing that several other persons have been undoubtedly drowned in that vicinity, and in no case has the body been afterwards found. If the evidence of Pierre is to be disbelieved, it could only be because one of two alternative theories is accepted by the Court to explain the undoubted disappearance of the accused. The first alternative would be that Pierre himself pushed his brother into the sea with the view of obtaining any benefit which he might derive from the policies, as one of the heirs *ab intestato* of the assured. This alternative has not, however, been suggested by either party, and if it had been the true explanation, it is obvious that the amount of the insurance would be payable by the company to the executrix of the estate of the assured. The only other alternative explanation, and the one relied upon for the defendant company, is that there was a conspiracy between the two brothers to defraud the company, and that the assured is still alive, and in hiding either in this colony or elsewhere. The amount of the insurances is undoubtedly considerable, for the assured was also insured in the Law Accident Society for £500, but upon the death of the assured, who had made no will, half of his estate would devolve on his mother, and the remaining half would go to his brothers and sisters. It is not suggested that the mother was a party to the plot, and whatever may be said of Pierre's conduct and evidence, her conduct and evidence were not such as to give the slightest colour to any suggestion of her complicity in an infamous plot of this nature. As to Pierre, his portion would amount to no more than £583, and if it is borne in mind that out of this amount he would have to pay over a substantial sum to his brother, supposed to be dead, the benefit would be by no means commensurate with the tremendous risk which they would both be running. The assured was a youth of between seventeen and eighteen years of age, and it seems extremely improbable that he would have consented to become a party to a scheme which would, so to say, ostracise him for life, and confer no corresponding benefit on him. It is common cause that he left the hotel on the morning of the 14th February last with his brother, and that he did not return to the hotel with his brother, and no witness has been produced to say that after that date he has been seen alive in this colony or elsewhere. If he is still alive, he must be in hiding somewhere, and that would involve an expense, a risk, and an inconvenience which would appear to be quite out of

proportion to the benefit which his relatives would derive from the fraud. Great stress has, however, been laid on behalf of the defendant company upon the conduct of the brother Pierre soon after the alleged accident, and upon the condition in which he was found by Mr. Nichol and others, who met him on his return from the scene. Mr. De Possel-Deydier's evidence is as follows: "I saw a man coming along towards us with two rods. He was coming slowly along. He was not running. He greeted me and called me by my name. He said: 'Good morning, Mr. De Possel; are you going fishing?' I said: 'That's a queer thing to ask when you see I have a rod.' He said: 'Foei toch, don't go.' I said: 'Why should I not go?' He said: 'A great accident has happened.' I asked: 'What accident?' He said: 'My brother has just got drowned.' I said: 'Can I do anything for you?' and I put my rod down. He said there was no need for assistance, because he had remained at the spot for a quarter of an hour or twenty minutes to see if his brother appeared again. He did not seem to be agitated at all. He was quite quiet. His sleeve was properly soaked lower down. His left leg was dripping wet to the knee. He did not appear to be dripping wet as if drenched by a wave. He went on speaking to me. He said his brother was staying with his mother at Observatory, and that his mother would feel the death of that boy very much, because she was very fond of him. He did not know how to break the news to his mother, as he was afraid she would get a fit." Pierre, in giving evidence, had said: "We went down on to the rocks to cut bait. I went first, and he went afterwards on to a rock on the water's edge. I had walked back about five paces from him on the same rock, with my back to the water. When I turned round he was bending forward to cut bait. I next heard him call help, and a wave dashed against me, and threw me against the rocks, where I clung fast. When I turned round again he was about 50 paces off in the sea, not with his head, but with his back to the surface." In another part of his evidence he said that his clothes were wet through, and that he was dripping wet, and it is contended that his statements are quite inconsistent with De Possel-Deydier's description of the condition in which Pierre was. A wave might have dashed him against a rock without necessarily washing over the upper portion of his body, and the witness admitted that the lower portion was dripping wet. As to the general demeanour of Pierre, it was certainly of a most callous description. Few persons are probably to be found, who, after witnessing the death of a brother by drowning would announce the sad fact with the coolness displayed by Pierre, but his callous behaviour is not conclusive against his credibility. The theory is that there was a plot between the two brothers to defraud the insurance companies. If the theory be correct, the scheme must have been well thought out beforehand, and the most obvious course in carrying out that scheme would have been for Pierre to drench himself to the skin in the water, and to assume the appearance of extreme agitation on first meeting people so soon after the alleged accident. The point, however, upon which the chief conflict in the evidence arose was the question whether, in view of the state of the tide on the 14th of February, it would have been possible for the assured to cut red bait on the rocks at about quarter past six in the morning. Pierre stated that it was between that time and half-past six that his brother was washed from the rock while in the act of cutting bait, and some of the witnesses for the defendant company confidently stated that it would be impossible to cut bait at that time, as the moon had been full on the 12th, and the tide was at its highest on the 14th at about twelve minutes past four in the morning. If these witnesses were correct in saying that within two hours after springtide it would have been impossible to cut bait, a very serious doubt would have been cast upon Pierre's credibility, and accordingly it was suggested by the Court that a gentleman in whose judgment and impartiality both the parties had confidence, should be appointed to make a practical test at the next springtide. It was agreed that Mr. D'Oliveira, the Resident Magistrate of Somerset West, should be so appointed, and he accordingly went to the spot at 3.20 p.m. on the 19th of November with spring tide. Pierre, who had been directed not to

visit the spot in the interval, accompanied the Magistrate, and brought him direct to the place where, according to him, the accident had taken place. An hour and three-quarters after high tide a fisherman began cutting red bait, of which there seems to have been a considerable quantity, without getting wet. "The rock," says Mr. D'Oliveira, "on which the deceased, as pointed out, was standing, is a very dangerous one. The sea came sweeping over it, and no person, in my opinion, could or ought to stand there to fish unless he practically intends to commit suicide. The rock pointed out by Pierre Basson as the one on which he himself had stood I watched carefully for eleven minutes after, and not once did the sea go over that rock." This fresh evidence, therefore, supports the evidence given by Pierre, and it only remains for me to consider some minor points relied upon as throwing doubt on his statements. It is said that when a few hours after the alleged accident he accompanied Mr. Holloway in a boat in a search for the body, he pointed out three different rocks as being the rock on which his brother had stood. The rock pointed out the last time was the rock known as Ruigtevlei rock, and was the spot afterwards pointed out to the Magistrate. If he made a mistake while in the boat, such mistake is easily accounted for by the fact that he approached the shore from the sea, and not, as he had previously done, from the land side. The Ruigtevlei rock is about 500 yards from the rock known as the Sewing Room Rock, and the impression left on my mind by the evidence of Pierre certainly was that the accident occurred in the neighbourhood of the latter rock, but the distance is not so great as to justify the conclusion that there was a deliberate misstatement on his part. The only other point that requires consideration is whether the witness Kruse was correct in stating that Pierre had offered him £25 for making an affidavit. Pierre positively denied having made the offer, and I am by no means satisfied that he did. Kruse does not suggest that Pierre wished him to state a falsehood in the affidavit. He (Kruse) had informed Pierre, as the fact was, that he had seen Pierre and his brother go away together from the hotel on the morning in question, and it was in regard to this information that Pierre is said to have made the offer of £25. The case is in many respects an extraordinary one, and it is by no means surprising that the defendant company has refused to pay the amount of the policy until the fact of the death of the assured has been established, so far as, humanly speaking, it can be established, by the judgment of a Court of Justice. It would be a terrible miscarriage of justice if parties to a conspiracy to defraud an insurance company were to succeed in obtaining the earning of their fraud, and it therefore was the clear duty of the Court to probe this case to the very bottom. On the other hand, the Court could not, in justice to the mother and other next-of-kin to the assured, reject the testimony in support of the death of the assured merely because the only eye-witness to the drowning was somewhat callous in his demeanour soon after his brother's death, and will derive some benefit from his death. The insurances had been effected at the instance of the mother of the assured, who stated—and her statement was not denied—that she had been several times urged by Mr. Murphy, the agent of the defendant company, to insure her son's life. As I stated before, it has not been suggested, and there would not have been the slightest ground for such a suggestion, that she was a party to the supposed fraud upon the company. Pierre, as the elder brother, saw to it that the premiums were paid, but the policies were not ceded to him, nor did he acquire any other special interest in them. Under all the circumstances, I am of opinion that the death by drowning of the assured has been satisfactorily proved, and that the judgment of the Court should be for the plaintiff, with costs.

Maasdorp, J., concurred.

Kotzé, J.: I am of the same opinion. Of course, the Court has to find as a fact whether Jasper Basson was actually drowned, and I think the probability points to that conclusion, after a careful survey of the circumstances. I, therefore, agree in the judgment.

De Villiers, C.J.: In regard to the Law Accident Insurance Society, that is a somewhat different case. In that case the insurance was only for accident. The

terms of the policy are: "If at any time during the said policy or during the continuance of this policy after renewal, the assured sustains any bodily injury, caused by violent, accidental, external, and visible means while in South Africa, and so forth," £500 shall be payable at death. If a man were drowned, there can be no doubt that the amount of the policy was payable. The judgment of the Court in this case also must be for the plaintiff, with costs.

[Plaintiff's Attorneys: Michau and De Villiers; Attorneys for Union Insurance Co.: Fairbridge, Arderne and Lawton; Attorneys for Law Accident Insurance Company: Reid and Nephew.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZE.]

ADMISSIONS. { 1903. Nov. 13th.

Mr. Buchanan moved for the admission of Herbert Chas. Rothman, as an attorney and notary.

Application granted, and oath to be taken before the Registrar of the High Court at Kimberley.

Mr. Buchanan moved for the admission of Wilfred Franceys Cranswide, as an attorney and notary.

Application granted, and oath to be taken before the Registrar of the High Court at Kimberley.

TRIAL CAUSES.

BANGEE V. DUSTAY.

This was an action brought by Ismail Bangee, an Indian, lately carrying on business at Lady Grey, in the district of Aliwal North, against Ebrahim Dustay, lately of Aliwal North, for an account of certain partnership transactions and £500 damages.

The declaration set out that on or about the 20th November, 1902, and at Aliwal North, plaintiff and defendant entered into an agreement of partnership under which plaintiff was to leave the remunerative employment he then had for the purpose of carrying on the business of general dealers at Lady Grey. It was agreed that the plaintiff should supervise the said business, and that the defendant should put in a cart and two horses, the plaintiff to supply the harness and all profits and losses to be shared equally. Plaintiff, in pursuance of the said agreement, hired premises, and started and carried on the said business, and made considerable profits for the partnership. Defendant had from time to time received moneys for and on behalf of the partnership, which he had failed and refused to account for to the plaintiff, and had taken possession of and refused to deliver up the books. He had also taken forcible possession of the premises, and refused to allow plaintiff to carry on the said business. Plaintiff had always been ready and willing to render an account of his share of the business, and to pay to the defendant such amount as might be found to be due, and he had tendered and still tendered such amount. Defendant refused to render an account. Plaintiff had, in consequence, wholly lost his share of the profit from the partnership, and had sustained damages in the sum of £500 sterling. He claimed that the defendant be ordered to render a full and fair account, duly supported by proper vouchers, and pay to the plaintiff such sum as may be found due, also the sum of £500 as damages.

Defendant, in his plea, admitted the formal allegations save in that he said he also carried on business, and was resident at Lady Grey. He denied that any partnership was entered into between himself and plaintiff, and said that it was agreed between them that the plaintiff should be employed as manager of the defendant's business at Lady Grey. He admitted that the plaintiff hired premises, and started and managed the business, but he said he did so on behalf of the defendant. He admitted that consi-

derable profits were made, but said they were made for himself (defendant) alone. He admitted that he entered into possession of the premises in July, 1903, and refused to allow the plaintiff to carry on business, and take any profit therefrom. Except as above, he denied the allegations in paragraph 6. In reference to paragraph 7, he denied that the plaintiff had tendered to him any account or any money. He admitted that he refused to render to plaintiff any account, or tender him any money. He prayed that the claim be dismissed with costs. In reconvention, the defendant said that the plaintiff had received from time to time moneys of the defendant, and he claimed an account from the plaintiff of his transactions as manager, debate of the same, and such sum as might be found due to the defendant.

The replication was general.

Mr. Burton (with him Mr. Upington) for plaintiff; defendant in default.

Mr. Upington read correspondence from which it appeared that on the 24th October the defendant's attorneys intimated that the date of trial would be convenient, and that on the 3rd November they wrote: "We are instructed by our local correspondent that the defendant has absconded, and we are to incur no further costs."

Evidence was called for the plaintiff.

Ismail Mohammed Bangee, the plaintiff, said he was a general dealer, and he was approached by the defendant to enter into partnership. Profits and losses were to be equally shared. He put £8 cash into the business. The defendant was to provide a cart and horses, and he (plaintiff) the harness. The goods were to be sent from Aliwal North. In January he proceeded to Lady Grey, and opened a general business there. Business was carried on till July. It was successful, and realised about 35 to 50 per cent. profit. About £200 per month was the extent of the turnover. When the defendant came to Lady Grey in July he (plaintiff) asked him to square up accounts, but defendant said he would not do this, as plaintiff was not his partner, only his manager. Afterwards, defendant took possession of the building, and evicted witness, who had been kept out of the business since then, and had neither received any money nor a statement from defendant. In August witness placed the matter in the hands of his solicitor. He had sustained damages, which he assessed at £500.

[De Villiers, C.J.: 35 per cent. seems a large profit. Are the books to be had?]

Mr. Upington: The defendant has absconded, and taken the books with him.

[De Villiers, C.J. (to witness): The money that you got from the sale of the goods, did you hand that over?]

Witness: Yes, every day's takings was deposited in the bank.

Osman Ali said he was a general dealer in Aliwal North. He recollected a conversation between plaintiff and defendant. The latter asked him (witness) to become his partner. Defendant afterwards told him that he had arranged a partnership with plaintiff.

John Hamilton Diplin, formerly a clerk in the office of Attorney Cloete, Lady Grey, gave evidence as to the making out of a cheque in the name of the partnership.

Mr. Upington applied for judgment, including costs of previous applications, which was decided against the defendant.

Judgment was entered for plaintiff for £240 damages, with costs.

Mr. Upington: There is another matter, my lord, arising out of the application, with reference to the order granted by your lordship on the 29th October, calling upon one Ebrahaim Cotwal to show cause why he should not be interdicted from selling or making away with any property or stock-in-trade, pending the result of the action respecting the said partnership. I now apply for that rule to be made absolute.

Rule made absolute accordingly, costs to be paid by Cotwal.

[Plaintiff's Attorney: P. A. M. Cloete.]

PROVISIONAL ROLL.

SOUTH AFRICAN MILLING V. GRAND JUNCTION RAILWAYS.

Mr. Benjamin said that an arrangement had been arrived at between the parties to the suit in this matter and the various creditors, and asked that the rule granted for the sequestration of the estate of the defendants should be discharged, in terms of consent paper. The consent paper was signed by all the

parties to the suit and the principal creditors.

Mr. McGregor (representing the South African Banking Corporation) applied for an order that the money in the hands of the Registrar in connection with the award of £76,000 should remain with the Registrar until paid over to the receivers mentioned in the consent paper (Messrs. Close and Syfret).

De Villiers, C.J.: Has notice been given of these applications?

Mr. McGregor: No, not formally.

Mr. Benjamin: Two receivers have been appointed by the consent paper, and on behalf of the plaintiffs, I am instructed to consent to the application.

Rule discharged as asked, and interdict to continue, the money meanwhile to remain in the hands of the Registrar until paid over to the receivers.

LANDSBERG V. IBERTSON.

Mr. Benjamin moved for provisional sentence on a mortgage bond of £1,600, due by reason of non-payment of interest, and also for £2 3s., being premium paid and stamps upon a certain policy of assurance. Counsel added that the summons set out the amount due for premiums at £3 18s., whereas the correct amount was £2 3s.

Order granted.

DOUGLAS AND ANOTHER V. GLASS.

Rules of Court of 1903—Postponement of cases.

Mr. Buchanan asked that this matter should stand over, in terms of the consent paper signed by plaintiffs' and defendant's attorneys, the suggested date being December 12.

De Villiers, C.J., said he supposed counsel was aware that, under the new rules of Court, unless, in the opinion of the presiding judge, it would not be in the interests of the parties that matter should be postponed, the case might be ordered to stand over till next term.

Mr. Buchanan: I think this case will probably satisfy your lordships that it is a matter of urgency. It is a case of compulsory sequestration.

Application granted.

SMITHERS V. GRIFFITHS.

Mr. P. S. T. Jones moved for provisional sentence on two mortgage bonds of £850 and £400 respectively, together with interest from the 1st January, 1903, at the rate of 6 per cent. per annum, the bonds having become due by reason of non-payment of interest.

Order granted.

HANSEN AND SCHRADER V. SHACKLETON.

Mr. J. E. R. de Villiers moved for the final sequestration of the defendant's estate, and also for meetings of creditors, to be ordered to be held at Port Elizabeth.

De Villiers, C.J. said that final sequestration would be granted, but the other matter must be the subject of application to the Master.

JAGGER AND CO. V. AMERICAN CLOTHING CO. AND DAVIES.

Mr. Buchanan moved for the final adjudication of the defendant's estate as insolvent, and for the appointment of Mr. Thomas H. Hazell as provisional trustee, pending the election of trustee. The defendants carried on business at Sea Point and Salt River, and it was desirable in the interests, both of the estate and the creditors, that Mr. Hazell, who had been acting as *curator bonis* of the estate, should continue to supervise the business.

Order granted as prayed.

ESTATE MARSH V. McMULLEN.

Mr. Russell moved for provisional sentence on a mortgage bond for £1,000, with interest at the rate of 6 per cent., and also for £2 6s., the premium of insurance paid by plaintiff on behalf of the defendant, and also for the property specially hypothecated to be declared executable, and for costs. The bond had become due by reason of the non-payment of interest.

Defendant appeared, and consented to judgment.

Order granted as prayed.

RICE V. STRYDOM.

Mr. Buchanan moved for a decree of civil imprisonment against the defendant upon an unsatisfied judgment of this Court for £370 5s., and taxed costs amounting to £8 2s. 10d. A writ of execution had been issued, and a return

of nulla bona made. There was also an item of £1 5s., sheriff's charges.

The defendant, Cornelius Johannes Strydom, of Wynberg Flats, said he owned certain property there, 1¾ morgen, which he bought for garden purposes. The property was mortgaged up to its full value. He had no other property besides that. He made about £10 a month. He was prepared to pay £5 a month. The debt he was sued for had reference to a number of rams that he bought. He bought the rams in the Transvaal; he was too late for the market that year, and in the following year, they contracted scab, and most of them died. Before the war he had property at Oudtshoorn, which was sold.

Cross-examined by Mr. Buchanan: The debt was already eight years old. It was for a loan. He had not paid off any portion. He wrote and told Rice of the ill-luck he had had with the scab and the rinderpest. After that came the war. Rice agreed to wait.

Decree granted with costs, to be suspended on payment of £5 per month until the debt was discharged, the first payment to be made on December 1.

WARNER AND CO. V. DAY.

Mr. Pyemont moved for a writ of civil imprisonment against the defendant on a judgment of the Court for £349 1s. 8d., together with costs.

Order granted.

MICHAU V. LEISTER.

Mr. De Waal moved for the final sequestration of the defendant's estate as insolvent.

Order granted.

ROLFE, CRAIG AND CO. V. CAREY.

Mr. Close moved for the provisional order for the sequestration of the defendant's estate to be made final.

Order granted.

STEFFENS V. BLACK.

Mr. Russell moved for provisional sentence on a bill of exchange granted by the defendant for £159 0s. 5d., together with interest from due date, and costs. The bill had been presented to the African Banking Corporation's Bank, and their answer was, "Not provided for."

Order granted.

ILLIQUID ROLL.

EPSTEIN V. SIERADZKI.

Mr. Benjamin moved for judgment, under Rule 329d, for £100 16s. 7d., being overdraft paid by the plaintiff for and on behalf of the defendant, and also for another sum paid by plaintiff for defendant.

Order granted.

ZEEDERBERG AND DUNCAN V. WEIYTROB.

Mr. Benjamin said that this was an application for judgment, under Rule 329d, for £15, under a certain deed of suretyship. The principal had now been paid, and plaintiff merely asked for costs of suit.

Order granted as prayed.

MOSTERT V. HARE AND ROUS.

Mr. Benjamin moved, under Rule 319, for judgment in default of plea for £32 7s., on a declaration for balance of account. The account was for hire of horses, and wagons, less £10 paid.

Order granted.

TANCRED V. BRUKES.

Mr. Greer moved for judgment, under Rule 329d, for transfer of certain lots of land, of which the purchase price had been paid, and for costs of suit.

Order granted.

TANCRED V. KOTZE.

Mr. Greer moved for judgment, under Rule 329d, for transfer of certain lots of land, of which the purchase price had been paid, and for costs of suit.

Order granted.

PURCELL, YALLOP AND EVERETT V. NELSON.

Mr. Upington moved for judgment, under Rule 329d, for £97 1s., being balance of account due, and owing for

goods sold and delivered, and work done, and for interest and costs of suit.

Order granted.

PURCELL, YALLOP AND EVERETT V. GOODMAN.

Mr. Upington moved for judgment, under Rule 329d, for £74 7s., balance of account due and owing for goods sold and delivered and work and labour done, and for interest and costs of suit.

Order granted.

KRAAIFONTEIN BRICKFIELDS V. FALCONER.

Mr. Greer moved for judgment, under Rule 329d, for £52 12s. 6d., being account due for certain bricks sold and delivered, with interest *a tempore morae*, and costs of suit.

Order granted.

PEYCKE AND CO. V. DURING.

Mr. Smith moved for judgment, under Rule 329d, for £51 6s. 1d., for work and labour done and materials supplied, with interest *a tempore morae*, and costs of suit.

Order granted.

CAPE AND KOSHER MEAT SUPPLY CO. V. SCHOOR AND GEUTZKY.

Mr. Russell moved for judgment, under Rule 329d, on an account for goods sold and delivered, the balance due being £134, and for costs of suit.

Order granted.

MENDELSSOHN V. MOSES.

Mr. Alexander moved for judgment, under Rule 329d. as follows: (1) The sum of £30 16s. 7d., being the amount of a certain cheque, the property of the plaintiff, stolen by the defendant, from the plaintiff's office in Burg-street, Cape Town, on the 9th January, 1903. (2) An order declaring the amount of £38 11s. 9d., belonging to the defendant, attached by order of this Honourable Court, and now in the hands of the Registrar, executable; (3) an order declaring the proceeds of two promissory notes attached at Kimberley by order of this Honourable Court, dated September 5, 1903, executable; (4) an order empowering the plaintiff to institute proceedings against the makers and endorsers of the said promissory notes for recovery of the amount, with interest and costs; (5) interest *a tempore morae*; (6) costs of suit.

[De Villiers, C.J. (to Mr. Alexander): Has the defendant been convicted of these offences?]

I think he is awaiting trial on the charge.

[De Villiers, C.J. : It seems that the defendant is on the Breakwater.]

Mr. Alexander said that the present application was made in order to enable the plaintiff to execute judgment. At present there was nothing to execute judgment against except the money in the hands of the Registrar and the proceeds of the notes. The plaintiff was not a party to the notes, and without the order now sought could not proceed with the execution. The promissory notes were found in the possession of the defendant when he was arrested.

De Villiers, C.J. said the Court could not authorise the plaintiff to institute proceedings without first of all putting him in such a position that he was entitled to sue.

Mr. Alexander said that the Court had already made these very notes attachable, but the plaintiff could not proceed to attach without an order.

De Villiers, C.J.: The Court will authorise the Sheriff to attach these notes. The Sheriff then can sell these notes. The purchaser will have a good title to sue. The plaintiff has no title; until he has bought the notes he can have no title to them. The Sheriff can, by order of Court, sell and pass title to the notes, but the plaintiff would have no title until he purchased them. An order will be granted in terms of prayers 1, 2, 3, 5, and 6.

HOLLANDER V. HUGO.

Mr. Buchanan moved for judgment under Rule 319, in default of plea, to a declaration, alleging that plaintiff delivered to the defendant a certain Cape-cart, of the value of £40, for the purpose of having certain repairs done to it, the defendant having failed to effect the repairs or to redeliver the said cart. There was also a claim for damages, which counsel said he did not press. An order

was sought requiring the defendant to return the cart in the order in which it was handed to him, or to pay the value thereof.

Order granted as prayed.

MULLER V. MULLER.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £88 14s. 4d., balance of certain money lent and advanced, also interest at the rate of 5 per cent. from the 1st February this year.

Order granted.

TURNBULL AND BYGOTT V. DURING.

Mr. Sutton moved for judgment, under Rule 329d. for £75 9s. 1d., balance of account due for goods sold and delivered, and work and labour done, and costs.

Order granted.

REHABILITATIONS.

Mr. Alexander moved for the rehabilitation of David Johannes Philippus du Toit, whose estate was sequestrated in March, 1891.

Granted.

Mr. Alexander moved for the rehabilitation of Christian Rudolph Pretorius.

Granted.

Mr. De Waal moved for the rehabilitation of Ernest Johannes Jansen.

Granted

Mr. Gardiner moved for the rehabilitation of Robert Drummond.

Granted.

Mr. Benjamin moved for the rehabilitation of John Ward. Some objection was raised by the trustee in the estate of Ward and Vippan.

Application refused, but leave given to apply again in three months.

Mr. De Waal moved for the discharge of the estate of Pieter William Bester from sequestration.

Granted.

GENERAL MOTIONS.

SWANEPOEL V. SWANEPOEL.

Mr. C. W. de Villiers said that this was the return day of an order granted on the 7th August last by Mr. Justice Maasdorp, at Uniondale, calling upon the defendant to return to her husband on or before the 5th November. His Lordship's judgment included provision as to custody of the children and division of the joint estate, but the order made out by the Registrar did not include this. Counsel now applied for the order to be amended accordingly, and for the return day to be extended. The defendant had, he added, failed to return to plaintiff.

De Villiers, C.J. said that the Court would amend the order made by incorporating the entry in the judge's notes, and order service of a fresh rule, to be returnable on the 12th December, service to be effected in the same manner as previously, defendant to return to the plaintiff on or before the 30th November.

Ex parte WILSON.

Mr. Russell moved for a rule *nisi* under the Derelict Lands Act to be made absolute. The matter had previously been before the Court, but had been postponed through an irregularity in the publication of notices. Due publication had now been given.

Order granted.

Ex parte DE VILLIERS.

Mr. Benjamin moved for an order confirming a certain agreement made by the petitioner, as secretary of the Paarl Board of Executors, on behalf of the creditors in the insolvent estate Glasberg. It appeared that the insolvent had had certain property transactions in Wilson-street, that he had raised bonds with the petitioner's Board and that some difficulty had arisen in the registration of the transfer to another purchaser.

Order granted as prayed.

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

LOUW v. EAST. 1903. Nov. 16th. „ 17th.

This was an action brought by Thomas Arnoldus Johannes Louw, of Newlands, against Clara Theophila East, wife of Henry Flint East, also of Newlands, for an order requiring the defendant to take transfer of a certain estate, Sans Souci, in terms of certain conditions of sale.

Counsel stated that the action arose out of the construction of a certain agreement of purchase and sale between the parties. The plaintiff sold to Mrs. East the estate Sans Souci under certain conditions of sale, which were subsequently followed by a certain memorandum, and it was really upon the construction of these two documents that the case would turn.

The declaration set out that on the 3rd June, 1903, the plaintiff sold to Henry Flint East, acting for and on behalf of the defendant, the remaining portion of the estate Sans Souci for £25,000, upon certain conditions of sale. The plaintiff reserved for the period of one month an option or right of retaining a portion of the said property described in the conditions, and if this option were exercised, the purchase price was to be reduced by £6,000. Thereafter the plaintiff, on or about the 1st July, agreed in writing to cancel the said reservation in consideration of the sum of £500 being paid to him by the defendant. It was arranged that the sum of £2,500 was to paid upon the purchase price upon the date of transfer, the balance to be raised by mortgage bond, to be passed by defendant. It was provided in the written memorandum of the 1st July that in the event of the plaintiff being unable to obtain possession of a certain house, called Lockerbie, in time to give possession of Sans Souci as per contract, defendant should allow plaintiff gratis a fortnight overtime. He was unable to obtain possession of Lockerbie on the 3rd October; thereupon he remained in possession until the 17th October. He had tendered, and again tendered, transfer to the defendant of the property, upon payment by him of the sum of £2,500, with interest at the rate of 6 per cent., in terms of the defendant's and plaintiff's agreement, and defendant to pass a mortgage bond for £23,000, balance of the purchase price. This the defendant refused, and claimed that interest on the sum of £23,000 should only run from the 17th October. Plaintiff claimed: (a) Payment of the sum of £2,500, with interest from the 3rd October, 1903, at the rate of 6 per cent.; (b) that the defendant be ordered to take transfer of the aforesaid property, and pass a bond for £23,000, with interest at 6 per cent. from the 3rd October, 1903, plaintiff tendering all necessary documents; (c) alternative relief; (d) costs of suit.

Defendant, in her plea, admitted the formal allegations in regard to agreements, except that she craved for greater certainty leave to refer to the documents. She admitted that plaintiff did not take possession of Lockerbie on the 3rd October, and remained at Sans Souci until the 17th October; but said that plaintiff obtained possession of Lockerbie on the 6th October. She said that plaintiff was not entitled to interest on the bond beyond the date when possession of Sans Souci was given by plaintiff to the defendant, viz., the 17th October, and not before. She had tendered £2,500 against transfer, and also the sum of £658, claimed as expenses. She was willing to pass a bond from the 17th October, the date from which plaintiff gave possession of Sans Souci. Plaintiff wrongfully refused to pass transfer of the premises. Defendant offered to pay £2,500 upon receipt of transfer of the property purchased, also £658 as expenses, and pass a bond with interest from the 17th October. Defendant prayed that plaintiff's claim should be dismissed, with costs. In reconvention, defendant said that plaintiff wrongfully and unlawfully refused to pass transfer of the property. Plaintiff was aware that the defendant had sold portions of the said estate to the value of £10,625, and intended to sell other portions, and defendant had sustained special damages in the sum of £500 by reason of the defendant having, through his wrongful and unlawful refusal, been unable to complete contracts

with the buyers of the portions or to sell other portions in the manner contemplated.

The plaintiff, in his replication, admitted that the transfer of the property Lockerbie was passed to him, and registered in the Deeds Office on the 6th October, but said he was unable to occupy it owing to certain alterations and repairs that had to be made, and he retained possession of Sans Souci under the agreement of the 1st July. He denied that he had wrongfully or unlawfully refused transfer. In his plea to the claim in reconvention, plaintiff said he had been informed that the defendant had sold a portion of the estate, but he had no knowledge of the purchase price. He denied that the defendant had sustained damages in the sum of £500, or any sum for which he was liable, or that his refusal to pass transfer was wrongful or unlawful.

Mr. Searle, K.C. (with him Mr. Gardiner) for plaintiff; Mr. McGregor (with him Mr. Close) for defendant.

Thomas A. J. Louw, the plaintiff, said that he now lived at Lockerbie. Last June he owned and occupied Sans Souci. He sold on the 3rd June to the defendant the remaining extent of the property, according to the conditions of sale produced. On the portion on which he reserved an option, there was a dwelling-house occupied by Colonel Woodhead. The rent of this was paid to him up to the 30th September. On the 3rd June he had not bought any other house, but on the 6th June he bought Lockerbie. He met Mr. Chiappini, who was a partner of Mr. East, shortly before the 8th June, and told him that he had purchased Lockerbie. Mr. Chiappini informed Mr. East, and on the 8th June witness received a letter from Mr. East thanking him for promptly informing him of his purchase, and saying that, of course, the option would now be off. Witness replied that he was surprised at the contents of the letter. He had never said anything about giving up the option. Subsequently, he gave Mr. East notice that he would exercise the option reserved in the conditions of sale. Mr. Chiappini came to see him on or about July 3, and, after a long discussion, witness agreed to give up the option. Witness next day received a letter from Mr. East accepting the arrangement made with Mr. Chiappini, as to giving up the option on payment by the defendant of £500. Mr. East added: "I am also agreeable to the arrangements mentioned in the second and third paragraphs of the endorsement. Memo.: The cash to be paid against transfer will now be £2,500." Further correspondence ensued, but in the end it was agreed that no deviation should be made in the conditions of sale. It was necessary to obtain an amended title, owing to the complications in the estate. On the 25th September, Mr. East asked when possession was to be given him. Witness replied on the 28th September that he was unable to offer any earlier date than the one agreed upon, viz., October 17. He was stopped by Mr. Gibson, of Lockerbie, who was to give up possession on the 6th October Witness left Sans Souci on the 17th October. He got the key of Lockerbie on the 6th, but the house was in such a state that he could not enter into possession. The water supply was blocked, the electric lighting was wrong, and for several reasons it was impossible to enter at once. He had workmen in the house at Lockerbie even to-day. Witness did everything he could to assist Mr. East, while he remained in Sans Souci until the 16th October. Mr. East practically had a free run of the place from the 1st October. Mrs. East even came into the house almost whenever she liked. All that witness knew about the sale of any portion of the estate by Mr. East was that Mr. Chiappini and Mr. Wiener, jun., had bought portions.

Cross-examined by Mr. McGregor: The option was not a purely personal one in order to provide against the contingency of his not being able to find another place. He said that he would keep the option, and if he did not want it he would give it up. He did not tell Mr. Chiappini at the football match that Mr. East could have the whole place. He offered to toss Mr. Chiappini as to the price—whether it should be £6,500 or £7,000 The price agreed upon was £6,500.

[Kotzé, J. (interposing): It seems to me that this verbal evidence is of no importance. The question is one as to the construction of the documents put in, pure and simple. The only point on which you want evidence, it seems to me, is as to your claim in re-convention.]

Cross-examination continued: The only "deviation" of which witness was

speaking in his letter was with regard to the title deeds. When the discussion took place as to the agreement, Mr. East told him that he did not intend to keep the whole of the estate. Even if witness had done everything in his power East could not yet have obtained an amended title to the property. There was not time for the formalities to be gone through. The piece of ground he reserved was worth £7,000.

By Maasdorp, J.: The value of the property had not fallen since October 6.

Henry Flint East, husband of the defendant, stated that on June 3 certain conditions of the sale of Sans Souci were entered into, and previously the matter had been talked over. When he got the letter about the option, Mr. Chiappini saw the plaintiff, and witness instructed the former to settle the matter. After the memorandum, he sold portions of the ground to Mr. Chiappini and Mr. Wiener, who took six acres between them for £10,625. He could not get the amended title until he got transfer. Neither Chiappini nor Wiener had got transfer. The conditions of sale specified that, in the event of the buyer disposing of any portion of the estate, any moneys received or bonds disbursed would go towards the reduction of the bond of £23,000 or £17,000, and the longer the transfer was delayed, the more interest would have to be paid. He had been approached by others in regard to the sale.

Cross-examined by Mr. Searle: There was no document in connection with the sale to his partner, Mr. Chiappini. He could sell the reserve portion without obtaining an amended title. The Municipality was a joint owner in respect of a road, and it was necessary they should pass the plans before they were submitted to the Surveyor-General. He never gave the plaintiff formal notice of the other sales.

Antonio Chiappini, partner of the defendant, said that on the 6th June he had a conversation with the plaintiff at Newlands. He said he had bought Gibson's place, and that witness could tell the defendant he could buy the whole of Sans Souci. On June 30 witness asked plaintiff if he was going to exercise his option, and the latter wanted £500. The plaintiff wanted to sell witness Woodhead's property for £6,400 or £6,500. Next day Mr. Louw made the endorsement on the memorandum.

Cross-examined by Mr. Searle: He was interested in the property himself. He was anxious that the plaintiff should give up his option.

Charles van der Byl, broker, in partnership with Harold C. Wood and Co., stated it was through his agency the sale was effected. He knew the defendant intended to re-sell the ground in portions. Witness approached the defendant with a view to make a purchase, but owing to the delay in passing transfer, no business could be done. The plaintiff, he believed, was aware of the defendant's intention.

Cross-examined by Mr. Searle: Witness told the defendant he had a buyer for a particular portion of the ground.

Mr. McGregor closed his case.

Counsel having been heard in argument on the facts,

Cur. adv. Vult.

Postea (Nov. 17.)

Maasdorp, J.: On the 3rd of June, 1903, the plaintiff sold to the defendant the remaining extent of the estate Sans Souci, with adjoining ground, for the sum of £25,000, on the following conditions, amongst others: £2,000 to be paid off upon the date transfer is taken, and for the balance a mortgage bond to be passed, bearing interest at 6 per cent. per annum, payable half-yearly, the seller agreeing that the Bond shall not be called up within the term of five years; the seller to remain in full possession for a period not exceeding four months from the date hereof; should the seller desire to vacate before that time, then one month's due notice will have to be given to the buyer. Transfer to be taken upon the date upon which the seller gives possession of all the premises to the buyer. It is further agreed that the seller shall have the option for the term of one month from the date hereof to retain a certain portion of the estate, a description of which is given, for the sum of £6,000, thus reducing the purchase price to £19,000. On the 29th of June the plaintiff gave notice to the defendant that he would avail himself of the option reserved by him. On the 1st of July it was agreed between the parties that, in consideration of the defendant paying the sum of £500, any time up to

the date of transfer, the option exercised by plaintiff should be cancelled; and that, in the event of the plaintiff being unable to obtain possession of a property called Lockerbie, in time to give possession of Sans Souci, as per contract, the defendant would allow him gratis a fortnight overtime. The plaintiff ascertained in September that he could not get possession of Lockerbie on the 3rd of October, and on the 28th of September he wrote to defendant's agent, in answer to a question put by him, that he could not fix an earlier date for giving up possession than the 17th of October. On the 25th of September the plaintiff's attorney requested the defendant's attorneys to get the necessary documents signed, in order to have transfer passed on the 3rd of October, and amongst other things, required the plaintiff's signature to a power of attorney to execute a bond for £23,000, to bear interest at 6 per cent. per annum from the 3rd of October. The defendant was prepared to do everything required to effect transfer, but refused to have a bond executed to bear interest before the 17th October, on the ground that the plaintiff had decided not to give possession before that date. The plaintiff now tenders transfer of the property, and prays that the defendant may be ordered to take transfer, to pay him the sum of £2,500, and to execute a bond for the balance of the purchase price, amounting to £23,000, to bear interest from the 3rd of October. The defendant pleads that she was prepared to comply with all the conditions, except as to the bond, which she says should bear interest from the 17th day of October, when the plaintiff was prepared to give her possession of the property. The Court has to decide whether, under the circumstances, the bond should bear interest from the 3rd of October, or the 17th of October. Under the above-mentioned conditions of the contract dated the 3rd of June, the seller was to give up full possession of the property not later than the 3rd of October, and transfer was to be taken upon the date upon which the seller gives possession of all the premises to the buyer. Two thousand were to be paid upon the date transfer is taken, and for the balance a mortgage bond was to be passed bearing interest at 6 per cent. The effect of this contract was that on the 3rd of October the plaintiff became entitled to his money and his bond, and the defendant became entitled to receive transfer and possession. The question now arises, whether by the agreement of the 1st of July, it was intended to defer the performance of all these conditions until the 17th of October, or whether all were to be performed on the 3rd of October, with this exception—that the plaintiff was to retain possession until the 17th October, after the performance of all the other conditions. The agreement of the 1st of July stipulated that if the plaintiff should be unable to obtain possession of Lockerbie in time to give possession of Sans Souci as per contract, the defendant would allow him gratis a fortnight over time. The plaintiff was unable to obtain possession of Lockerbie in time to give possession of Sans Souci on the 3rd October. In construing this agreement, it seems to me there is a term used therein which has an important bearing on the case, and that is the word "gratis." The plaintiff is to be allowed possession "gratis," that is without reward or consideration to the defendant. The defendant is to receive no consideration, except such as is contained in the other items of the agreement of the 1st of July. If the other terms of the original agreement are altered as to the date of the transfer, the payment of £2,500, and the interest payable on the bond, then a consideration is introduced other than that contained in the agreement of the 1st of July. The consideration excluded by the word gratis might be either some benefit to pass to the defendant, or some detriment to the plaintiff. If the plaintiff were deprived of the interest, which it was contemplated he should receive after the 3rd of October, it would be a detriment to him, which would not be consistent with the term gratis. Then, again, until the other conditions of the contract were performed, and the defendant became the owner of the property after transfer, she was hardly in a position to claim any return for the possession allowed to the defendant, which is given up under the term gratis. To give effect to this expression, I think we must come to the conclusion that it was intended that all the other conditions of the contract of the 3rd of June were to be performed, and thereafter the plaintiff would be

allowed to remain in possession free of charge for another fortnight. The word "overtime" used in the agreement seems to me to point in the same direction, although I do not wish to make too much of it. It seems to me to signify that the defendant would allow the plaintiff to remain in possession a fortnight over the time when as per contract all the other conditions of the contract were performed on the 3rd of October. There is in my opinion nothing unreasonable in this construction. The plaintiff, having discovered that it would be inconvenient for him to quit possession on the 3rd of October, does not propose that the time should be extended for the performance of the contract, but that the contract should go through, and that the defendant, as a matter of grace, should allow him to remain in a few days longer. And this is made one of the conditions of the agreement of the 1st of July. If the defendant had insisted in obtaining transfer on the 3rd of October, I do not think the plaintiff could have refused it on the ground that he was entitled to possession for another fortnight. It is quite true that purchasers of property as a rule guard themselves against the liability to pay interest on the purchase price until they enjoy the benefit of possession, or take care to stipulate for rent if possession is retained after transfer. But this contract must be construed upon the express terms used, and it seems that it is precisely this claim for use and occupation, or for rent after transfer, which is given up in the use of the term gratis. On the whole, I come to the conclusion that defendant should have taken transfer on the 3rd of October, and passed a bond bearing interest from that date. The plaintiff is therefore entitled to judgment as prayed, and as a consequence the claim of the defendant in reconvention must fail. Judgment is given for the plaintiff upon the claim in convention, and also on the claim in reconvention, with costs.

Kotzé, J.: I have arrived at the same conclusion. I think the memorandum of the 1st of July does not in any degree vary the terms of the contract as expressed in the conditions of sale, viz., that transfer had to be given or taken on or before the 3rd October. The effect of the memorandum was a stipulation on the part of Mr. Louw that if he could not succeed in getting another house by the 3rd October he was to be allowed a fortnight's extra time at Sans Souci gratis, that is to say, it was to be free and for nothing, in other words, no consideration was to be given by him for being there this extra fortnight. Having arrived at the same conclusion, I agree in the judgment

[Plaintiff's Attorney: C. Bernard; Defendant's Attorneys: Findlay and Tait.]

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D., the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice KOTZE.]

GENERAL MOTIONS.

STORK V. STORK. { 1903. Nov. 17th.

Mr. M. Bisset moved in terms of the petition of the plaintiff, John Christ Stork, for the appointment of a commission to take the evidence of the plaintiff's witnesses, who are principally resident in the vicinity of Kokstad, East Griqualand. Petitioner was suing his wife for divorce, and he made the present application in consequence of the great expense of bringing witnesses to Cape Town. He asked that the Resident Magistrate of Mount Currie, or in the alternative the A.R.M., should be appointed to take the evidence of material witnesses, and also that the day of trial should be set down for the February term. The matter had previously been before the Court, but, a letter having been received from the defendant denying the allegations and saying that the matter had previously been before the Court in Natal, it was ordered to stand over, and in the meantime the Registrar was to write to the defendant and advise her to consult an attorney. The defendant had not replied to the letter sent to her by the Registrar.

Order granted as prayed, the trial to be set down for the first Tuesday in February.

THE MASTER v. DICKSON. { 1903. Nov. 17th.

Contempt of Court—Costs.

On application for attachment of a trustee of an insolvent estate for contempt of Court in not filing an account as ordered by the Court, it appeared that he had filed an account with the Resident Magistrate which, however, was very incomplete. No order was made for attachment, as the trustee was held to have acted in good faith, but he was ordered to pay the costs.

This was an application upon notice of motion for an order for the personal attachment of Thomas Henry Charles Dickson, of Piquetberg, for alleged contempt of Court in failing to comply with an order to file a liquidation account and plan of distribution in the insolvent estate of Carl A. van der Merwe, of which respondent is trustee.

The affidavit of the Acting Master (Mr. Heinmann) stated that the order of the Court had been served upon the respondent, but he had failed to comply. The respondent, it appeared, was appointed trustee on the 12th March, 1902.

The answering affidavit of David Tennant, jun., an attorney of this Court, stated that he had been asked to lay certain facts before the Court. On the 11th October the defendant sent in an account to the Master's Office, but, the chief clerk returned the account with a note, requiring further particulars under several heads. Defendant wished to point out that before he had time to attend to the note made in the Master's Office, proceedings were taken against him. The account was originally filed as far back as the 7th October, in the Magistrate's Office. There had evidently been some misunderstanding. Practically no time was allowed between the date of the memorandum and the date of issue of the affidavit.

Mr. P. S. Jones for the Master; Mr. Alexander for respondent.

Mr. Jones: The Acting Master informs me that the affidavit was made in the morning, and that the account came in in the afternoon.

[De Villiers, C.J.: Then why didn't he withdraw the affidavit?]

Because the account was rejected as being an improper account. The defendant has been very negligent in failing to file the proper accounts with the Acting Master. If the Court does not think that the defendant should be committed, at any rate, he ought to be required to pay the costs to which the Acting Master has been put.

Mr. Alexander submitted that the defendant had filed a proper account as far as he was able within the period specified by the order of Court. It was impossible for the defendant to file a final account, as there were a number of assets which could not be realised. Evidently there had been a misunderstanding. The Chief Clerk of the Acting Master seemed to have received the account and made the memorandum, while the Acting Master swore the affidavit, and no doubt at the time the latter was not aware that the account had been furnished. He contended that there had been no contempt on the part of the defendant. In view of the misunderstanding, counsel said he did not press for the costs to be paid by the Acting Master personally, but he did not see any reason why the respondent should pay the costs.

Mr. Jones contended, in reply, that the order of Court had not been carried out, and, with regard to the costs, he submitted that the respondent's default was the cause of the costs having been incurred, and he should bear the same.

De Villiers, C.J.: If the account filed by the respondent had been in every way a satisfactory account I should have had some difficulty in dealing with this matter upon the question of costs, but this account seems to me a wholly unsatisfactory account. It is very perfunctory, it has no details such as an account of a trustee should give, and, therefore, I think the respondent should pay the costs of this application. There will be no order for attachment, seeing that there has been

some attempt on the part of the respondent to obey the order of the Court. He has acted perfectly *bona fide*, but still he has not filed such an account as in my opinion he ought to have filed, and for the neglect he ought to pay costs. He has the opinion of the Court that this account is insufficient, and he will, therefore, have to amend that account.

Ex parte BOTHA.

Mr. Buchanan moved for an order authorising a certain deed of transfer to be executed and registered. The petitioner stated that he resided at Jagersfontein, in the Orange River Colony, but formerly resided at Colesberg. On the 14th February last he sold a farm in the said district of Colesberg to the R.B. and B. Syndicate for £3,639 8s. 3d. The memorandum of association of the said syndicate was not signed until the 17th June of this year. From the affidavits of Mr. Abe Bailey, Sir L. Michell, and Mr. E. R. Syfret, it appeared that there had been certain delay in the completion of the articles on account of the deed having to be referred to subscribers in Johannesburg, and some of the executors in the estate of the late C. J. Rhodes, residing in England. It was stated, however, that the original purchasers of the farm and the syndicate were in effect the same.

[De Villiers, C.J.: Is the question one as to transfer duty?]

Transfer duty has been paid once, but the Registrar contends that, seeing that the syndicate was not in existence at the time of the purchase, transfer duty must be paid by the syndicate before the property can be registered in their name.

A rule was granted, calling upon the Treasurer-General to show cause on the 23rd inst. why an order should not be granted in terms of the prayer.

GREEN AND SEA POINT MUNICIPALITY V. MORRIS. 1903. Nov. 17th

Interdict — Municipality — Building regulatiohs.

Certain building regulations framed under the Municipal Amendment Act of 1896, described the materials which should be used in the construction of new buildings within the Municipality to ensure the stability of such buildings. The respondents, in laying the foundations of certain buildings, used materials prohibited by the regulations, and likely, in the opinion of the Court, to endanger the stability of the erection and the safety of future inmates and probably of the general public, and they refused to comply with the request of the municipal engineer that they would use proper materials.

Held on motion, *that the Municipality was entitled to an interdict, restraining respondents from erecting walls on such foundations unless and until the structure of the same should be such as not to endanger the safety of any buildings erected thereon, but leave was reserved to the respondents to institute an action to have such interdict set aside.*

This was a motion to make absolute a rule *nisi* to restrain the defendants from proceeding with the erection of certain houses in Morris-road, Sea Point, until such time as they should have complied with the Municipal regulations

The affidavits of various officials of the Council alleged that considerable difficulty had arisen between the Council and the respondents as to the property, and that the defendants had proceeded with the erection of houses without first having plans passed.

Sir H. Juta (for the respondent) said he would like to know what the interdict applied to, as it would considerably shorten the case if it was only the second block of houses.

Mr. Searle (for the applicants) said that the objection was to the second block, on the ground of improper drainage and indifferent materials.

The answering affidavit of Jacob Morris set forth that the plans had been approved of by the Council, and in support of the statement, he referred to the correspondence. Deponent also stated that the stables were also approved of by the Council, and that the interdict was based entirely on the question of material. He instructed Mr. Cairncross, the late Municipal Engineer for the city of Cape Town, and Mr. Esdon to inspect the buildings, and they were entirely satisfied with the work. The work had been carried on under the supervision of the late Building Inspector of the Municipality, and any alterations suggested to him by the Council's representative were carried out. The sample of the foundation was taken before the preparation was properly mixed, and he could prove by witnesses that the foundations were 2 feet 4 inches wide. The affidavit of Solomon Morris corroborated that of his brother, and added that notice was repeatedly given to the Municipal Engineer that the work was proceeding. The Municipal Engineer said he would condemn the building before he saw it. Reports were read from Mr. Cairncross, who for twenty years had been engineer to the city of Cape Town, and others, to the effect that there was nothing wrong with the material.

The replying affidavit of the Municipal Engineer denied that he condemned the whole of the building.

The affidavit of the Sanitary Inspector stated that he instructed the respondents to desist from proceeding with the work on the second block until the plans were approved.

Other affidavits stated that there was apparently no sand in the sample, and that the cement appeared to have no effect.

Sir H. Juta contended that, in order to obtain an interdict, the applicant must show that irreparable damage would ensue to the person applying. At the bottom of the Municipality's objection, it was really not the question of the material, but that the class of building was not in keeping with the environment. Mr. Esdon, who had no interest in the case, said that the quality of material used was better than what was generally used in such buildings. Mr. Cairncross also said the same thing.

Counsel contended that no case had been made out in the evidence in favour of an interdict, and that the whole thing was a little dispute between the builders and the Municipality.

Mr. Searle said that the case for an interdict was overwhelming. The Municipality had not even approved and sanctioned plans of the drainage. He argued that the Municipality were quite within their rights in insisting upon a certain class of materials being employed in the construction of buildings. The Council objected that the foundations were not wide enough, and that the materials used were not of sufficiently good quality to meet the approval of the Municipal Engineer. They had the evidence of experienced witnesses that the material used was improper material, and the samples produced in court supported that view.

De Villiers, C.J.: The fourth section of the Municipal Act of 1896 confers on municipalities very large powers in the framing of building regulations. The fourth section enacts that "every municipality may, acting in accordance with the law under which it is constituted, from time to time make, alter, revoke, or amend the rules and regulations for all or any of the following purposes: For regulating the structure of walls, foundations, roofs, and chimneys, of new buildings . . . . for securing stability, the observance of sanitary precautions, the prevention of fires, and other purposes of health and public safety.' Under that Act the Municipality of Green and Sea Point has framed building regulations, giving minute details as to the structure of the different parts of buildings. The 226th regulation, for instance, describes the materials of which the walls of the building should be constructed. "The external walls of every building and other structure . . . . shall be constructed of good hard, sound, well-burnt bricks, sound stone, or other hard and incombustible substances." The object of the Act is to enable municipalities to provide for the safety of the tenants, who are to inhabit the houses, and the public, who might be in the neighbourhood of such houses. On reference, however, to the 224th regulation, I am bound to say that it is rather obscurely worded. It is not at all perfectly clear what is meant. The section provides that "The foundations of

the walls of every building or other structure hereafter erected or reconstructed shall rest on proper footings. When concrete is used as a foundation, such a foundation shall be at least nine inches wider than the foremost course of brickwork which is to rest thereon. The footings shall be placed on solid ground, concrete or some other solid sub-structure, and shall be either of brick or stone, or brick and stone laid in good lime or cement mortar, to the satisfaction of the Council's engineer, or of cement concrete." The word "footings" here seems to be used in two different senses, but, upon the whole, I am of opinion that the object of this regulation is to confer on the Municipality a right of control in regard to the foundations similar to the control conferred on it in regard to the structure of the walls. If it is essential to the stability of buildings that the walls should be constructed of proper materials, it is still more essential that the foundations on which the walls rest should be secure. The respondents, however, have used materials for the foundations which, if the applicants' affidavits are correct, will endanger the stability of any building that may be constructed thereon. Samples of the materials used have been submitted to the Court, and if they fairly represent the everage quality of the materials there can be no doubt that heavy rains would bring down any buildings erected thereon. It is just possible that the respondents may be able to disprove the statements, and for that purpose they will be allowed to bring an action to set aside any order now made, but as the evidence before the Court shows it would not be fair to future tenants, or even to the general public, to allow the construction to proceed, to allow the construction to proceed. The Court will therefore grant the interdict with costs, restraining the respondents from building upon any foundations on which the building of walls has not been commenced, unless and until the structure of such foundations shall be such as not to endanger the safety of any buildings erected thereon, with leave to the respondents to institute an action to have such interdict set aside and to recover any costs paid.

[Applicants' Attorneys: Van Zyl and Buissiuné; Respondent's Attorneys: Silberbauer, Wahl and Fuller.]

NZOBO V. NDABA AND ANOTHER. { 1903. Nov. 17th.

Native custom—Tribal tenure.

Certain land within one of the Native Territories had been purchased for the use of a certain Native tribe with funds raised from the contributions of the members of that tribe. Transfer had been passed to the chief and eleven councillors, as trustees for the tribe. These conditions had not been inserted in the Deed of Transfer. Two of these councillors had obtained an order of Court, enabling them to pass transfer of a portion of this land to a certain purchaser. On the application of certain other members of the tribe, who were not represented when the former order was granted, the Court now granted an order, restraining transfer from being passed, pending an action to be forthwith brought by them for the rectification of the original transfer to the chief and his councillors.

This was an application upon notice of motion for a certain order of Court to be stayed pending an action to be brought by the applicants, or pending a further order of Court on hearing the applicants in opposition to the order already granted. Mr. Upington appeared for the applicants; Mr. Benjamin was for the respondents.

It appeared that Ndaba and Breakfast had obtained an order from the Court calling upon the other parties to a certain deed of property at Matatiele to enable the applicants to pass transfer of the property. (See 13, C.T.R., 618.) The other parties, Nzobo and eight others, were not represented when the matter first came before the Court, in consequence of some delay in the filing of affidavits, and they now asked the Court to grant leave to stay the previous order. Nzobo and others said it was distinctly understood at the time of the

original purchase that none of the subscribers should dispose of their portion, because the object for which the land was bought would be defeated. There would be danger of all the land being absorbed by a neighbouring landowner, and the location of the tribe being curtailed.

Counsel having been heard in argument,

De Villiers, C.J.: If the circumstances now brought to the notice of the Court had been known to the learned judge who granted the order, I am satisfied that that order would never have been made. It is now stated that the persons who purported to sell portions of this farm were merely trustees for the tribe, that the Chief collected the purchase price from the tribe, and that transfer made to the Chief and eleven counsellors was intended to be made in trust for the tribe, and not to the eleven transferees individually. Through some omission, the conditions were not inserted in the transfer, and, in my opinion, an opportunity should be given to the applicants to institute an action to have the transfer amended by the insertion of these conditions. The Court will, therefore, grant an order restraining the transfer from being passed, pending an action to be forthwith brought by the present applicants for the rectification of the transfer. In regard to the costs of the previous application, the Court has already ordered these costs to be paid by the present applicant, and that order the Court will not now disturb, but it is understood that the applicants will be entitled to include in their claim for rectification of the transfer a claim also for the re-payment of any costs which they may pay in consequence of the previous order. As to the costs of the present application, they should be costs in the cause.

[Applicants' Attorneys: Findlay and Tait; Respondents' Attorneys: Van Zyl and Buissinné.]

HILLS v. COLONIAL GOVERNMENT. { 1903. Nov. 17th. „ 18th.

Appeal — Privy Council — 37th Rule of Court.

The plaintiff, in a civil suit, lodged a petition for leave to appeal to the Privy Council within fourteen days after final judgment, but failed to give notice to the defendant of the lodging of the appeal in manner required by the 37th Rule of Court. On application for leave to appeal, the defendant objected on the ground, inter alia, *that the terms of the Rule had not been complied with.*

Held, *that although it might be competent for the Court with strict compliance with rules relating to appeals to the Supreme Court itself, it should not grant leave to appeal to another tribunal unless the requirements of the Rule have been complied with.*

This was an application upon notice of motion for leave to appeal to the Privy Council against a judgment of this Court of the 3rd August last, the petitioner having deposited a security bond for £500, signed by the Bank of Africa.

The affidavit of the applicant's attorneys, Messrs. Tredgold, McIntyre and Bisset, stated that the plaintiff was aggrieved by the judgment of the Supreme Court, and that the matters in dispute exceeded in value £500.

The affidavit of Mr. John Henry Reid, of Messrs. Reid and Nephew, respondents' attorneys, stated that notice was given to him of the appeal on the 7th inst. According to the 37th rule of Court, the petition for leave to appeal must be lodged in the office of the Registrar within fourteen days next after judgment had been pronounced, and notice of the lodging of such petition must be forthwith given, but no such notice was given in the present case. The judgment against which the plaintiff now sought leave to appeal was passed upon the report of the referees appointed by the Court by order made on the 6th March, 1903, against which the plaintiff did not appeal, and the judgment now in question was given upon the application of the plaintiff himself.

Mr. Searle, K.C. (with him Mr. Close) for applicant; Mr. McGregor for respondent.

Mr. Searle said that what the petitioner wished to appeal upon was the question of interest, amounting to about £60,000 or £70,000. The Court held that no interest could be allowed as part of the actual cost of the work done on the lines by the plaintiff. That was really the important point that Mr. Hills wished to be decided. He submitted that petitioner could not have appealed upon that point until the Court gave judgment upon the report of the referee. The next point was as to proper notice not having been given to the respondents' attorneys. He was afraid that that was the case. The point was whether that notice was imperative. As far as he was aware, there was no definite case that decided that point. Counsel quoted *Jones* v. *Cape Town Council* (12 Juta, 19), and also from the Charter of Justice. He also cited the case of the *Bank of Africa* v. *Cape of Good Hope Building Society* (11 Sheil, p. 18), in which it was held that fourteen days was imperative as the period during which the petition should be lodged. There did not, however, appear to be any case which decided the question of notice being given. He did not see that any prejudice could have occurred to the Government through notice not having been given.

Mr. McGregor contended that the application should fail because notice of the appeal was not lodged within three months of judgment being given in the action. He urged that the date from which the period was to be reckoned was, not the 3rd August, but the 6th March. What it was now proposed to do was contrary to the 37th rule of Court. As to notice not having been given to the respondents, he submitted that his learned friend had not shown any authority for his opinion. He urged that the judgment given by the Court on the 6th March last was not an interlocutory judgment. Counsel contended that the case was quite different from the recent case of Hanekom, from Griqualand West (13 C.T.R., 834).

Mr. Searle having been heard in reply,

Cur. Adv. Vult.

Postea (November 18):

De Villiers, C.J.: This is an application for leave to appeal, and the application was opposed on two grounds, the first ground being that a final judgment was given in the month of March of this year, and the petition for leave to appeal was not filed until the month of August, and that consequently the rule has not been complied with which requires that the petition for leave to appeal shall be filed within fourteen days after the judgment has been pronounced. The judgment in the case was given in the month of March, and then the matter was referred to certain referees, and an application was made for a confirmation of the finding of the referees on the 3rd August. The terms of the judgment delivered in March were as follows: "The Court grants judgment for the plaintiff for the return of the shares, with costs to date of tender, dismisses the claim for damages, and appoints Arthur May Tippett, Thomas Roy, and Harry Gibson special referees to ascertain the actual cost incurred in respect of the construction of the line taken over by the Government, including buildings, plant, and materials, such cost not to include interest or goodwill or wasted expenditure, or any work or materials of which the Government has not received the benefit, and also to ascertain the amount paid by Government on account, and the amount of the retention money in the hands of the Government." Part of this order, no doubt, was final, but the form of the order of reference to certain referees was not final, and no final judgment upon the finding of the referees was given until the 3rd August, when the Court, having heard counsel, entered judgment for the plaintiff for the sum of £76,225 9s. 4d., with interest *a tempore morae*, with costs, including the fees and expenses of the special referees, the defendant, in his capacity as commissioner, undertaking liability in respect of items (a), (b), and (c) of the suspense account, and to pay the same or such portion thereof as he shall find to be due, not exceeding in any case the sums mentioned in the report. So far, therefore, as the judgment upon the referees' report was concerned, the final judgment, in my opinion, was only given on the 3rd August, and if therefore the rules of Court were complied with, after the 3rd August the plaintiff ought, in my opinion, to obtain leave to appeal, if the plaintiff feels aggrieved by the judgment. He claimed about half a million pounds; the judgment of the

Court was for £76,000, and if he were aggrieved, it was upon a substantial matter upon which he was entitled to appeal. If, therefore, this were the only question, there would be no difficulty in granting leave to appeal, but a further objection has been raised, and that is that the 37th Rule of Court has not been complied with. The terms of that rule are clear and explicit: "When any person against whom any final judgment, decree, or sentence, or any rule or order of this Court, in any civil suit or action, having the effect of a final or definitive sentence, has been pronounced, made, or given, the party aggrieved may appeal to the Privy Council, provided that such person shall within fourteen days next after the same shall have been pronounced, made, or given lodge in the office of the Registrar of this Court his petition for leave to appeal therefrom, and shall forthwith give notice of the lodging of such petition to his opponent." If this had been a question of an appeal to this Court, I have no doubt whatever as to the power of the Court to dispense with the requirement of notice. The question arises whether this Court has the right to dispense with the requirement contained in a rule of Court in regard to an appeal to another tribunal. The matter was incidentally considered in the case of *Jones* v. *Cape Town Council*, and in that case the Court, adopting the practice which it has always adopted of facilitating appeals to the Privy Council, held that if the petition had been lodged, and notice given to the opposite side within the fourteen days, then it is always open within three months after the filing of the petition to make a formal application to the Court. The essential point is that there should be a lodging of the petition and notice to the opposite party. That was assumed. It was assumed in my own judgment, where I said, "It has always been assumed, if the petition was filed within fourteen days, and notice given to the opposite party of such filing, it was always open within three months after the filing of the petition to apply to the Court and give security." My brother Upington said: "In all my experience, I have always understood that if the petition were lodged with the Registrar, and notice given to the other side within the fourteen days, that was sufficient." In the present case, it is admitted that the petition was lodged, but the notice was not given to the opposite side till some weeks had elapsed after the time within which the notice had to be given. In my opinion, the Court should not, and cannot, dispense with a clear provision of a rule of Court, which is a condition precedent to the right of appeal to another tribunal. The 51st section of the Charter of Justice gives to the Privy Council full right and power to give leave to appeal, notwithstanding that any rules of Court in this court have not been complied with. It is, therefore, quite competent for the applicant to apply for leave to the Privy Council, and I have no doubt that such leave will be granted, but so far as this Court is concerned, I think it should not depart from the clear provisions of its own rules. The application will, therefore, be dismissed.

Kotzé, J., said he was of the same opinion. Seeing that this was an application for leave to appeal to another tribunal he thought that the Court had no discretion in the matter, but was bound by the rule as to notice. As the terms of the rule in question had not been complied with, leave to appeal to the Privy Council must be refused.

Mr. MacGregor (for the respondents): Will your lordship make any order as to costs?

De Villiers, C.J.: Costs will follow the result. Leave will be refused with costs.

[Applicant's Attorneys: Tredgold, McIntyre and Bisset; Respondents' Attorneys: Reid and Nephew.]

HALLER AND SOGWAGWA v. ESTATE HALLER AND MULLER.

This was an action brought by George Frantz Haller and Stofel Sogwagwa, married, in community of property, to Annie Sogwagwa (born Haller), of St. Mark's Mission Station, in Tembuland, against Louisa Christina Muller (born Haller), also of St. Mark's Mission Station, to have a certain will declared null and void.

The declaration set out that the defendant was sued in her capacity as executrix in the estate of the late Katrina Juliana Haller (born Schneider), and also

as guardian and curator for all purposes material of the minors, Louisa Wilhelmina Haller and Carl Haller. Defendant's husband, Julius August Muller, sen., was also joined to the suit. The first-named plaintiff, the first-named defendant, and the said Annie Sogwagwa were children of the late Katrina Juliana Haller, who died on the 5th August, 1901. There were two other children, both majors. In or about July, 1901, a document purporting to be the last will of the said Katrina Juliana Haller, was signed at St. Mark's Mission Station, and the witnesses purported to be one Mr. Peters and one Mr. Haynes. The first-named defendant had taken out letters of administration under the said document. The said Peters and Harnes did not see the said Katrina Juliana Haller sign the said document, nor were they present either of them at the execution thereof, nor did they sign the said document in her presence, and the said document purporting to be such will was therefore null and void, for non-compliance with the provisions of Ordinance 15, of 1845. The plaintiffs said, further, that the said Katrina Juliana Haller was not at the time of the execution mentally capable of executing a valid will. Under the said document the testator purported to appoint her grandchildren, Louisa Wilhelmina Haller and Carl Haller, as her heirs respectively of three-quarters and one quarter of all her estate, and the first-named defendant as guardian and curator of the said minor children. The first-named defendant had in her possession the whole of the said estate, which was valued at about £350. The plaintiffs claimed: (a) That the said document be declared to be null and void; (b) that the said Katrina Juliana Haller be declared to have died intestate; (c) that the appointment of the first-named defendant as executrix be cancelled, and that she be ordered to account to such person as may be appointed executor dative in the estate of the said late Katrina Juliana Haller for the value thereof, and to pay over to him the portion to which the plaintiffs are entitled as heirs *ab intestato*; (d) alternative relief; (e) costs of suit.

Mr. Upington for the plaintiff; Defendant in default.

Counsel read the evidence taken on commission before the Assistant Resident Magistrate, at St. Mark's, from which it appeared that Wm. Peters, son-in-law of the deceased, stated that during Mrs. Haller's lifetime he was not a witness to any will made by her. The will was also witnessed, he noticed, by his daughter. The document was brought to his home by Mrs. Muller, and he signed it in order to oblige Mrs. Muller. He knew that Mrs. Haller had then been dead for some time. Other evidence was given to show that Mrs. Haller had for some years been mentally incapable of executing a will. It was stated that Mrs. Haynes was unable to attend to give evidence owing to the illness of her child.

[De Villiers, C.J.: Was no evidence given on behalf of Mrs. Muller?]

Mr. Upington: No.

[De Villiers, C.J.: It is a very serious charge that is made against Mrs. Muller.]

I may say counsel was not in possession of the full facts when the declaration was drawn, otherwise it might have been drawn differently.

Decree granted as prayed, costs to come out of the estate.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.).]

Ex parte CREDITORS OF THE COLONIAL BUILDING CORPORATION.
Ex parte SAMSON.
1903. Nov. 18th.

Company—Voluntary winding up—Compulsory winding up—Liquidator—Staying proceedings in winding up.

A special resolution having been passed for the voluntary winding up of the B. Company, three liquidators were duly appointed. Subsequently a majority of the shareholders, including the applicant, who was one of the liquidators,

desired to stay proceedings in the winding up for the purpose of resuscitating the Company, and they passed a resolution to the effect that the applicant alone should control the liquidation without the intervention of the two other liquidators, and should apply to the Court for an order staying proceedings in the voluntary winding up. On such application being made, the two other liquidators, supported by a substantial minority of the shareholders and by the bulk of the creditors, opposed the application, and moved for the compulsory winding up of the Company.

Held, *that although it might be competent for the Court, under the 143rd and 186th sections of the Companies' Act, 1892, to stay proceedings in a voluntary winding up, such a course was not advisable under the circumstances.*

Held further, *that in view of the facts that the Company had, by resolution of shareholders, been ordered to be wound up voluntarily, that the liquidators had arrived at a deadlock in the winding up, and that a substantial minority of the shareholders and the great majority of the creditors were opposed to a resuscitation of the Company and in favour of a compulsory winding up, it was just and equitable that the Company, although perfectly solvent, should now be wound up compulsorily.*

These applications were heard together by consent. In the former petition the liquidators and certain creditors and shareholders applied for the company to be judicially wound up, and an official liquidator to be appointed. In the other petition, one Samson, supported by certain shareholders in England, applied for the company to be removed from voluntary liquidation, and to be allowed to carry on its business again.

The petition of George Gordon Samson stated that he was formerly managing director of the Building Corporation, and he was now one of the liquidators. The company was formed in November, 1895, and acquired various properties, which formed the company's assets. For some years it carried on business most successfully. At an extraordinary general meeting of shareholders held in Cape Town on the 30th July, 1902, during petitioner's absense in Europe, special resolutions were passed to wind up the company voluntarily. These resolutions were subsequently confirmed at a meeting held on the 15th August. Upon hearing of these resolutions, one Stockham and other shareholders resident in England moved the Supreme Court to set aside the proceedings at the said meetings on the ground (1) that they had received no notice of the said meetings; (2) that certain proxies had been rejected; and (3) that the company was solvent. The motion did not succeed.* In May, 1902, petitioner, who had been managing director of the company and secretary since its flotation, tendered his resignation on account of ill-health. This resignation was not accepted by the directors, and he again tendered it at a later date, with the alternative of six months' leave of absence. The Board accepted the resignation, and gave petitioner a bonus of £50. Petitioner left for England on the 4th June. Then the meetings were called in Cape Town to discuss the position of the company. On the 20th August a meeting of the English shareholders was convened by Mr. H. W. Stockham in London, at which it appeared that they were entirely opposed to the liquidation of the company. A requisition was prepared and signed by some 21 English and local Cape Town shareholders, praying that a meeting should be convened in Cape Town for the purpose of rescinding and reviewing the proceedings of the meetings held in Cape Town. No meeting was convened by the liquidators conformably thereto. Since the company

*See 12 C.T.R. 740.

was placed under voluntary liquidation many properties had been sold. The business of the company had not been carried on by the liquidators to the satisfaction of the shareholders, and in their opinion it would be better to reinstate the company. Petitioner held proxies representing 2,837 shares. The total number of shares issued was over 6,000. A special meeting of shareholders was held in Cape Town on the 6th October, 1903, at which petitioner was asked to take further steps in the matter.

The answering affidavits of Messrs. John Yeoman and A. T. Hennessy, liquidators of the company, said that the properties of the company had been valued. The valuation of Mr. G. Smart was £9,855, whilst Mr. Hennessy's was £9,500. Deponents had no notice of the meeting held in England. The properties which had been sold by the liquidators had produced very satisfactory prices, and had realised £420 in excess of the book values. It was denied that petitioner was a creditor of the company. He was a debtor of the company for £7 2s. 5d. in respect of rent collected by him, and not accounted for. The company was solvent, and if the business were carefully carried on contributors should receive 22s. 6d. in the £. Deponents believed that the resumption of the business of the company would not be beneficial to the interests of the shareholders. During the liquidation about £4,050 had been paid off on preferent claims. An affidavit by Mr. H. M. Arderne stated that, as a contributor and creditor and agent of other creditors of the company, he was strongly opposed to the application of the petitioner Samson; and a further affidavit by Mr. J. D. Logan stated that as a contributor in respect of 50 shares, he was opposed, upon the facts before him, to the liquidation of the company being suspended.

The replying affidavit of the petitioner Samson admitted certain of the allegations of the deponents, but said that the valuations made by Messrs. Smart and Hennessy were altogether worthless. Through the want of expert knowledge and inefficient administration on the part of the liquidators, Messrs. Yeoman and Hennessy, the company showed a very small profit. He anticipated no difficulty in obtaining other mortgages if all the others were called up, and there was no danger of the assets being sacrificed. The overwhelming majority of the shareholders for suspending the liquidation would justify the Court in acceding to the petition. Replying to that of Mr. Arderne, petitioner in his affidavit accused Messrs. Yeoman and Hennessy of neglect in not paying a certain bond. An affidavit was put in from Sub-Inspector Osberg, showing that the value of a house which he bought in April, 1901, had almost doubled in value at the present time.

[De Villiers, C.J.: That does not show that there was neglect in 1901.]

Mr. Upington (for the applicant, Samson): No, my lord. The object of this is to show the value of a similar house sold by the liquidators, while the company was in liquidation. Counsel proceeded to read affidavits from Philip Turner as to advantageous purchases he had made from the liquidators, and from Christopher Crowe, a director, to the effect that a suspension of the liquidation would be to the interests of the shareholders.

Mr. Gardiner (for the petitioning creditors) put in a list of mortgages, and a list of the names of shareholders with their respective holdings, who desired the winding-up of the company. The affidavit of Mr. Arderne set forth that the loan of £1,600 was to relieve another bond that had been called up. In view of the difference of opinion and the pressing claims of bond-holders, he suggested that Geo. Wm. Steytler should be appointed as official liquidator.

Mr. Upington read the answering affidavit of the petitioner, denying that there never was any suggestion about the temporary loan of £1,660. Mr. Arderne was paid the usual commission, and he was aware it was a permanent loan.

Mr. Gardiner read a replying affidavit, and put in several from shareholders to the effect that the liquidation was the best thing in the interests of the shareholders.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: The Court has very large powers in cases of voluntary winding-up under the 186th section of the Act, which enacts that, "where a company has been wound up the voluntary liquidators or any contributory of the company may apply to the Court to determine any

question arising in the matter of such winding-up, or to exercise, as respects the enforcing of calls or in respect of any other matter, all or any of the powers which the Court might exercise if that company were being wound up by the Court." Amongst the powers which the Court may exercise in a case of compulsory winding up, is that of staying proceedings, and I am quite prepared to accept the view that where the proper occasion arises the Court may even stay proceedings in a voluntary winding-up. The question, however, is, has the occasion arisen in this case? In my opinion this is not one of those cases in which the Court should exercise the power. The voluntary liquidation was arrived at apparently with the consent of the requisite number. An application was subsequently made to the Supreme Court to set aside the order for the voluntary winding-up on the ground that the proper and requisite majority had not been obtained. That order was refused, and subsequently the liquidators proceeded with their duties, but they seem never to have been able to agree. There were continual squabbles, and the matter has now arrived at such a point that it appears to me impossible to expect harmonious co-operation between the three liquidators. If there had been only one or two objecting creditors, the Court might have directed that proceedings should be stayed upon buying out the objecting shareholders, but there is a substantial minority of the shareholders who object to the proproposed course. They object to this company being reconstructed, and in addition the great bulk of the creditors also object, and therefore I think this is not a case in which the Court should exercise any special powers which it might be able to exercise under the 186th section, and the only further question is: what is the Court to do? It seems to me that the parties are in a hopeless difficulty. If we allow the liquidation to proceed nothing will come of it, no proper business will be done; the shareholders have passed a resolution, an extraordinary resolution, to the effect that one of these liquidators shall have the power to control the liquidation without the assistance or the control of the other liquidators. In my opinion, that is a resolution which makes the winding-up unworkable. The respondents in the present case now say that a case has arisen in which the Court should exercise the power of ordering a compulsory winding up. The Court has that power in cases where the Court is of opinion that it is just and equitable that the company should be wound up. The creditors have already decided upon a voluntary winding-up; in the course of that winding-up, it is found impossible for the liquidators to carry on the business—the whole thing has arrived at a standstill—and the Court has to decide, under the 186th section, whether it would be just and equitable in the interests of all parties concerned, creditors as well as shareholders, that this company should be wound up in an effectual way. The voluntary winding-up has been wholly ineffectual hitherto. It will be quite effectual if the Court appoints its own liquidator, over whom the Court will have sufficient jurisdiction to see that the winding up is properly carried on. The Court is of opinion that an order should be made for the winding up of this company, and that Mr. Steytler should be appointed as official liquidator, with the full powers generally granted under the 149th section. In regard to the costs of this application, both applicants have acted in what they believed to be the interests of the shareholders and the creditors, and I consider it right that the costs of both the applicant and the respondent should come out of the estate. The question has been raised in the affidavits whether the liquidators—the voluntary liquidators—should receive any remuneration for their services, but that will be a question for the official liquidator. He will consider that matter, and report to the Court, and I have no doubt he will award to each of the liquidators a fair remuneration for the services he has rendered.

[Attorneys for the creditors: Fairbridge, Arderne and Lawton; Attorneys for the applicant Samson: Van Zyl and Buissinné.]

Ex parte PALMER. { 1903. Nov. 18th.

Fraud — Defence of prisoner — Cash found on prisoner.

The applicant being in gaol, awaiting trial for fraud, applied to the Court for an order on the police, who had taken possession of all the money found on his person at the time of his arrest, to hand over to the applicant's attorney a part of the money for the purpose of enabling him to provide for his defence. The Court ordered the sum of £20 to be so paid over to the applicant's attorney.

This was an application on behalf of Walter Alfred Palmer, now awaiting trial on a charge of fraud or theft, for the payment of a sum of £100 from funds in the hands of the police to the petitioner's attorney, for the purposes of his defence and his food, and other necessaries as occasion might require. Mr. Howel Jones appeared on behalf of the Attorney-General.

The petition stated that the petitioner was at present in Roeland-street Gaol, Cape Town, where he was awaiting trial on a charge of fraud or theft, and attempting to commit the crime of fraud. At the time of his arrest the petitioner had in his possession the amount of £229 15s. 6d., more or less, which was now in the hands of the police. He instructed his attorney to make an application for payment of this money for his defence and for food, but the application was refused. It was pointed out in the letter of refusal that the money was supposed to be portion of the stolen property. The petitioner drew out from his bank the amount of £248, and along with other moneys in his possession, this made up the amount of £299 15s. 6d. found on him on the day of his arrest. He was to be tried at the Criminal Sessions on the 23rd inst., and he had no money for his defence. He had not been able to find bail, and he had no funds whatever apart from the money in the hands of the police. An affidavit was read from the petitioner's attorney, Charles Edward Price Hughes, to the effect that it would be necessary to obtain witnesses for the defence from New York.

The affidavit of the Assistant Resident Magistrate of Cape Town stated that at the preliminary examination the accused was charged with fraud, and subsequently committed for trial. The money found on the accused was supposed to be portion of the money obtained by fraud.

Mr. Pyemont moved.

Mr. Jones (for the Crown) explained that no notice was served upon the Attorney-General, and in order to expedite matters, he had an affidavit drawn up by the Acting Chief Clerk, which stated that the prisoner had been indicted on a charge of fraud or theft and attempted fraud. From the evidence adduced and the statements made by the assistant accountant of the Cape Town branch of the Standard Bank, it appeared that the amount of £299 15s. 6d. now in the hands of the police was a portion of the proceeds of the crime alleged to have been committed by the petitioner. Counsel said it appeared that the accused gave himself out as the managing director of the South African Trading Company of New York, Delagoa Bay, Durban, and other places, and he inserted advertisements in the newspapers about the end of August calling upon persons to apply to him for the positions of collectors and managers, and they had to deposit security with him. He received £450 from several people between 29th August and the 8th September. This sum was paid into the bank, and all drawn out again—about £300—on the 8th September. Next day he was discovered with the amount stated in his possession, on his way to the Docks with his baggage. Counsel read an affidavit from Mr. Kinsley, acting for Messrs. Lane and Haupt, objecting to the police parting with any of the money in their possession, and also the cheque for £100, which he received from Mr. Haupt. The numbers of the notes which the accused obtained from Mr. Lane were known, and these notes and cheque were obtained by means of false pretences. Counsel said that the evidence showed that these notes were found in the possession of the pri-

soner, and the cheque, which was drawn in favour of Haupt, was banked on the 8th September. There was very strong evidence against the prisoner. On the 29th August he received £150 from two persons; on 1st September, £100 from one person; 4th September, he deposited £200 at the bank. On 7th September, he obtained £100 in notes.

Mr. Pyemont put it to the Court whether the police had any ground on which the application for the money was refused. He had not seen the record of the proceedings, but as the applicant had not been proved to be guilty, he went on the assumption that he was innocent. If there were any money which could not be identified, then the police had no right to retain it All his learned friend's argument had been based on the assumption that the man was guilty of theft. That assumption could not be granted for one moment. He submitted that the petitioner should not be interdicted from using money found in his possession that had not been identified. If the money could all be identified, then the matter might be placed on a different footing. His learned friend had also said that the petitioner had opened a banking account for the purposes of this crime. He (Mr. Pyemont) was informed that the petitioner had previously had a banking account. The petitioner desired to get his witnesses from New York, and if the trial took place on the 23rd, he would be debarred from doing so.

Mr. Jones (in reply) said that if the prisoner was allowed this money for his defence, it meant that the people who had been defrauded would be paying his expenses.

De Villiers, C.J.: If the accused had been in possession of stolen property, or even of property alleged to have been stolen, the Court would not order such property to be handed over to the accused for the purpose of enabling him to defend himself, but the bank notes acquired by the accused do not belong to his creditors. They are not stolen property. They may be the proceeds of the stolen property, but the ownership of the bank notes is not in the creditors, and therefore it is impossible to hold that these bank-notes or the money in the possession of the accused is stolen property. It is quite competent, therefore, for the Court, having due regard to the rights of the persons alleged to have been defrauded and to the possible innocence of the applicant, to order a certain sum to be paid over by the police to the attorney of the accused for the purpose of enabling him to provide for his defence. The only question is as to the amount. It appears to me that £100 is excessive, and I think that £20 would be sufficient to enable him to have a fair defence in the case, and the Court will therefore order that £20 be paid out of the money in the hands of the police.

Mr. Jones: £80 is really identified, my lord.

De Villiers, C.J.: There will then be £20 not identified, but even the bank notes are not identified as having been actually stolen.

Mr. Jones: Oh, yes, they were, my lord.

De Villiers, C.J.: The bank-notes are identified as being the proceeds of the fraud, but not as being the property taken. But the cash in the possession of the prisoner which cannot be identified at all exceeds £20, and therefore the order will be made as stated.

[Applicant's Attorney: P. Hughes.]

SUPREME COURT

[Before the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZÉ.]

REX v. MARITZ. } 1903. Nov. 19th.

Spare diet.

By the Governor's regulations published in Circular No. 11 of 1881, no juvenile offender under the age of 16 years can be sentenced to spare diet.

Kotzé, J.: A case came before me as judge of the week from the Special Justice of the Peace for Herbertsdale, in the Mossel Bay division. It is a case of a young boy, age 15, named Johannes Martz, who

was charged with malicious destruction of property. He pleaded guilty, and the Special Justice sentenced him to six days' imprisonment, and two days on spare diet. Under the Magistrates' Act (section 42), it is laid down that magistrates have to conform to regulations published from time to time with reference to spare diet, and a special Justice of the Peace has, in the same way as a magistrate has, also to conform to these regulations. Now, it appears that regulations were published by a Circular (No. 11 of 1881), which, amongst other things, provides that no spare diet shall be inflicted upon juvenile offenders under the age of 16 years. The record in this case is that the boy is about 15 years of age, and, consequently, that portion of the sentence which relates to spare diet is struck out.

GENERAL MOTIONS.

BETHE AND VAN EHREN V. DREYER AND SUSSMAN.

Mr. Upington said that this was the return day of a rule *nisi*, calling upon one Lewis Burman, of 1, William-street, Cape Town, to show cause why he should not be interdicted from dealing with certain goods purchased by the respondents from the applicants. It had been impossible to effect service of the rule upon either Dreyer or Sussman, and counsel was instructed to apply for an extension of the return day until the 12th December.

Mr. Buchanan said he represented Lewis Burman, of 1, William-street, upon whom the rule had been served. He read an affidavit by Burman, which stated that he bought the goods from Dreyer and Sussman, who had carried on business in Caledon-street, and had paid the price agreed upon, £142 3s.

Mr. Upington said that the estate of Dreyer and Sussman was now in provisional sequestration. He contended that the sale to Burman was not a fair and *bona fide* sale, and that applicants should have some opportunity of answering the affidavit of Burman.

The matter was ordered to mentioned later.

Later on, Mr. Upington said that the replying affidavits could be prepared in three or four days.

The matter was ordered to stand over until Monday.

Postea (November 23):

Mr. Buchanan (for the respondent) said that the matter was ordered to stand over until the 23rd November, upon an application for an interdict granted upon the petition of Charles Friedlander, attorney, from which it appeared that the plaintiffs were a firm carrying on business in Hamburg, and were the owners of certain property in Hanover-street. In October an agreement was entered into with the original respondents, Dreyer and Sussman, who agreed to buy the stock in the said premises for £240, payable by £50 in cash, £60 in three months, £70 in six months, and £60 in nine months. None of the instalments had been paid, and counsel appeared for a man named Lewis Burman, to whom the stock had been sold, and who was restrained from parting with any of the goods pending the decision of an action against Dreyer and Sussman. The notice was, in the first instance, granted against a man named Lewis, who turned out to be Lewis Burman, of 1, William-street, Cape Town. The affidavit of Burman set out that he first made the acquaintance of the first-named respondent in October, 1903, when he purchased 5 dozen of aprons, and obtained a receipt from Joseph Dreyer, who informed him that he intended selling all his stock and taking other premises. On October 28, £142 3s. was paid for the remainder of the said stock, and Joseph Dreyer receipted the transaction.

De Villiers, C.J., said there was no proof of a fraudulent sale to Burman, and that the rule must be discharged, with costs.

ARMSTRONG AND CO. V. DAVIDSON.

1903. Nov. 19th

Master and servant—Competition in trade—Interdict.

Respondent had contracted to serve the applicants under an agreement, by which, inter alia, *he engaged not to enter into trade competition with them anywhere within a radius of twenty miles for the space of five years. After a few months*

respondent left the service of applicants, and there was some evidence to show that the said agreement was cancelled by mutual consent. Respondent thereafter commenced business on his own account in the same town in which he had served the applicants. Applicants now applied, on motion, for an interdict to restrain him from carrying on his said business.

Held, *that in face of the evidence produced by the respondent, the interdict must be refused with costs and the applicants left to their ordinary remedy by action.*

This was an application upon notice of motion for an interdict restraining the respondent from carrying on or entering into business as an engraver and signwriter within twenty miles of Cape Town for a period of five years.

The affidavit of George E. Shelvoke, a partner in the firm of W. H. Armstrong and Co., engravers, die sinkers, etc., Cape Town, stated that on the 16th March, 1903, the parties entered into an agreement for the engagement of the respondent to assist in applicants' business. Respondent came to the Colony from England, and entered applicants' service on the 6th April. On the 3rd October the respondent, for good and sufficient reasons, was dismissed from the service of the applicant firm, and was no longer in their employ. He had since opened business as an engraver and signwriter in Cape Town, having his office at Medway Chambers, and had canvassed customers of the applicants for orders, although by the agreement (clause 5) he was specially debarred from doing so. The agreement, which was dated the 17th March, 1903, stated that the respondent agreed to serve them for two years from the date of commencing work, and clause 5 was in the following terms: "The employee shall not during the service nor afterwards, within the radius of 20 miles of Cape Town, aforesaid, for a period of five years, be engaged or interested, either directly or indirectly, whether on his own account or in partnership, in a business similar to that of the employers." Affidavits from the managers of two firms in town were also put in, showing that the respondent had solicited orders for engraving from them.

The answering affidavit of the respondent, Charles Davison, stated that he had applied for situations in Cape Town and Johannesburg, but without success; hence he had been compelled to start business, as he had no other means of subsistence. He denied that he was dismissed from applicants' employ, and said that he left their service by a mutual agreement. When it was agreed that he should leave their service, he understood that the original agreement was cancelled in all respects. He attached a certificate granted to him by the applicant in the following terms: "During the time Mr. Charles Davison has been with us we have been well satisfied with the excellence of his copperplate work. He leaves us by mutual agreement."

The replying affidavit of Mr. Shelvoke stated that the respondent was dismissed from their service by reason of his unpunctuality and his continued insolence to himself (deponent). He told the respondent that they would strictly adhere to the terms of the agreement.

Mr. Russell (for the applicants): The applicants rely on paragraph 5 of the agreement. Even if respondent's services were terminated, that would not terminate the agreement. See paragraph 5 of the replying affidavit. We do not object to his getting work, we only object to his setting up in business for himself.

[Kotzé, J.: I cannot understand how you came to dismiss him for wrongful conduct and yet give him a certificate of character.]

That certificate refers only to the character of his work. We wished to get rid of him, and perhaps he wished to leave. The question as to whether he left by mutual consent or was discharged cannot affect the contract of service.

Mr. Benjamin (for the respondent): The applicants have not made out a claim for an interdict on motion; their remedy (if any) is by action. Their own certificate shows that their agreement with the respondent was at an end; and it does not lie in their mouths to say

that this certificate was a bogus document. If the agreement was terminated by mutual consent, all its conditions fall to the ground. Respondent's undertaking as to not setting up in business for himself would apply only if he remained in the applicant's service or was dismissed for unsatisfactory conduct. The applicant's admit in their affidavit that the agreement was terminated by mutual consent.

Mr. Russell (in reply): The letter "A" shows that he left by mutual agreement.

[Maasdorp, J.: If he was dismissed, there could be no question of mutual agreement.]

That was a mutual agreement that he should quit the service of the applicants, but not that the contract should be cancelled.

[Maasdorp, J.: You see your affidavit and the evidence are contradictory.]

Maasdorp, J.: The applicants engaged the defendant in England to come out to this colony and do the work of engraving here, and it was agreed between them that "the employee shall not, during such service or afterwards, within the radius of twenty miles of Cape Town aforesaid, for a period of five years, be engaged or interested, directly or indirectly, whether on his own account or in partnership in a business similar to that of his employers." The applicants allege that they dismissed the respondent from their service, and that, under the 7th clause of this agreement, in case the servant should be dismissed because he is incompetent, or on account of his having committed a breach of agreement, the conditions of the 5th clause of the agreement shall hold good; that is, after such dismissal he shall not be entitled to undertake the business of an engraver. The respondent, in his affidavit, alleges that he was not dismissed, but that the contract was mutually determined by the parties; and further, that when it was so determined, it was agreed that the applicant should raise no objection to his obtaining employment as an engraver with any other firm in Cape Town. Now, the first point of importance which the Court has to decide is whether he was dismissed, because then the 7th section would come into operation. The respondent put in a document, signed by the firm, in which they support his statement that the contract was determined by mutual agreement. Now, the Court would not grant an interdict of this kind unless a clear right had been made out and proof given that irreparable damage will be done. Unless that is proved, the applicants are left to their ordinary remedy of proceeding by action. The applicants now seem to admit that there was some mutual agreement by which the agreement was terminated, but they say they did not consent to his obtaining employment as an engraver. In the face of these contradictions, and seeing that there was some support to the respondent's statement in this document signed by the firm, the conclusion I come to is that there was not a clear case of a right made out. The Court cannot now decide whether the contract was mutually determined, and whether leave was granted or not to obtain employment elsewhere. Under the circumstances, the interdict must be refused, with costs, and the applicants left to their ordinary remedy of proceeding by action.

Kotzé, J., concurred.

[Applicants' Attorneys: A. W. Steer; Respondent's Attorneys: Reid and Nephew.]

Ex parte MATTHEWS.

Mr. Searle, K.C., moved for the appointment of a *curator ad litem* to represent the minor child of the petitioner in an action to be instituted to decide the meaning of a certain will and deed of donation. The parties belonged to Oudtshoorn.

Order granted as prayed, Mr. Burton being appointed *curator ad litem*.

Ex parte WALBURGH.

Mr. Benjamin moved for an order authorising the Registrar of Deeds to pass transfer of certain property in the estate of the late Samadien Jonathan, sold at public auction to Jacob C. Poles and the petitioner. The purchase price was £2.250, and the Divisional Council valuation was £1,350. The petitioner was one of the executors testamentary in the estate.

Order granted as prayed.

Ex parte SONNENBERG.

Mr. Benjamin moved for an order authorising the transfer of certain pro-

perty. By virtue of the power of attorney, petitioner was the agent of Alex. McGregor, who was at present in England, and whose estate had been voluntarily surrendered on the 10th April, 1900. On May 1, 1903, the estate, by an order of the Court, was discharged on all the creditors receiving certain payments, and consenting to release the insolvent of his debts. The said Alexander McGregor was the owner of two pieces of land convenient to the Lion's Rump, which property he had since sold to the petitioner. The Registrar of Deeds refused to pass transfer on the ground that the insolvent was not re-invested in his property. It would be necessary to have a resolution passed by the creditors which would entail considerable delay, and the sole trustee, Mr. George Wm. Steytler, had consented to the transfer of the property from the said McGregor. Counsel explained that there had been a mistake in applying to the Court for discharge under section 117, instead of under section 107, the latter of which would have re-invested the insolvent with his property. The property had been sold since the rehabilitation.

Order granted, authorising the trustee to pass transfer of this property of the insolvent to the petitioner.

Ex parte LOTZ.

Mr. Upington, for the petitioner, moved for an order authorising the amendment of certain letters of administration. The petition set forth that the applicant in his capacity as executor dative in the estate of the late John Johannes Brand, of Cape Town, filed the first and final liquidation account, by which the widow was entitled to the landed property of the estate. The property stood in the name of Johannes Jacobus Brand, and upon petitioner seeking transfer, the Registrar of Deeds called for a declaration of identity. Counsel put in the affidavits of the petitioner, and of the deceased's widow, to the effect that although Johannes Jacobus Brand was his correct name, the deceased was also known as John Johannes Brand. The name was given in the death notice as John Johannes Brand, and on that ground the Master refused to amend the letters of administration.

The matter was ordered to stand over, pending a report from the Master, to whom the matter was referred.

Mr. Upington, later in the day, mentioned that the Master had reported that the statements contained in the petition were correct, and that if the matter had been brought to his notice earlier, he might have been able to act on his own responsibility; but the matter had gone so far now that an order of Court was necessary.

Order granted, authorising the Master to alter the name of John Johannes Brand to that of Johannes Jacobus Brand in the letters of administration.

Ex parte GWYNNE.

Mr. Buchanan moved for the amendment of a certain deed of transfer, altering the name of Ryland and Sons, Africa, Ltd., to Ryland and Sons, Colonial, Ltd. The name was changed on 24th December, 1901, when the company was the registered proprietor of certain property, situated at Port Elizabeth, which they held in the deed of transfer in the name of Rylands and Sons, Africa, Ltd. The property had been sold to one Prior, and the Registrar of Deeds required that the name should be changed by an order of Court.

Maasdorp, J., said that the Registrar of Deeds had objected, and the Court would like to know what his objection was; and the matter was ordered to stand over for further information from the Registrar of Deeds as to the objection raised by him.

Postea (November 20): Mr. Buchanan stated that the Registrar suggested that the transfer should read "Ryland and Sons, Africa, Ltd.," now known and registered as "Ryland and Sons, Colonial Ltd."

Order granted in terms of the Registrar's report.

Ex parte VENABLES.

Mr. Russell moved for leave to transfer certain property without the assistance of the petitioner's husband. A rule *nisi* was granted on the 25th September, calling on the husband to show cause, but his whereabouts could not be traced and publication had been made in the "Cape Times" and a paper in Tarkastad, as required by the rule.

Order granted as prayed.

KRAMER V. KLEINBACH.

Mr. Benjamin applied for this matter to stand over until the 12th December. A rule had been granted restraining one Medska and others from dealing with a certain draft on the African Banking Corporation, at East London.

Mr. Buchanan, who appeared for the African Banking Corporation, said he was instructed to move that the rule be discharged. The bank were called upon to show cause why they should not be restrained from parting with the said draft or paying out moneys.

Mr. Benjamin said the respondent Kleinbach was now in gaol awaiting trial on charges connected with the same subject, and Medska had not been served.

Mr. Buchanan said that the draft was drawn on the bank in London.

The matter as between applicant and the bank was ordered to stand over until the 12th December and the return day extended accordingly as against the other respondents, questions of costs to stand over.

Postea (December 16): The rule was made absolute as regards Kleinbach and Metzki, but discharged as to the bank.

Ex parte MONGAMELE.

Mr. Searle, K.C., moved on behalf of the petitioner (a minor), living in Eastern Pondoland, and son of the late paramount chief of Pondoland, for the appointment of a *curator ad litem* to represent him in a dispute with Siga, as to certain cattle. Petitioner seemed to have no guardian, and he had applied to the Chief Magistrate for a guardian, and the Magistrate disapproved of Umbali, the guardian suggested, and said he was not a fit person. The Magistrate further said he did not see why a guardian should be appointed, because he might take the dispute to arbitration, or settle it otherwise, but the difficulty was that if the petitioner went to arbitration it would not be binding, as he was a minor. Petitioner claimed about 700 cattle as the representative of the younger house, and Siga tendered about 30.

The matter was referred to the Chief Magistrate of Pondoland, to recommend to the Court a fit and proper person to represent the minor, as *curator ad litem*, either in arbitration or legal proceedings.

Ex parte WILLIAMS AND ANOTHER.

Mr. Gardiner moved for an order authorising the first-named petitioner, who was the executrix testamentary of her late husband, to use certain money. The second-named petitioner was George William Steytler, secretary of the Colonial Orphan Chamber. Mrs. Williams enjoyed the usufruct of the property on certain conditions. The total income from the property was £162 14s. 8d. Mrs. Williams had three minor children still living with her. There was a sum of £496 in the hands of the Orphan Chamber due to the major and minor children, but the money was not payable until the youngest child was twenty-five years of age. It was proposed to devote the said sum entirely to the education of the minor children, and an order of Court was sought, authorising the money to be paid out. The major heir consented to the application of the money for this purpose.

The Master's report was favourable.

Order granted in terms of the Master's report.

ALLIE BROS. V. PORTER AND BOUSDORF. 1903. Nov. 19th.

Pleading—Tender—Payment into Court.

P. having been sued by A. for a certain sum of money, tendered, a less sum "in full satisfaction" in his plea. This tender A. refused to accept, but asked for an order to have all mention of the tender struck out of the plea, as irrelevant matter; or in the alternative, an order to defendant to pay the amount tendered into Court.

Held, *that as the granting of the first prayer would involve the trial of part of the principal case, on motion, and moreover as there was no rule to compel a defendant to pay the amount of his tender into Court, both the prayer and alternative prayer must be refused, and the plaintiff left*

to deal with the question of tender in his replication.

Semble: *In certain special cases the Court might order the amount of a tender to be paid into Court.*

This was a motion for an order against the respondents to compel them to pay to applicants or into Court the amount of a tender, £52 13s. 1d. which respondents offered in their plea, or, in the alternative, to have the said allegation expunged from the plea.

The affidavit of the applicants stated that they had commenced an action against the respondents for the balance of certain moneys promised to be lent to the applicants on a certain mortgage bond for £1,000. The respondents had lent a certain sum, closely approximating to £800, to the applicants. Respondents said in their plea that they had paid £800, less £52 13s. 1d., that they agreed to lend £800, and they had tendered £52 13s. 1d. Applicants stated that they had not received any such tender.

The affidavit of Mr. C. Brady, applicants' attorney, stated that on the 7th November he received from the respondents' attorney a cheque for £52 13s. 1d., in full settlement of the matter." He (Mr. Brady) had returned the cheque, and said that he refused to accept it unless it were tendered unconditionally.

The answering affidavit of Mr David Tennant, jun., stated that he made a tender to the plaintiff's attorney in the usual way adopted by attorneys of this Court in full and complete satisfaction of the respondents' liability. He prayed that the application be dismissed, with costs.

The replying affidavit of the plaintiff's attorney stated that the point was whether the respondents were justified in withholding an amount which was admitted to be due to the plaintiffs. He had acted, he maintained, in accordance with the recognised practice of Court.

Mr. Benjamin for applicants; Mr. Close for respondents.

Kotze, J. to Mr. Benjamin: Is not this rather a novel application?

Mr Benjamin: I don't know that there has been a similar application previously. Counsel went on to contend that the point was whether the defendants' attorney had or had not made a good tender. The tender pleaded here was, he submitted, no tender at all. The allegation could be struck out in accordance with the procedure as to irrelevant matter in the pleadings. The tender could not be good unless the defendant were ready to pay the money.

Without calling upon Mr. Close to address the Court,

Maasdorp, J.: In this matter it appears that the plaintiffs have sued the defendants for a certain sum of money, and the defendants pleaded that the sum claimed is not due, but admit that they are liable to pay the plaintiffs the sum of £52 13s. 1d., which amount they say they tendered to the plaintiffs before action, and they add that they are still ready and willing to pay the amount, and tender it again in their plea. Now, this motion is brought before the Court praying that the portion of the plea referring to the tender be expunged, or that the defendants be ordered to pay over the amount tendered to the plaintiff or to pay it into Court. It appears upon the affidavits that this tender is disputed in the affidavits made by the applicants. If the tender is disputed, then the ordinary way in which the issue is brought before the Court is to deny the fact that the tender has been made in the replication, and then the matter of tender, together with all the other issues between the parties, are raised at the trial, and there decided. There has been no precedent cited in which part of the action with reference to the facts bearing upon the question of tender has been tried upon motion before the action is heard. Upon that part of the application the plaintiffs pray that this portion of the plea should be expunged, and this for the reasons I have mentioned must be refused. Then there is a further and alternative prayer in the application that these moneys, which have been tendered, shall either now be paid over to the applicants, or be paid into the Court. There is no rule obliging a defendant who tenders a certain sum of money to pay the sum tendered into Court, and in the absence of such a rule, and in the absence of authority bearing upon this case, that also must be refused; and we certainly never have

had a case in which the sufficiency of the tender having been denied by the applicants, the applicants have been entitled as a matter of course to come into Court to claim that the money should be paid over to them. There might be special circumstances where the Court would assist a plaintiff where it appears that certain moneys are due, and where it would be only just when the moneys tendered, and admitted to be due, should be secured. In such a case the Court might assist the plaintiff, but certainly no special ground has been shown in this case for the Court to grant the relief asked for by the applicants, by ordering that the money should be paid over to them or be paid into Court. The application will, therefore, be refused, with costs.

Kotzé, J., concurred.

[Applicants' Attorney: C. Brady; Respondent's Attorney: D. Tennant, jun.]

Ex parte SCHOEMAN.

Mr. C. W. de Villiers moved for an order authorising the Registrar of Deeds to pass transfer to the petitioner of certain property at Dordrecht, in the estate of the petitioner's father, of which he was executor testamentary. The property was sold by public auction for £195, which was in excess of the Divisional Council valuation.

Order granted as prayed.

Ex parte HURD.

Mr. Buchanan moved for an order authorising the amendment of certain deeds of transfer, an ante-nuptial contract, and a mortgage bond, by the substitution of the petitioner's correct name. Petitioner, who lived at Port Elizabeth, said that ever since childhood he had been called Sidney Hurd, and he found that his correct name was Herbert Hurd, and that he was christened Sidney Hurd The said documents were in the name of Sydney Hurd.

Mr. Justice Maasdorp: Why should he change his name now and raise this difficulty?

Mr. Buchanan said he supposed petitioner felt that his transactions were now fairly fixed, and that it would be best to have the change made now before a regular series of complications arose.

The matter was ordered to stand over, pending further information on certain points.

ROSS V. MOTAN.

Mr. Buchanan moved for an order for an attachment of certain property at Newlands belonging to the respondent, *ad fundandam jurisdictionem*, and for leave to the plaintiff to sue defendant by way of edictal citation, in an action for the purchase price of certain property at Kenilworth. Petitioner stated that he resided at Salt River, that the defendant had been in the Cape, but was supposed to have returned to Pretoria, and that petitioner had sold to him certain property at Kenilworth, the purchase price being £850. Respondent was to take transfer on or before the 1st September, but he had failed to do so. Defendant had drawn rents from the property. A summons had been issued against him in the Transvaal, but the Sheriff was unable to effect service upon the defendant.

Order granted for the attachment of the property at Newlands owned by the defendant, and leave granted to sue by edictal citation, personal service to be effected, rule to be returnable on the 12th December.

FARDINI V. FARDINI AND ANOTHER.

Mr. M. Bisset moved for a certain award of Mr. Advocate Close as arbitrator to be made order of Court and for costs of application. The dispute arose out of certain property, which was paid for jointly out of the money of the parties.

Order granted in terms of the first part of the prayer, but no order as to costs of application.

MULDER V. HEYNE AND OTHERS.

Mr. Searle, K.C., moved, on behalf of Hendrick Johannes Mulder, for an award of arbitrators in a certain water dispute in the division of Oudtshoorn to be made a rule of Court, and for costs of the arbitration and application, in terms of the award. One of the signatories to the deed, it appeared, had simply signed his own name, but he had filed an affidavit stating that he signed, not only individually, but as executor of a certain estate.

Order granted as prayed.

Ex parte SYPEO.

Mr. Buchanan moved for leave to pass a certain mortgage bond. Petitioner was executor testamentary in the estate of the late Sarah Annie Hall, who purchased certain property from one Annie Tebb, in Mill-street, Cape Town. The deceased was on the eve of passing a bond, but she died before it could be completed. The deceased paid £3.000 on the property, and it was arranged that the balance of £1,500 should be raised on first mortgage bond. In her will, Mrs. Hall made a proviso that the property was not to be realised until her youngest child attained the age of 21 years.

Order granted to raise £1,500 on mortgage, as prayed.

BOOSEY AND CO. v. SIMMONDS. { 1903. Nov. 19th.

Copyright Act 18 of 1895.

The English Act 5, 6 Vict. protects the holders of an English copyright throughout the entire British Dominions.

This was an application on behalf of Boosey and Co., music publishers, London, against James Simmonds, of 11, Hope-street, Cape Town, for an order (a) restraining the respondent from selling or dealing in certain musical productions, copyright of which was held by the applicants; and (b) directing the respondent forthwith to deliver to the applicants or the Supreme Court, or to destroy the aforesaid productions, or such other relief as the Court should think fit.

The affidavit of George R. Forrest, manager for C. M. Muller, the representatives of the applicants in Cape Town, stated that the defendant had exhibited for sale "The Better Land" and other songs, in which the applicants had copyright. Copies of the illegal prints and the copies issued by the applicants were laid before the Court.

Mr. Searle for applicants; Mr. Greer for respondents.

[Maasdorp, J.: Are they the same?]

[Kotzé, J.: We could not put them to a practical test very well.]

Mr. Searle: I am afraid I cannot do that. Counsel went on to contend that the applicants were entitled to an interdict under the Act 18 of 1895. The applicants' copyright was entered at the Stationers' Hall, London. The Act of 1895 covered sheets of music. The Act was passed after a deal of discussion, to prevent pirated reprints, mainly American reprints of British books. For instance, the books of Dickens and Thackray were brought in and Chambers' Encyclopœdia.

Kotzé, J.: I am afraid a good number of us are *participes criminis*.

Mr. Searle (for applicants): The last English Copyright Act was 5 and 6 Vict., C. 45. The last Colonial Act was 18 of 1895 (of which see Section 3). That Act repealed the Act of 1854, and introduced the provisions of the English Acts. The object of the Act of 1895 was to prevent the introduction of foreign reprints, which could be brought into the Colony before that Act was passed. Act 6, Vict. C. 45 is an Imperial Act applying to the entire British Dominions, unless it should be suspended in any portion thereof by an Order in Council. Stamped copies are evidence, and these put in are stamped. It may be necessary that we should bring an action, but at present we only ask for an interim interdict (see Section 4 of Act 18 of 1895 and also Sections 3 and 11 of the Act of 1873. It does not appear that Boosey and Co. are registered here, but that is not necessary, as our last Act brings in the protection afforded by the Imperial Act. Almost the only case similar to the present was *Dickens* v *The Eastern Province Herald* (4 Searle, 33). At that time foreign reprints were allowed. As we cannot now bring an action for three months, and may by that time suffer serious damage, we ask for an interim interdict. As to proof of publication, see Section 3 of the Act of 1873.

[Maasdorp, J.: Does not that refer exclusively to books?]

No, see Section 4 of the Act of 1895. Under that Boosey and Co. might register here, but I say that is not necessary.

[Maasdorp, J.: If registration is necessary here it must be necessary in all cases, or you cannot claim protection.]

I submit that in view of the Imperial Act registration is not necessary. In any case we are entitled to an interdict, as these publications are our property.

[Kotzé, J.: In *Jefferys* v. *Boosey* (4, H.L., 815) the House of Lords held that

there was no copyright at English Common Law.]

I submit that we are not bound by decisions of the House of Lords but only by those of the Privy Council. We do not now press to have the pirated copies delivered up to us, but only for an interdict.

Mr. Greer (for respondent): Counsel for applicant relies on the Acts 5 and 6 Vict., C. 45; but if he depends on that Act he must take the remedy provided by that Act, and that remedy is by action. He has not produced the proof required by Section 3 of Act 2 of 1873. I submit the Court will not grant an interdict until the rights of the parties have been determined by action. To do so would be an irreparable injury to the respondent. I would suggest that the respondent should be ordered to keep an account, as was done in the case of *Musical Copyright Company* v. *Simmonds* (13 C.T.R., November 6th).

[Maasdorp, J.: That might be done, but what is your defence?]

We rely on Section 3 of Act 2 of 1873, and I would suggest the keeping of an account as the most convenient course.

Mr. Searle (in reply): I must press for an interim interdict and for damages. I would also ask that the pirated copies should be delivered to the Registrar. Of course they can at any time bring their action for damages if so advised.

Maasdorp, J.: In this case the applicants apply for an interdict restraining the respondent from selling or dealing in copies of musical productions, the copyright of which is owned by the above-named applicants, and a list is given of the names of the pieces of music referred to, and the applicants further pray for an order compelling respondent forthwith to deliver them up to the applicants or their agent in Cape Town, or to this honourable Court, or to destroy all productions in their possession or control. It appears that the applicants are the proprietors of the copyrighted pieces of music mentioned in their affidavit. A certificate has been put in as proof that the applicants are such proprietors. They allege that pirated editions of these pieces of music have found their way into the hands of the respondent, and that the respondent is now engaged in selling the music to the loss and damage of the applicants. The respondent has put in no affidavit in this case, and there seems to be no denial of the main facts on which the application is based. Upon reference to the affidavit, and upon the pieces of music which have been put in it seems on the face of these pieces that the alleged pirated copies are identical with those to which the applicants claim the copyright. Counsel for the respondent contends that as these copyrights have not been registered in the Colony under our Act of 1873, that the applicants are not now entitled to take proceedings, not being as he contends the holders of registered copyright in this colony. Now, it seems to me upon reference to the Act of 1873 that the registration therein required is of books which are published and brought out in this colony, and without any reference to publications in England, but it is not necessary now to decide that point. It may be raised hereafter, when other questions are raised between the parties. It seems, however, that the English Act protects the holders of such copyright through the British Dominions, and under the 15th section of that Act, where there is an infringement by anyone of such copyright, an action on the case can be brought by the holder of the copyright for any injury he may suffer in consequence. Upon the facts placed before the Court, I think the applicants have made out a *prima facie* case that they are being injured by the production of pirated identical copies of this music, and that they would be entitled to an action under the English law of copyright. The application here made for an interdict might seem upon the face of it to be for a perpetual interdict, but, however that may be, the Court will, upon the facts now before it, grant an interdict restraining the respondent from selling the pieces of music mentioned in the affidavit, and refuse the further prayer contained in the notice of application. The Court will grant an interdict restraining the selling of the music pending an action to be brought forthwith by the applicants to decide the question in dispute between the parties, costs to be costs in the cause.

Kotzé, J., concurred.

[Applicants' Attorneys: Silberbauer, Wahl and Fuller; Respondent's Attorney: F. B. Andrews.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C. K.C.M.G., LL.D.) and the Hon. Mr. Justice MAASDORP.]

REVIEW.

REX V. ABRAHAMSON. { 1903. Nov. 20th.

Previous conviction—Aggravation of sentence.

Where a person is charged with a criminal offence committed before the date of his conviction of a similar offence, such latter conviction cannot be used as evidence for the purpose of aggravating his sentence.

De Villiers, C.J.: The case came before me as judge of the week of *The King* v. *Adolph Abrahamson*, in which the prisoner was charged in the Court of the Resident Magistrate of Malmesbury, at Darling, with contravening the conditions imposed by his licence, under and by virtue of sections 1 and 2 of Act 28 of 1898, by wrongfully and unlawfully selling liquor to a native. He was sentenced to a fine of £50, or three months' imprisonment, with hard labour. There is no question in the case as to the prisoner's guilt, but the Magistrate took into consideration an alleged previous conviction. It is clear that such seems to have taken place on the same date on which the prisoner was charged, and the Magistrate discovered, after giving the verdict, that this offence for which the prisoner is now charged really took place before the previous conviction. It is clear, however, that such previous conviction could not be produced in aggravation of punishment, seeing that the offence had really been committed before the previous conviction took place. The Magistrate says: "After finding the accused guilty, I allowed the previous conviction to be recorded, losing sight of the fact that the dates of previous conviction and of committal of the offence of which the prisoner had just been convicted were identical, and that the sale on the 6th October very probably took place prior to Abrahamson's conviction on that date. Had I not overlooked the point referred to, I would have refused to record the first conviction, and would have inflicted a fine of £25, or three months' hard labour." The sentence will, therefore, be altered into one of £25, or in default, imprisonment for three months.

GENERAL MOTIONS.

LEFEVRE V. BOADIGONI.

This was a motion to have a rule *nisi* made absolute, calling on the respondent, Victor Boadigoni, to show cause why he should not be interdicted from dealing with or disposing of the rights in a certain system of removal and disposal of night-soil known as the Omega sanitary system.

Applicant's affidavit stated that the respondent was inventor of the system, for which certain patent rights had been taken out. For the effective exploitation of the system in South Africa, a partnership was entered into between the petitioners and the respondent, and under the deed of partnership, the latter was bound to use all his efforts on behalf of the said partnership, and work in the interests thereof, and under clause 5 of the said deed, neither of the said partners was entitled to dispose of his share in the said partnership to any other person without the consent of the said partnership. The respondent subsequently gave notice to withdraw, but applicants refused their consent, and wrote to him accordingly. It had since come to the knowledge of the applicants that the respondent had commenced installations of the system at Port Elizabeth and other places, under the style of the Colonial Automatic Pit Co.

The affidavit of the respondent stated that he had not infringed the patent of the Omega sanitary system, and that the automatic pit system was quite different. He described the difference of principle between the two systems. He was taking steps to protect the automatic pit system. One great objection to the Omega system, so far as South Africa was concerned, was that it re-

quired a large supply of water. The necessity for this was dispensed with under the automatic. Plans and specifications were attached to the affidavit.

Mr. Searle, K.C. (for the respondent) said that he was instructed that the papers had been lodged, and that the applicants were going to oppose the respondents' application before the Attorney-General for letters patent in the automatic pit system. He did not see how the Court could decide the differences between one system and the other, and under the circumstances, he thought the whole matter should stand over, the rule in the meantime to be made absolute.

Mr. Benjamin (for the applicants) agreed that this would be the best course.

De Villiers, C.J., said that the only course for the present would be to continue the operation of the interdict until a further order of Court, the question of costs to stand over, leave being given to either party to move the Court again.

JACOBS V. JACOBS.

Mr. Alexander moved on behalf of the petitioner (the wife) for leave to sue her husband by edictal citation for restitution of conjugal rights, or, failing that, divorce, on the ground of the defendant's malicious desertion. The parties were married in community in Cape Town in 1897, and subsequently resided, after leaving Cape Town, in Johannesburg, Durban, and England. The defendant maliciously deserted the plaintiff in 1902, and his present address was unknown.

Leave to sue granted, the citation to be returnable on the 1st February, and personal service to be effected.

Mr. Alexander: We don't know the defendant's whereabouts.

De Villiers, C.J.: Well, but you must try to find him. If you don't succeed, then you may apply to the Court again.

FRAUM V. GERHARD AND HEY, LTD.

Mr. Gardiner moved for a rule *nisi* to be made absolute calling upon the Bank of Africa, Ltd., to show cause why they should not be restrained from parting with the proceeds of a sale of certain timber, the property of the defendants, so as to found jurisdiction for an action to be brought against them.

Rule made absolute, with leave to sue by edictal citation, return day fixed for February 9.

BEYER V. WORSLEY.

Mr. Buchanan, for the applicant, moved for the removal of the trial in the above case to the Circuit Court at Willowmore or Uniondale. Consent papers to the removal were put in from both attorneys.

Order granted as prayed.

CONTAT V. CONTAT'S COLLIERIES.

Mr. Upington, for the applicant, moved for an order calling upon the respondent to show cause why a certain judgment granted against the applicant in July, 1903, should not be satisfied by the payment of the sum of £1,000 in cash in about three months' time, and the balance in not less than instalments of £750 yearly. Counsel put in certain affidavits, which set out that there were good grounds for supposing that a contract for coal would be accepted by the Cape Government Railways from one Robert Blunt, to whom the mining rights had been leased, and then it was anticipated the liquidation would be settled in a comparatively short time.

Mr. Benjamin read the affidavit of the liquidator, who gave as his reason for declining the proposal the fact that the creditors were making constant applications for their money, and that the ultimate liquidation would be postponed for an indefinite period.

The matter was ordered to stand over to Monday, in order that the parties might be communicated with, and security arranged on behalf of the applicant.

Postea (November 23):

Counsel put in the affidavit of applicant's attorney, Mr. Jacobsohn, which set out that from information received from the applicant's attorney at Molteno, the coal would be tested by the Government next Tuesday, and if the contract were accepted, after the payment of £1,000, security would be given for the payment of future instalments. The delay of three weeks would be unavoidable,

Mr. Benjamin read a telegram from the local attorney of the defendant at Kimberley, from which it appeared that the liquidator, Mr. Pooley, left the matter of the suspension in the hands of the Court.

Application for a stay of execution granted, on condition that within four weeks from that day the applicant pay to the respondents the costs of the application, and give satisfactory security to the Registrar for the payment of one-half of the judgment within twelve months of that date, and the remaining half within two years. If all the costs were not paid and security given within four weeks from date, execution to be issued.

MCKAY V. HUTCHISON.

Mr. Gardiner moved for an order compelling the respondent to deliver up possession of a bakery business on the Main-road, Three Anchor Bay. Counsel read the affidavit of the applicant, which set out that the respondent had failed to keep two agreements entered into with the applicant, and as a consequence the latter had lost his lease through the non-payment of rent.

Order granted as prayed.

Ex parte VAN DER WESTHUYZEN.

Mr. Van Zyl moved on behalf of the petitioner for leave to raise money in the interests of a minor daughter on certain property situated in the division of George.

The Master's report was favourable.

Order granted in terms of the Master's report.

Ex parte SICHEL AND OTHERS.

Mr. Searle, K.C., moved for the cancellation of certain sales of land, situated at Elsie's River Halt, the property of the South African Natural Mineral Water Co., which the petitioners as liquidators represented. With the exception of two purchasers, no instalments had been paid by several others, who bought under conditions, which stipulated that if the instalments were not paid the sales were cancelled. In one particular case, that of Chetty, the stipulation was that the property could again be auctioned, and the purchaser be held liable for any deficiency. Every effort had been made to find the respondents, but without success.

A rule was granted calling on all the respondents, excepting Chetty, Cohen, and Vincent, to show cause by 12th December why the sales should not be cancelled, the rule to be published once in each of the Cape Town daily newspapers, with leave to sue the three persons stated by edictal citation returnable January 12, with similar publications in addition to publication in the "Gazette."

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice KOTZE.

Ex parte BOTHA. { 1903. Nov. 23rd.

Transfer duty Purchase on behalf of a Company.

It having been clearly proved that the purchase of a farm had been made by the applicant on behalf of a Company which had been formed but not registered at the time of the purchase. The Court authorized the Registrar of Deeds to allow transfer to be passed, after registration of the Company, by the seller directly to the Company.

Mr. Buchanan moved for a rule *nisi* to be made absolute, calling upon the Treasurer-General to show cause why an order should not be granted directing the Registrar of Deeds to pass transfer of the farm Macasserfontein, in the district of Colesberg, as prayed by the petitioner.

Mr. Howel Jones (for the Government) read a report from the Registrar of Deeds setting forth the reasons why he declined to pass transfer without an or-

der of Court. The Registrar said that the farm was sold on the 14th of February to the original purchasers, and it was not until the 23rd June that the articles of association were signed for the R.B. and B. Syndicate, for which transfer was now asked. There was no documentary evidence produced by the applicants to show that the original purchase was made on behalf of the syndicate which was subsequently formed. It appeared that the company was formed by the executors of the late C. J. Rhodes, H. Eckstein and Company, and Mr. Abe Bailey, for the purpose of encouraging the cultivation and settlement of lands in South Africa.

Mr. Jones said that the position taken up by the Registrar was that he would not allow property bought by private individuals before a company was formed to be registerd in the name of the company that was subsequently formed, unless there was documentary evidence that at the time of purchase the persons who purchased actually purchased on behalf of the company. In this case there was nothing to show that the founders were buying on behalf of the company. There was no document put in to show that the land was purchased in the name of and on behalf of the company. Something should be put before the Registrar to show that sale was made to the company. He said that in the absence of such evidence, he must leave the matter in the hands of the company, as to whether the sale did take place to the company or it was a sale to Mr. Rhodes's executors, Mr. Beit, and Mr. Bailey, the parties having the intention of forming a company, no doubt, but really the sale being to them individually. The purchase took place in February last, and the articles of association were not signed until June, the explanation given being that there was great delay owing to the signatures of the company being required, and some of the members being in England at the time.

Mr. Buchanan read the affidavits of Mr. Abe Bailey, Sir Lewis Michell, Mr. E. R. Syfret, and others, from which it appeared that there had been a certain delay in the completion of the articles on account of the deed having to be referred to subscribers in Johannesburg, and some of the executors in the estate of the late C. J. Rhodes, residing in England. It was stated, however, that the original purchasers of the farm and the syndicate were in effect the same.

De Villiers, C.J.: The Registrar of Deeds was quite justified in the first instance in refusing this registration without an order of Court. The parties might easily at the time when the original purchase was effected have executed a document making it perfectly clear that the parties were purchasing, not on their own behalf, but as trustees or agents for the syndicate which was about to be formed. But they neglected to do so, and the Registrar of Deeds was quite justified therefore in throwing upon them the onus of clearly satisfying this Court that the original purchase was intended to be a purchase on behalf of the syndicate about to be formed. In point of fact, the syndicate was being formed at that time, but it was not registered as a limited liability company until some months after the purchase. The question before the Court now is whether the Court is satisfied that the purchase was on behalf of the syndicate, and, in my opinion, the affidavits made by Sir Lewis Michell and the others are quite sufficient to prove that the purchase was on behalf, not of the original purchasers, but of the syndicate, and if there were any doubt upon the point, that doubt is removed by the form of the receipt for transfer duty, which, however, did not appear to have been submitted to the Registrar of Deeds. That receipt was given on the 1st of April, that is, some months before the company was actually registered, but in that receipt the company is recognised as the purchaser. The property is alleged there to have been sold privately to the R., B. and B. Syndicate (Limited) by the present applicant, and the power of attorney, which was executed as far back as March by the present applicant, authorised the transfer, not to the original purchasers, but to the R. B. and B. Syndicate. It is clear, therefore, that this is not a case in which the Court should insist upon double transfer duty being paid. Even if there had been transfer to the original purchasers, and subsequent transfer by them to the syndicate, it might have been fairly contended that double transfer duty would not be payable. Amongst the exemptions provided for

by the 19th section of the Act 5 of 1884 is the following: "In every case (says section 19, sub-section 9) in which any one person shall, by the records in the Deeds Registry Office, appear to be merely a trustee for any other person, whether the latter shall be a minor or a major, or under coverture or not, the property so held in trust may be removed from the name of the trustee to that of such other person being entitled to have it so removed, without payment of transfer duty. The only question remaining in the case is the question of costs. Well, it appears to me that the syndicate, the trustees, have themselves to blame for any difficulty which has arisen. If they had taken care that the deed of sale was executed to clearly show for whom this purchase was made, this question would never have arisen, and therefore I think that, while making the rule absolute, the Court will order that the applicant must pay the cost of the application.

Kotzé, J.: I am of the same opinion. I am satisfied upon the affidavits that this property was bought for and on behalf of the syndicate, which was subsequently registered as a limited liability company under the Act.

Ex parte WAHL AND ANOTHER.

Mr. Buchanan moved, on behalf of Silberbauer, Wahl and Fuller, as executors in the estate of the late James Brista, for an order authorising the Registrar of Deeds to issue a certified copy of a certain mortgage bond, and for costs to be paid out of the estate. The petitioners stated that a mortgage bond had been passed in favour of the said estate by Isabel Sophia Jackson, married out of community, for £1,800, now reduced to £1,600, under which bond certain property was specially hypothecated. The bond was sent by registered letter to Mr. Thomas Stephenson, of Port Elizabeth, the mortgagee's agent, for the purpose of having certain portions of the land released, and having £200 written off the capital thereof. The bond had not been delivered, and although inquiries had been made at the Post-office, no trace had been obtained of the missing document. An official of the Post-office deposed that a search had been made of the registered letter books, but they had failed to discover any entry of the letter alleged to have been forwarded about the date in question by the petitioners. A junior clerk in the employ of the petitioners deposed that he kept a book of postages, and that the letter was entered in the book, and the postage was shown to have been 9d., which would be sufficient to include registration fee. He could not swear, however, that the letter was posted, or that it was registered.

Kotzé, J.: I must say that it is very doubtful whether the letter was ever posted.

Mr. Buchanan: That would practically be a charge of theft against this boy.

De Villiers, C.J.: Not necessarily.

Kotze, J.: Oh, no; young people are forgetful, and he may have lost this letter.

A rule was granted calling upon all concerned, on the 12th December, to show cause why an order should not be made as prayed, rule to be published once in a Cape Town newspaper, and once in a Port Elizabeth newspaper, costs to be paid by the petitioners.

Ex parte THOMAS AND OTHERS.

Mr. Gardiner moved for an order authorising the Registrar of Deeds to register certain lots of land at Kalk Bay, in the name of the petitioners. The petitioners stated that their father, the late Jonas Thomas, purchased from one Johannes Marthinus Muller, whose estate was unrepresented, certain two lots of land at Kalk Bay, in 1861. Although the aforesaid lots were duly deducted from and marked on the original diagram, and were about to be transferred to Jonas Thomas (who died in 1871), transfer was never effected, and the land still stood in the name of the said Muller.

[De Villiers, C.J.: Why was this application not made under the Act of 1881, the Derelict Lands Act?]

I don't know, unless they thought it was a matter in which the Court would desire to hear counsel in argument.

De Villiers, C.J.: Application should be made to a judge in Chambers under the Derelict Lands Act, and it will be necessary to place much more information before the Court in regard to the matter before a rule can be granted.

Ex parte WASSERMAN AND OTHERS.

Mr. Buchanan moved for an award of arbitrators to be made a rule of Court. The arbitration was between the petitioners, who were joint proprietors in undefined shares of certain property in the division of Uniondale. In 1896 the proprietors appointed one Mr. Mulder to make a division, and an award was made, but was never carried out, and in the present year the owners had an amended award prepared by Mulder.. All the present proprietors consented to the application.

Order granted as prayed.

COCHRANE AND FITT V. FUCHS.

This was an application upon notice of motion calling upon the respondent to show cause why an order should not be granted requiring him to reinstate the applicants in possession of the premises erected by them at the Ndabeni Location, Maitland.

The affidavit of John E. Fitt, a member of the applicant firm, said that they were builders and contractors, and that the respondent, Henry Fuchs, was a general dealer, at the Native Location, Maitland. They entered into a contract whereby applicants were to erect a wood and iron building for £490, £100 to be paid on completion of the building and the balance in monthly instalments of not less than £20. It was also stipulated that the building should remain the property of the contractors until the £490 was paid, the building to be completed within six months of the signing of the contract. Immediately on completion of the contract the applicants began preparations for the work. About four days after the signing of the agreement the respondent requested them to suspend operations until he had arranged a dissolution of partnership with his partner. Deponent agreed to do this. About the 24th October his firm received a notice from the respondent's attorneys, requesting them to resume work at once. Immediately after deponents' firm went to resume work, but on November 11 they found that the respondent had secretly and stealthily taken possession of the foundations, and that he and his men were engaged in carrying on the work. Respondent refused to allow applicants to have access to the said building. In addition to the foundations of the building which applicants had constructed, there was a quantity of building materials which was suffering loss and damage. His firm were willing to carry out the terms of the contract entered into with the said Fuchs, but the latter was having the building completed as soon as possible.

The answering affidavit of Henry Fuchs, the respondent, said that at the time he entered into the agreement, on the 14th September, he purposely had a clause inserted fixing a date when the building should be completed, as he was anxious to take possession. He denied that he directed the applicants to suspend operations. He continually pressed the applicants to complete the work in terms of the contract, but he was put off with various excuses until he was at last compelled to instruct his solicitors to write to the applicants. It was not until the 12th November that a start was made. In the meantime he had entered into a fresh agreement, and the work was now being proceeded with. He said that by reason of the default of the applicants he entered into a new contract, and treated the contract of the applicants as cancelled. He denied that there was any building material there which was the property of the applicants. He was prepared to meet the applicants in an action at law.

The replying affidavit of J. E. Fitt denied that he ever put off the respondent with excuses, but said that the respondent asked him to suspend operations until the dissolution of partnership had been arranged. Deponent further declared that his firm had deposited materials near this property.

Mr. Gardiner for applicant; Mr. Benjamin for respondent.

Mr. Gardiner (for the applicant): One term of the contract entered into between these parties is that the building is to remain in the possession of the contractor till the sum of £491 shall have been paid. We fully admit that there has been some delay, but the question is: to whom was that delay attributable? I do not contend that the building is ours, but I do say that we have a lien on it.

[De Villiers, C.J.: You had only put in the foundations?]

Yes, but we have a lien on them, and the foundations are often the most important part of the work. We expended money also in preliminary work.

[De Villiers, C.J.: A workman has a lien for work done, but has a contractor a similar lien?]

He has; see *Brown's Assignees* v. *Pote* (4 E.D.C., 50). This was a case of a corrugated iron building, and therefore the cost of foundations would be proportionately heavier than in the case of a brick or stone building. We have certain rights under our agreement, and I submit that the Court will preserve to us that right.

Mr. Benjamin (for respondent, on the question of costs): I am instructed to press for costs incurred. The work should have been completed within six weeks. The applicant asks for a postponement on the ground of mutual consent; but their proper remedy was by way of action. As to the foundations, there is no evidence as to their value. They have not shown any special urgency to justify them in proceeding by motion, and they should have brought their action.

De Villiers, C.J.: A great deal must depend in the present case upon the question as to whether the applicants or the respondent were responsible for the building not being proceeded with. The applicants say that they are quite prepared to go on with the building for which they were responsible. The respondent, on the other hand, alleges that he did not delay the work in any way, and the delay was owing to the applicants' fault. That question it would be impossible to decide upon the statements of the parties, which are directly in conflict. It lies upon the applicants to make out a clear case for an interdict, and such a clear case has not been made out. The respondent does not object to the applicants removing any of the materials. There will be no order, therefore, excepting that the applicants be allowed to remove any materials, and as to the question of costs, that must stand over.

DUMINY V. DAY.

Mr. Upington, for the plaintiff, moved for leave to take the evidence of certain witnesses in the Transvaal upon commission. The application was supported by the affidavit of plaintiff's attorney, Mr. Jacobson, which set out that the evidence of a witness in Johannesburg and one in Pretoria was most material to the plaintiff's case.

Leave granted, with Mr. Saul Solomon appointed as commissioner, costs to be costs in the cause.

BETHE AND VON EHREN V. BURMAN.

Mr. Buchanan, for the respondent, said that this matter was ordered to stand over until the 23rd November, upon an application for an interdict granted upon the petition of Charles Friedlander, attorney, from which it appeared that the plaintiffs were a firm carrying on business in Hamburg, and were the owners of certain property in Hanover-street. In October an agreement was entered into with the original respondents, Dreyer and Sussman, who agreed to buy the stock in the said premises for £240, payable by £50 in cash, £60 in three months, £70 in six months, and £60 in nine months. None of the instalments had been paid, and counsel appeared for a man named Lewis Burman, to whom the stock had been sold, and who was restrained from parting with any of the goods pending the decision of an action against Dreyer and Sussman. The notice was, in the first instance, granted against a man named Lewis who turned out to be Lewis Burman, of 1, William-street, Cape Town. The affidavit of Burman set out that he first made the acquaintance of the first-named respondent in October, 1903, when he purchased 5 dozen of aprons, and obtained a receipt from Joseph Dreyer, who informed him that he intended selling all his stock and taking other premises. On October 28, £142 3s. was paid for the remainder of the said stock, and Joseph Dreyer receipted the transaction.

De Villiers, C.J., said there was no proof of a fraudulent sale to Burman, and that the rule must be discharged, with costs.

Ex parte HUGO.

Mr. Benjamin moved for the appointment of a *curator bonis* to look after the farm at the Paarl of petitioner's husband, Francis Jacobus Hugo, who was

blind, and had become mentally deranged.

An order was granted calling upon the respondent to show cause by the 30th November why he shall not be declared incapable of taking care of his affairs, and why a curator should not be appointed. The Resident Magistrate of the Paarl was appointed as *curator ad litem*, service of the summons to be served on the curator, and the respondents.

APPEALS.

COLYN V. SMITH.

This was an appeal from a decision by the Acting R.M. of Elliot, in which the Magistrate upheld an exception taken on behalf of the defendant to the summons on the ground that the original copy was not produced to the defendant. There was a note by the Magistrate that from time to time he had warned the messenger to be more careful in his duty, and in allowing the exception the messenger would be liable for the costs. Counsel submitted that there was no evidence to show that the messenger had not fulfilled his duty, and that it was not necessary that the original copy should be exhibited.

De Villiers, C.J.: The messenger's return of summons is as follows: I served a copy of this summons upon the person named, and gave it to him personally, at the same time explaining the nature and exigency thereof. There is nothing to show that the messenger may not have had the original with him, and ready to show it to the defendant. The Magistrate, however, seems to have taken it for granted that he had not the original with him. There is no evidence to support that, and I think, therefore, upon the messenger's return the Magistrate ought to have taken it that there was a good service upon the defendant. It may be a question as to whether it would have been a good service if it had been proved that the messenger had not the original with him, but that point does not arise, and had it arisen the further question would have had to be decided. I am not sure that the messenger is bound to show the original, and it is not suggested in the present case that the copy differs from the original. The appeal will, therefore, be allowed, with costs. The Magistrate will hear the case on its merits, and decide the question of costs in the cause in the Court below.

DU PLESSIS V. DALL. { 1903. Nov. 23rd.

Principal and agent—Authority—Liability.

The defendant, purporting to act as the agent of M., bought certain goods from the plaintiff who debited M. with the price and afterwards claimed the amount from him. M., however, had in the meantime paid the price to the defendant and repudiated his liability. The plaintiff thereupon sued the defendant, who refused to pay, on the ground that he had not purchased the goods on his own behalf, but he failed to prove that he had been authorized by M. to pledge his credit.

Held, *that the plaintiff was entitled to recover the amount from the defendant.*

Wright v. Williams (*8 Juta, 166, followed*).

This was an appeal from a decision of the R.M. of Richmond, in which judgment was given for the plaintiff in an action brought to recover the sum of £3 0s. 3d. for goods sold and delivered.

The case came before the Resident Magistrate of Richmond in August last, in which the respondent was the plaintiff and the appellant defendant. The plaintiff claimed £3 0s. 3d. for goods sold and delivered to the defendant for one Van der Merwe. The defendant took exception to the summons as being vague, and that no date was given of the alleged sale, but an amendment was allowed, and judgment was given for the plaintiff for the amount claimed with costs. The defendant pleaded a settlement of account between the parties in November, 1902, and, secondly, general issue. The Magistrate in his reasons for judgment said that the defence set up

was that the defendant purchased the articles as the agent of Van der Merwe, and that, therefore, he was not liable for the debt. The defendant had not denied that he received payment for the items, and that he failed to satisfy the plaintiff's claim. He did not think there was any express mandate from Van der Merwe to defendant to purchase in his name, though no doubt he would have been quite prepared to pay plaintiff's claim had he not been aware that it had already been paid to the defendant. Defendant implicitly admitted that he received the money from Van der Merwe, but he did not remember paying the plaintiff. As the party who ordered the materials, for which he received payment from the deceased's estate, he was of opinion that the defendant was liable to the plaintiff for the amount claimed.

Mr. Upington (for appellant) contended that the judgment of the Magistrate was wrong, because it was perfectly clear that the material was ordered by Van der Merwe, to whose debit the amount stood in the plaintiff's books. The Magistrate was driven in his reasons to the conclusion that if Van der Merwe had not paid the defendant, he would have paid the plaintiff when the demand was made. The principal alone could be held liable, with certain exceptions, which he held did not apply in this case. The principal who was dealt with was Van der Merwe. The plaintiff admitted that Van der Merwe was not his agent. It was not alleged anywhere that Du Plessis was the principal. There was no contract between the parties to found an action against Du Plessis. He submitted that the plaintiff's remedy was against Van der Merwe, and then Van der Merwe had his remedy against his own agent.

Mr. Buchanan (for respondent) said it was perfectly clear that Du Plessis had got the money from the estate of Van der Merwe. Du Plessis did not plead at the hearing that he was not liable, and that Van der Merwe must be sued, but he pleaded that he had settled the account. In his own evidence, Du Plessis said that he had paid, and that he could not be sued again.

[De Villiers, C.J.: Yes, but that seems to be the line of defence—that he was the agent of Van der Merwe.]

Yes; after the plaintiff's evidence had been given. He allows the plaintiff's case to be closed, and then he takes exception on the ground that we should have sued Van der Merwe. Counsel went on to contend that Du Plessis must show that he had the authority of Van der Merwe to pledge his credit. Defendant's attitude throughout the hearing seemed to have been, "Oh, I have paid the amount." There was no express mandate on the part of Van der Merwe to Du Plessis to go and get the goods and pledge Van der Merwe's credit. If that had been so, Van der Merwe would never have paid the money to Du Plessis.

Mr. Upington, in reply, said that the plaintiff's own bookkeeper admitted that the account was sent out twice to Van der Merwe. The goods were debited to Van der Merwe. It was only after the account had been sent out twice that this item of £3 0s. 3d. was objected to, and then it was said that the money had already been paid to Du Plessis. The fact that Van der Merwe was debited in the books was an admission that Van der Merwe was treated as principal

De Villiers, C.J.: The plaintiff sued the defendant in the Court below for the purchase price of certain materials, and the evidence shows that the defendant did, in fact, purchase these materials from the plaintiff. But it also appears that the plaintiff gave credit, not to the defendant (the purchaser), but to Van der Merwe (the principal of the purchaser), and he debited Van der Merwe with the price because the defendant told him to do so. Then, when the amount fell due, Van der Merwe paid Du Plessis (the defendant). The plaintiff demanded the amount from Van der Merwe, but Van der Merwe said, "I have already paid Du Plessis," whereupon the plaintiff sued Du Plessis (defendant in the suit). If in the present case it had been clearly proved that Du Plessis had been authorised by Van der Merwe to pledge his credit, I confess upon the summons as it stands I should have felt great difficulty in affirming the judgment of the Court below. In such a case the defendant's liability would have arisen, if any liability existed at all, by reason of

his having received the money on behalf of the plaintiff. But the action is for the price of certain goods, and there is no evidence to show that the defendant had been authorised by Van der Merwe to purchase the goods on his behalf. In the absence of such proof, the Court below properly held that the defendant was liable, and the appeal must be dismissed with costs.

Kotzé, J., concurred.

[Appellant's Attorneys: Fairbridge, Arderne and Lawton; Respondent's Attorneys: P. de Villiers.]

KILGOUR v. CAPE TOWN TRAMWAY CO. { 1903. Nov. 23rd.

Damages—Negligence.

The plaintiff, being a passenger in a tram-car, signalled to the driver to stop, and as the car was just going round a curve, the driver slackened speed, with the view of stopping at the further end of the curve. The plaintiff went to the platform of the car and, while standing there, fell, owing, as he said, to a jerk of the car, but he was unable to say whether or not he was holding on to the rail at the time.

Held, *that the mere fact that there was a jerk as the car rounded the curve was not sufficient proof of negligence on the part of the Tramway Company's servants, so as to render the Company liable for damages for injuries sustained by the plaintiff.*

This was an appeal brought by plaintiff in the action, who resides in Cape Town, from a judgment by the Acting Resident Magistrate of the Cape, to recover £20 damages from the respondent company for personal injuries alleged to have been sustained in a Plein-street tramway car. The Magistrate gave absolution from the instance with costs.

The Magistrate, in his reasons for judgment, said that the plaintiff sued the defendants for £20 damages in consequence of the negligent driving of the defendants' servants, and their failure to stop as required, whereby plaintiff was thrown to the ground, causing him severe injuries. Plaintiff, in his opinion, failed to prove that it was in consequence of the negligent driving of the defendants' servants that he was thrown to the ground and sustained injuries. It was not clear whether the plaintiff gave the signal to stop, whether through the guard or by the bell, and he stated that the car stopped as a rule at either one end or the other of the corner of Buitenkant-street and Roeland-street, that he got out of the car on to the platform so as not to delay the car, that it stopped, and there was a jerk, and he caught at the support, but missed it, and fell off. He did not know what caused the jerk. It was impossible to say what caused the jerk. The plaintiff was an aged man, and he should not have gone on to the platform when turning a curve until the car had stopped, as it was his (the Magistrate's) experience that whenever a car went round a curve there was a jerk. Plaintiff failed to prove that it was owing to the defendants' negligence in driving the car that he was injured, and absolution from the instance was given with costs.

Mr. Benjamin (for the appellant): The Magistrate has evidently imported some of his own personal knowledge into the case. He says that he knows that when a tram goes round a curve it invariably jolts.

[Kotzé, J.: It seems to me that the motorman gave a signal to move on.]

I would submit that there was no contributory negligence in this case. The jerk must have been very violent. Any ordinary jerk, such as is usually experienced when going round a curve would not have been sufficient to throw the appellant off the car. The onus is on the respondents to show that the jerk was not abnormal.

[De Villiers, C.J.: No; the onus would seem to be on the appellant to show negligence on the part of the Tramway Company.]

The appellant was an elderly man, and was holding on to the rail when he was thrown off. The Magistrate's reasons do not clearly show whether he held that the negligence was on the part of the appellant or on that of respondents.

[De Villiers, C.J.: Where is there any proof of negligent driving?]

Mr. Close (for the respondents): In this case the onus is on the appellant to show negligence. There is no *prima facie* proof of negligence; certainly the jolt of the tram does not prove it. The plaintiff is an aged gentleman, and a slight jolt may have been sufficient to throw him off the car. Such a jolt may arise from many unavoidable causes.

[Kotzé, J.: If he had stood on the foot board I could have understood that there might have been contributory negligence; but he was standing on the platform. Suppose that a passenger gives the signal and the car slows down, has he not a right to presume that it will stop?]

Yes; but here the appellant's case is that a spurt was put on, and that then he did not remember what happened. His letter of May 14 is not in accordance with his evidence in the Court below. I submit that the Magistrate was fully justified in granting absolution from the instance.

Mr. Benjamin in reply.

De Villiers, C.J.: In order to succeed in this action, the plaintiff was bound to satisfy the Magistrate that the accident occurred through the negligence of the defendants' servants. Now, what is his evidence as to negligence? He gave the signal to stop, but he admits that the car sometimes stopped at one end of the curve and sometimes at the other end. The car slackened speed in going round the curve, but it does not appear whether the car slackened in consequence of his signal or not, but in any case it slackened speed in going round the curve. The plaintiff then went on to the platform. He is not quite clear how the accident happened, whether he was holding the rail at the time or not, but he says there was a jerk in the car, and he fell. He does not say that the jerk was an unusual one, that it was a severe one, that it was such a jerk as he could not have expected to take place. If he had said that, then there might have been some proof of negligence, but all he says is that there was a jerk. Surely the Court cannot hold that, because there was a jerk, however small, however slight, the defendant company is liable, because an elderly gentleman fell from a car. There must be some proof of negligence. The mere fact that he fell is not sufficient proof of negligence on the part of the defendants' servants to justify the Magistrate in calling upon the defendants to give evidence. He granted absolution from the instance, and, in my opinion, the appeal should be dismissed, with costs.

Kotzé, J., concurred.

[Appellant's Attorneys: Fairbridge, Arderne and Lawton; Respondents' Attorneys: Syfret, Godlonton and Low.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

GENERAL MOTIONS.

Ex parte NTULIKAZI. { 1903. Nov. 24th.

Mr. Benjamin moved, as a matter of urgency, for a peremptory order requiring the respondents, Sifili, Ndingazo, and Mfundisi, to restore to petitioner certain stock alleged to have been seized by spoliation. The applicant, in her petition, said she was a native widow, married to her late husband according to native custom. Her husband at his death left five cattle and 246 sheep, which his eldest surviving brother, Majoro (who was the only one who, according to native custom, had any authority to interfere in the administration of the estate), directed should remain in petitioner's possession. From time to time petitioner had had *bona fide* and undisputed lawful possession of the said stock until, on the 26th day of September, but on the 4th October, the respondents (who were younger brothers of her late husband), forcibly dispossessed her of the said stock, which, owing to the severity of the drought in Herschel, were then on their way to fresh pastures in the Orange River Colony. The cattle and sheep were in a very poor condition, and

as the severe drought still continued in Herschel petitioner would be a heavy loser unless an order were given reinvesting her with possession of the stock so as to have them returned to the better pasture she had secured. She asked for an order accordingly pending an action to be brought under the Native Succession Act of 1864, before the R.M. of Herschel. Respondents, it appeared, did not deny spoliation, but claimed native succession.

Order granted as prayed.

Ex parte IN THE INSOLVENT ESTATE OF GUS. A. SHACKLETON.

Mr. Benjamin moved as a matter of urgency for the appointment of a provisional trustee in the insolvent estate of Gus. A. Shackleton, of Naauwpoort. Petitioners stated that among the assets in the estate were several very valuable racehorses, which required to be carefully looked after, and their food supply was a great expense to the said estate, which the estate could not afford. Petitioners asked for the appointment of Mr. John D. Simmonds, of Port Elizabeth, as provisional trustee with power to dispose of the said racehorses, and perish able effects, and to collect book debts. Applicants represented claims to the amount of over £3,000.

Order granted as prayed.

Ex parte SYFRET.

Mr. Buchanan applied for the leave of the Court to mention a matter of urgency arising out of the insolvent estate of Herman Blomstein, of Piquetberg. Petitioner was appointed by the Master to be *curator bonis* of the estate. The first and second meetings of creditors were duly advertised to be held, but, before the second meeting could be held, the debtor made an offer of a composition to his creditors which they accepted, and the second meeting was accordingly not held, and a trustee had not been appointed. The debtor had sold his hotel, and the purchaser had entered into occupation. The debtor had given notice of his intention to apply in the Supreme Court on the 12th January, 1904, for his discharge, and he intended as soon as he obtained his discharge to give transfer of the property. There was no one, now qualified to make application for the transfer of the licence from the insolvent to the purchaser, and petitioner asked for authority of the Court to make application in terms of section 56 of Act 28 of 1883.

The application was refused, the Court stating that the petitioner might, if he applied, be vested by the Master with authority to apply for the transfer of the licence.

MSI V. BOVANA AND OTHERS. { 1903. Nov. 24th. „ 25th.

Magistrate's jurisdiction—Future rights.

The plaintiff, being an occupier of certain land in a Mission Station under regulations framed by the Missionary Society, which held the land by leave and licence of the Crown, instituted an action against the defendants in the Magistrate's Court for damages for destroying a certain fence which she had erected to indicate the boundary of her allotment. The Magistrate sustained an exception to the jurisdiction, on the ground that the action was one whereby future rights could be bound.

Held, on appeal, *that as a judgment between the parties would decide no more than the question immediately at issue between them, namely, whether the plaintiff was occupying more than the portion allotted to her under the regulations, future rights would not be bound, and that consequently the Magistrate had jurisdiction.*

This was an appeal from a judgment of the Acting R.M. of King William's Town, in an action brought by the appellant, Msi, against the respondents, two natives, to recover £20 damages by reason of the defendants' act in unlawfully and wrongfully breaking down and destroying a certain fence at Brownlee Station.

When the case came before the Magistrate the defendants' agent took the following exceptions: "(1) That the action is beyond the jurisdiction of and not cognizable by the Court of the R.M., inasmuch as the issues involved bind the future rights of the parties, and the rights of other residents at Brownlee Station in certain reserved land known as Brownlee Station, in which the said fence removed was situated; (2) that the summons is bad and insufficient, inasmuch as it does not allege that the plaintiff had the right with and to the property or site upon which the fence was erected, or that the plaintiff was in lawful occupation thereof, or possessed of or held title to the same either by lease or purchase."

The Court decided to hear evidence and deal with the exceptions afterwards. The evidence of the resident missionary of the London Missionary Society's Station was to the effect that the plaintiff enclosed the space at the reservation in defiance of the orders of the Local Committee. The Government was the owner of the land, but the London Missionary Society had its use and occupation. The site granted to the plaintiff had previously been granted to some other persons. The plaintiff was repeatedly directed to remove the fence, but she refused. The fence was removed by the defendants, acting on the directions of the Local Committee.

The Magistrate, in his reasons for judgment, said that he dismissed the summons with costs, because he found that his decision would bind the future rights of the parties.

Mr. Gardiner for appellant, Mr. Buchanan for respondent.

Mr. Gardiner contended that the second exception was not valid. With regard to the first exception, he submitted that the future rights of the parties would not be bound by any decision given by the Magistrate in this case. The rule had been laid down by this Court that future rights would be regarded as bound by a decision of the Magistrate if that decision rendered the matter *res judicata* in future cases. Counsel quoted the case of *Riversdale Divisional Council* v. *Pienaar* (3 Juta, p. 252). He submitted that in the matter now in appeal no right was set up by the defendants. Whatever rights there were in the ground were vested, not in the defendants, but in the trustees. There was nothing to show that the defendants were trustees. Counsel also argued that where the total value of the future rights did not exceed the Magistrate's jurisdiction, the Magistrate was entitled to try the case *Gadiega* v. *Ebriem* (13 S.C.R. 117). It did not appear that in this matter the value exceeded the Magistrate's jurisdiction. Even Mr. Harper, the missionary, did not claim title in the ground. Neither the title to the land nor the future rights of the parties was in dispute.

Mr. Buchanan said that the plaintiff in the case claimed by virtue of a wrong. The summons was bad and insufficient, because it did not allege that the plaintiff had any right to be there. Counsel submitted that the plaintiff was claiming a declaration of rights by means of an action for trespass. It was clear that the two defendants were the agents of the society. The plaintiff was really basing her action upon her own tort. It was not only the future rights that would be bound, but it was a question of the plaintiff's right to the land. The defendants, as agents of the Missionary Society, could avail themselves of the same defence as their master. The fact of the two defendants removing the fence at the end of seven days showed a connection with the notice that had been sent to the plaintiff to remove it. It was necessary before determining the question of damages to decide the right of occupation. If the Magistrate decided in the plaintiff's favour by awarding damages, it established her right to the land, and if the Government or the missionary society took no further action, the plaintiff would, in time, establish her title to the land by virtue of occupation.

Mr. Gardiner, in reply, said there was no evidence to show that the defendants were acting as agents of the society. The missionary or the trustees not being a party to the suit could not be affected by any decision in the present case. The defendants were sued for damages and not for trespass. No decision in that case could affect any future rights of the trustees.

Cur. adv. vult.

Postea, (Nov. 25).

De Villiers, C.J.: This is an appeal against a judgment of the Magistrate for King William's Town, in which he

upheld certain exceptions, which were taken to his jurisdiction by the defendants. The action was brought by a native woman against three other natives, living at the Brownlee Station, for damages for "wrongfully and unlawfully breaking down and destroying a certain fence," alleged to have been the property of the plaintiff. To this summons the following exceptions were taken. I will take the second first: "That the summons is bad and insufficient, inasmuch as it does not allege that the plaintiff had a right in and to the property or site upon which the fence was erected, or that the plaintiff was in lawful occupation thereof, or possessed or held title to the same, either by lease or purchase." This exception was not sustained by the Magistrate, and very properly, because the summons simply followed the form provided by the schedule (c) of the Act of 1856, and was perfectly formal, and not liable to the exception raised. The first exception was two-fold, defendants excepting to the jurisdiction of the Magistrate on the ground that future rights would be involved, and on the further ground that title to certain sites or portions of sites in certain reserve land was in dispute. The terms of the exception are: "That the action is beyond the jurisdiction and not cognizable by the Court of the Resident Magistrate, inasmuch as the issues involved bind the respective future rights of both parties, and the right or otherwise of the plaintiff and other residents of Brownlee Station to fence in and claim right and title to certain sites or portions of sites in a certain reserve land known as Brownlee Station, upon which the said fence when removed was situated." The Magistrate sustained the exception as to future rights, but said nothing in regard to the question of title being in dispute. In regard to this last exception, I am satisfied that there is really no question of title involved in the case. It is purely and simply a question of a right to occupation. The missionaries of the society have a right from the Government to occupation, and they distribute that right amongst the natives upon certain terms, and they frame certain regulations, and the real question which the Magistrate had to decide was whether the plaintiff was occupying more than the portion allotted to her under the regulations. She did not claim the title for herself, nor did she deny that the title was in the Missionary Society or in the defendants. That question, apparently, was not raised. The only other point to be determined is whether the Magistrate was right in holding that future rights were involved. After carefully considering this matter, I find it impossible to hold that there is any future right in question. In a certain sense, every judgment of a Magistrate's Court involves future rights if the sole test were the test that once a judgment has been given, this same question cannot be again raised as between the same parties—to that extent future rights would always be involved—but that is not the meaning of the enactment which prohibits the Magistrate from deciding as to future rights. The Act itself gives some indication as to what is intended by the term "future rights." There is a proviso to the 8th section (sub-section 3) stating "that no such magistrate shall have jurisdiction or cognisance to any action or suit . . . . whereby rights (c) in future can be bound," and then comes this proviso: "That any such magistrate may, in the course of any action or suit to recover damages for criminal conversation with the wife of the plaintiff, or for the amount of necessaries lawfully supplied to the wife of any person, determine in regard to the fact of marriage, and may in the course of any action or suit for the amount or value of maintenance lawfully supplied to the child, legitimate or illegitimate, of any person, determine upon the question of affiliation, so far as may be necessary for the decision of any such action or suit, without thereby binding, or being deemed or taken to bind, rights in future." Here, then, it seems to be assumed that without this proviso a decision as to the fact of marriage or upon the question of affiliation would bind future rights. Then follows this further proviso: "The evidence in every such case as aforesaid shall be recorded, and the same may be put in as proof by either the plaintiff or defendant in any subsequent suit or action in the same court between the same parties in which the matters in dispute in the former suit or action shall again come into dispute." In

the present case, I fail to see that there is any future right which would be bound by the action. A decision as to marriage or affiliation, affecting as it does the *status* of individuals might fairly be held to bind future rights, but a decision whether a defendant is justified in breaking down an occupier's fence no more binds future rights than a decision as to whether the defendant owes the plaintiff a certain sum of money. Schedule C to Act 20 of 1856 recognises this by providing a form to meet the case of destroying fences. The decision against the present defendants would not affect other occupiers of this location, nor would it affect the missionaries themselves. It would be a binding judgment as between the present plaintiff and the present defendants, but it could not go further, so as to bind any future rights. For these reasons, I am of opinion that the Magistrate was wrong in holding that future rights would be involved, and that the appeal should be allowed with costs in this Court, and as to the costs in the Court below, they must abide the result of any decision given by the Magistrate upon the merits of the case.

Kotzé, J., said: I am of the same opinion. I do not think it could be successfully contended that in this case there was any dispute as to the title to the land or any other tenement, nor is it clear that any future rights would be affected by the Magistrate giving any decision on the matter. It is not quite clear that future rights will be affected, and I think that where that is the case, the Court should hold in favour of the Magistrate's jurisdiction.

[Appellant's Attorneys: Syfret, Godlonton and Low; Respondents' Attorneys: Innes and Hutton.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice KOTZÉ].

MASON AND CO. v BOOTH AND CO. { 1903. Nov. 25th.

Surety and principal debtor — Excussion—Pleading.

A surety, on being sued by the creditor in a Magistrate's Court, denied the suretyship by pleading the general issue but, failing such defence, he claimed the benefit of excussion. The evidence clearly established the contract of suretyship, notwithstanding the defendants' denial, and the Magistrate held, that as the defendant had deliberately postponed his claim to excussion until after issue had been joined, he could not claim the benefit after the issue had been found against him. The Court, on appeal, upheld the judgment.

This was an appeal against a judgment of the Acting R.M. of Port Elizabeth, in an action brought by the respondents to recover £35 11s. 9d. (reduced to £20, to bring the matter within jurisdiction) under a suretyship for goods sold and delivered to one Hop Chang, formerly carrying on business in Somerset East.

The summons set forth that the goods were supplied to one Hop Chang, of Somerset East, on the 27th February, 1903, "payment of which said sum was guaranteed to the said plaintiffs on the date aforesaid, at the time of the said sale, by the defendants, the said Hop Chang having no means or property in this colony to satisfy the said claim, and his whereabouts being to the plaintiff unknown." The defendant pleaded the general issue, and, failing that, he availed himself of the benefit of excussion.

The evidence in the Court below showed that Mason was present when

the goods were sold to Hop Chang, and that the defendant Mason stood as guarantor for the account. The defendant Mason denied that he ever agreed to become guarantor for Hop Chang, and said that he never represented to Booth and Co. that he would stand good for the account.

The Magistrate, in his reasons for judgment, said that he gave judgment for the plaintiff for £20, as prayed, and costs. In this case the plaintiff sued the defendant for £35 11s. 9d. (reduced to £20 to bring it within jurisdiction), for goods sold and delivered to one Hop Chang, but the payment for which was guaranteed by the defendant. The defendant pleaded the general issue, which amounted to a denial that he guaranteed payment, failing which he availed himself of the benefit of excussion. Upon the evidence led, he considered that credence should be given to the plaintiff's witnesses rather than to the defendant, and he found that the defendant had guaranteed payment. That being so, the defendant was not competent to take the benefit of excussion at that stage, and should have done so before issue was joined. The Magistrate, in support of this view relied upon the case of *Rogerson* v. *Meyer* (2, Menzies, p. 42).

Mr. Benjamin submitted that the Magistrate was wrong in his attitude he had taken up in regard to the plea of excussion. He contended that the plea of non-excussion was properly taken by the defendants. The plaintiff had clear knowledge that this defence of non-excussion was to be raised, and he thought it would be very hard if a technical objection were to be taken on the lines followed by the Magistrate. The Court had repeatedly laid it down that the object in requiring these pleas *initio litis* was in order that the plaintiff or the party might not be prejudiced by the point being sprung upon him either after the evidence had been closed or at some later stage of the case. That was the real object, and in this case he submitted that the point was raised *initio litis*. He contended that the exception of non-excussion was a good one, and that it should have been allowed by the Magistrate. The presumption was that the debtor had not left the country.

[De Villiers, C.J.: Is Mason a Chinaman, too?]

Yes, he seems to be.

De Villiers, C.J.: The fact—appearing from the evidence—that the principal debtor had left the Colony would have been a sufficient ground for withholding the benefit of excussion, but this was not the ground of defence relied upon in the Court below. The objection was taken that—as laid down in *Rogerson* v. *Meyer* (2, Menzies, 49)—the defendant ought to have pleaded the *beneficium excussionis* before litiscontestation, and not merely to have given notice that he would claim the benefit in case he should fail in his plea by which he put the plaintiff to the proof of suretyship. I am inclined to agree with the Court below that the objection, although technical, was a good one. The right of claiming that the principal debtor should be first excussed is a benefit which the surety should avail himself of at the proper time and in the proper manner. It is not enough for the surety to give notice that after the suretyship has been proved he will claim the benefit, but he should *in initio litis* take the exception that the principal debtor should be excussed before any claim is made on him. Until such exception is taken the creditor is perfectly justified in suing the surety instead of the principal debtor, and it is not too much to expect from a surety that he should take the exception unconditionally, before he puts the creditor to the trouble and expense of proving the contract of suretyship. The appeal must therefore be dismissed with costs.

[Appellant's Attorney: G. Trollip; Respondents in default.]

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

APPEALS.

REX v. MZIMBA. { 1903. Nov. 26th.

This was an appeal against a judgment of the Eastern Districts Court, to which the prisoner had been committed

by the Resident Magistrate of Stutterheim. The prisoner (a native) had been convicted of the crime of sheep stealing and sentenced.

The grounds of the appeal were: "That there is no evidence beyond that of an accomplice that the sheep had been slaughtered; that taking the carcase of a dead sheep is not a crime under the Act 35 of 1893, that the evidence of Inspector Wilson was inadmissible inasmuch as he did not caution the prisoner upon his arrest; and, generally, that the evidence for the Crown did not justify a conviction." Both the prisoner and his wife were arrested on the charge of being concerned in the theft, and put on their trial.

The evidence against the prisoners was to the effect that the sheep's throat had been cut, and that one of the witnesses, another native, helped to skin the animal. The male prisoner and his wife cooked the meat in the hut occupied by the natives in the service of the complainant (Ferdinand Steinhoffel). A pool of blood was found, which had recently been covered up. Both Mzimba and his wife were arrested. The male prisoner, who was the shepherd, denied that he killed the sheep, and declared that it died, and that he afterwards skinned it, as he understood there was trouble when a sheep was reported to be dead to his master. The Magistrate found the male prisoner guilty, and sentenced him to 12 months' imprisonment with hard labour, and to receive 20 lashes, and to pay 20s., the value of the sheep claimed by the complainant. The female prisoner was acquitted.

Mr. Gardiner for the appellant; Mr. Joubert for the Crown.

Mr. Gardiner said that the Act under which the prosecution was brought was an exceptional Act, inasmuch as it threw the onus of proof on the defendant. In support of this view counsel quoted section 28 of the Act, under which, he said, a person found in possession of stock was called upon to give an explanation of that stock, but the first thing the Crown had to prove was that he was in possession of stock. A definition of stock was given in section 2 of the Act, and set out the particular stock referred to, and went on, "and a slaughtered carcase or portion of a slaughtered carcase of any such stock." It lay upon the Crown before they cast the onus on the prisoner to prove that the prisoner was in possession of slaughtered meat. The prisoner's statement was that this was a sheep that had died. If the sheep had died, then the prisoner was not chargeable under the Act. There was the evidence of Bly, but he was an accomplice, as he admitted that he took part in the skinning, and that he ate some of the meat. If one left out the evidence of Bly, there was no evidence that a crime had been committed. Bly was clearly an accomplice, and, therefore, his evidence should be regarded by the Court with great suspicion.

[De Villiers, C.J.: What is a slaughtered sheep? Must its throat be cut?]

I should say a death brought about by human violence, or even by animal violence.

[De Villiers, C.J.: I think if you give a strict definition to "slaughter" it means cutting the throat. You don't slaughter a sheep if you throttle it, do you?]

I should say that a "slaughtered sheep" is not a sheep that has died a natural death. Counsel proceeded to urge that the evidence of the police inspector (Wilson) should be received by the Court with the greatest caution. Inspector Wilson seemed to have a peculiar view of his duties, and to think that the prisoner was called upon to account to him for possession of the sheep. Apart from Wilson's evidence, he contended that there was not sufficient evidence to convict. Wilson practically extorted a confession from the prisoner. Then if the conviction were upheld, he should submit that the punishment inflicted was excessive according to what was prescribed by the Act.

Without calling upon Mr. Joubert to address the Court,

De Villiers, C.J.: There is no ground either for disturbing the finding of the Magistrate or the finding of the Eastern District Court. The accused was charged with the theft of a sheep under the provisions of the Act of 1893. It was open, therefore, for the Magistrate to pass sentence upon the prisoner if he found him guilty in terms of that Act. But the object of the Act was not to prevent evidence being given against the prisoner so charged, except in terms of the provisions of the Act. Any evidence could be given which, under the ordinary law of the country, would

be sufficient to convict the prisoner of theft. What was the evidence given in this case? Steinhoffel, the owner, alleged that his sheep had been stolen, he alleged moreover that he went to the prisoner's hut shortly after the sheep had been stolen, and there he found the head of the sheep in the possession of the prisoner. He also found the paunch of the sheep warm still in a bag, which was found near the prisoner's hut. The prisoner, therefore, was found in possession of stolen property, and the ordinary rule is that the onus in such a case lies upon the accused to give a satisfactory explanation as to how he came into possession of the stolen property. Now, what is the prisoner's explanation? He says he found a dead sheep, but the Court would not believe that, and there was ample evidence to justify the Court in disbelieving his statement. I need not go into the whole of the evidence; it is sufficient to say that there was ample evidence for refusing to accept his explanation. Counsel for the prisoner, however, argued as if the onus were the other way, as if the onus lay upon the prosecution to prove that the sheep had actually been slaughtered. In my opinion, no such onus is thrown upon him in the ordinary rule of the Colony. If a man's sheep is stolen and he finds the sheep in the possession of another person, he is justified in calling upon that person to explain how he came into possession, and the evidence is on that point wholly unsatisfactory. But, then, it is said that the police constable extracted a confession from the accused, and that he had no right to demand an explanation from him. It is not necessary to go into that point, because, quite independently of any confession made by the accused to the police constable, there was an ample evidence to justify the Magistrate in finding that the prisoner had stolen the sheep. For these reasons, I am opinion that the appeal should be dismissed.

Buchanan, J., concurred.

REX V. MAWABE.

Native Marriage — Polygamy — Prohibited degrees.

Where native polygamous marriages are recognized as legal, a man may lawfully marry the widow of his maternal uncle and (semble) *may contract any marriage recognized by Native Custom, provided such custom be not contrary to the natural law.*

This matter came on for appeal on a point reserved for the High Court of Southern Rhodesia in a prosecution for alleged murder, before Mr. Justice Vintcent.

The case stated was in the following terms: "Question reserved for the consideration of the Supreme Court of the Cape Colony under section 63 of the Southern Rhodesia Order in Council, 1898: The accused Mawabe was tried at the Criminal Sessions of the High Court of Southern Rhodesia, held at Bulawayo on the 7th May before me, for the crime of murder, and was found guilty of culpable homicide and sentenced to pay a fine of £5, or in default of payment to undergo imprisonment with hard labour for a period of one month subject to the decision of the Supreme Court of the Cape Colony upon the question hereinafter referred to, reserved at the trial. The accused, who is a native of Matabeleland, has two wives, Tjona and Marekwa—to whom he was married in accordance with native custom. Tjona is the elder wife in point of date of marriage. Marekwa was, before her marriage to accused, the widow of the brother of accused's mother. The relationship between the accused and Marekwa is that of affinity only. Marekwa was adduced as a witness for the prosecution. Objection was raised by counsel for accused to the admission of this woman's evidence on the ground that she is the legal wife of the accused. After having heard evidence as to the relationship of the parties and argument, I allowed her evidence to be led, but reserved the question of her competency as a witness for the prosecution for the consideration of the Supreme Court. It is clear that polygamous marriages are recognised by native law or custom, and that the taking to wife by a nephew of the widow of his maternal uncle is recognised by such law or custom. If, in any civil case between natives, a question arises as to the effect of a marriage contracted according to native law or custom by a native

in the lifetime of one or more wives married to him according to native law or custom, the Court may treat such marriage as valid for all civil purposes in so far as polygamous marriages are recognised by the said native law or custom (vide section 51 of Southern Rhodesia Order in Council, 1898). My reason for allowing her evidence to be led was that, while holding that we must recognise native polygamous marriages if such be recognised by native custom, I did not consider this particular marriage valid in view of the relationship between the accused and Marekwa; in other words, I held that, where in a native marriage it is proved that the relationship between the parties is such that by our common law marriage between them is prohibited, our Courts should refuse to recognise the marriage even though it is valid according to native law or custom. According to the case of *Mills* v. *The Acting Resident Magistrate (Cape)* (11 Sheil's Reports, page 438), prior to Act 40 of 1892 marriage between a man and the widow of his late father's brother was prohibited—Act 40 of 1892 is not in force in Southern Rhodesia. If Marekwa's evidence be eliminated, the evidence for the prosecution is not sufficient to warrant a conviction. The question reserved for consideration is whether, under the circumstances, this woman was a competent witness for the prosecution? If the question is answered affirmatively, the conviction stands—if negatively the conviction is bad."

Mr. J. E. de Villiers in support of the point reserved; Mr. Pyemont for the Solicitor-General of Southern Rhodesia.

Mr. De Villiers quoted from the Rhodesian Order in Council, section 49, subsection 2, and said it was quite clear that the Colonial Amendment Act No. 40, 1890, did not apply to Rhodesia, and that by the Roman-Dutch law and the common law of the Colony as it then existed, marriage to the widow of one's deceased uncle was invalid as coming within the prohibited degrees. That would be the law if the section had stood by itself, but in section 50 it was provided that in civil matters between natives the High Court and the Civil Court should be guided by native law or custom so far as that law or custom was not repugnant to natural justice or morality. It appeared from the statement of the Judge that a marriage with the widow of one's maternal uncle was recognised by native law or custom. He submitted that that law was not "repugnant to natural justice or morality," and that the principle which was adopted in regard to civil matters should be applied to the law of evidence in a criminal matter such as this, because, after all, the civil law was the law that regulated marriage.

Mr. Pyemont addressed the Court in support of the theory that the woman was not prisoner's lawful wife, and that her evidence was admissible.

De Villiers, C.J.: By the law of this colony, as it existed before the Order in Council was framed, a wife was not competent or compellable to give evidence in a criminal case, for or against her husband. The only question, therefore, in the present case is whether Marekwa was or was not the wife of the prisoner, Mawaba. If she was his wife, her evidence was not admissible; if she was not, her evidence was admissible. The judge, in his reasons, says: "My reason for allowing her evidence to be led was that while holding that we must recognise the native polygamous marriages, if such be recognised by native custom. I did not consider this particular marriage valid in view of the relationship between the accused and Marekwa." It is clear, therefore, that in his opinion, but for the relationship between the parties, the marriage was legal, and the only point for this Court to consider is whether that relationship is or is not a bar to the legality of the marriage. Now, upon this point I think that we must hold that the marriage is legal. If it was legal, notwithstanding its polygamous nature, then it can only be because of native customs being introduced and if native customs recognise polygamous marriage I do not see why these customs should not be introduced, unless they are contrary to natural law. I am not prepared, for instance, to say that if there was a native custom that a man may marry his own daughter the Court would have held that that was not contrary to all natural law, that the Court would hold that that would be a legal marriage. The Court could not well hold that a marriage with the widow of the uncle is contrary to all natural law, seeing that in this colony the marriage of a man with his deceased

wife's sister is considered as a lawful marriage. The Court has also held in the case of Wills that since the Act allowed such a marriage it is also lawful for a man to marry the widow of his deceased brother. I think that the Court should have held that this marriage was legal, notwithstanding that it was a marriage of a nephew with the widow of his deceased uncle. I think, therefore, that the evidence was not admissible, and the point reserved ought to be answered in favour of the objection. The Court will direct that the judgment be set aside notwithstanding the verdict.

Buchanan, J., concurred, and said that he would like to add that this decision was based upon the Order in Council in force in Rhodesia, that was the statutory enactment for that country. It did not necessarily apply to this country, there being no similar Statute in this country.

REX V. SIMMONS AND WILLIAMS. { 1903. Nov. 26th. „ 27th.

Auctioneer—Principal and agent Breach of trust — Culpable insolvency — Insolvent Ordinance.

An auctioneer who does not within a reasonable time pay over to his principal money realised by him on behalf of his principal commits a breach of trust and if he becomes insolvent without having paid the money he is guilty of culpable insolvency in having incurred a debt by reason of a breach of trust.

This was an appeal on a point reserved by Mr. Justice Watermeyer in the High Court of Matabeleland in a case in which the appellants were criminally prosecuted for culpable insolvency.

From the record in the Court below it appeared that the appellants were auctioneers, and under six counts they were indicted for incurring a debt by breach of trust, by reason of having wrongfully appropriated the proceeds of a sale of four horses, the property of the Native Affairs Department. The jury brought in a verdict that the accused were guilty of having failed to pay over the money to the persons who authorised them to sell the horses. The Judge directed the jury that that was tantamount to a verdict of guilty of breach of trust. Counsel for the accused objected, and the following point was reserved for the decision of the Court of Appeal: "Whether an auctioneer, who has sold goods belonging to a client either at public auction or by private treaty as principal, without, at the time of the sale, disclosing the names of the seller or purchaser, can be indicted for culpable insolvency for incurring a debt by reason of a breach of trust, when it is shown that subsequent to the date of sale he had received payment from the purchaser, but had wilfully neglected to pay over to his client." The Judge did not comment on the point reserved, but said that the indictment itself sufficiently placed the point before the Supreme Court. The estate of the appellants, who traded as Simmons and Williams, was sequestrated on the 17th March, 1903, at Salisbury, and on January 11, 22nd March, and 5th April they received from the Native Affairs Department, for the purpose of sale, four horses. The horses were sold for £123, and the appellants failed to pay over the sum of £53, being part of the proceeds of the said sale.

Mr. Close for the appellants; Mr. Pyemont for the Attorney-General of Matabeleland.

Mr. Close said this case seemed to him to be of some importance to determine what the meaning of the crime was. The crime, he submitted, was loosely and vaguely defined therein as the incurring of a debt by reason of a breach of trust. Counsel discussed the nature of trusts. He was not aware of any convictions for culpable insolvency by reason of a breach of trust. He submitted that the debt was an ordinary civil liability. The auctioneer took the money in the ordinary way from the buyer. He was not responsible for the pieces of money just he received from the buyer to the seller. He contended that the appellants had not committed such a breach of trust as to amount to a crime under the Criminal Law Amendment Ordinance.

Mr. Pyemont said that the question had been asked what was a breach of trust. His definition was that it was a breach of any duty thrown upon a man

by his fiduciary relationship. He submitted that there was a fiduciary relationship between an auctioneer to whom goods were entrusted for sale and the person who employed him.

Cur. Adv. Vult.

Postea (November 27):

De Villiers, C.J.: This is an appeal from the High Court of Southern Rhodesia, which comes before this Court under the following circumstances: The prisoners were tried for culpable insolvency, the culpable insolvency alleged consisting in incurring a debt by reason of a breach of trust. The jury returned the following verdict: "The accused, having received the money, specified in such counts, wrongfully and unlawfully failed to pay over the same." The Court thereupon directed the jury that this amounted to a verdict of guilty on those counts, and they thereupon returned a verdict of guilty. Before sentence was passed, counsel for the accused objected to the finding of the jury, and asked that the point of law be reserved for the consideration of the Supreme Court. The following point of law is therefore reserved: "Whether an auctioneer, who has sold goods belonging to a client, either at public auction or by private treaty as principal, without, at the time of the sale, disclosing the names of the seller or purchaser, can be indicted for culpable insolvency for incurring a debt by reason of a breach of trust, when it is shown that subsequent to the date of sale he had received payment from the purchaser, but had wilfully neglected to pay over to his client." The question therefore arises, what is the duty of an auctioneer on receiving the proceeds of a sale? There can be no doubt that it is his duty, within a reasonable time, if not immediately, to pay over the proceeds to his principal. If he wilfully neglects to perform this duty, I am of opinion that he is guilty of a breach of trust. The question reserved distinctly says that the accused in the present case wilfully neglected to pay over to his client, and in my opinion, therefore, such wilful neglect was a breach of trust. Next, how does this debt arise? It is urged on behalf of the appellant that the debt arises only from the receipt of the money. In my opinion, however, the two should be connected. The debt arises from the receipt of the money, and the non-payment of that money to the principal. If the non-payment of that money is a breach of trust, then, in my opinion, the debt is incurred by reason of a breach of trust. In the case which was cited by Mr. Pyemont, the case of *Crowther* v. *Elgood*, the duty of the auctioneer was incidentally considered by the Court of Appeal. It was there held that "an auctioneer is a person acting in a fiduciary capacity within the meaning of the Debtors' Act, 1869 (sec. 4, sub-sec. 3), and if he makes default in payment of the money produced by the sale of goods entrusted to him for sale when ordered to pay it by a Court of Equity, he is liable to attachment, whether he still holds the money or has parted with it." The remarks of Lord Justice Cotton have an important bearing upon the present case. "In the first place," said the judge, "was the appellant acting in a fiduciary capacity in the transaction? In my opinion he was. He was an auctioneer, and as such he held the goods in trust to sell them for the benefit of the person who entrusted them to him, and if any deposit was paid at the time of the sale, he held it in trust for the vendor. It was not, in fact, disputed that the auctioneer is in a fiduciary capacity as to the goods, and it appears to me to follow that when he has received the money produced by the sale he holds that as the money of his principal." That appears to me to be an accurate statement of the law of this colony also. The auctioneer holds the money as the money of his principal, and if he does not, within a reasonable time, pay the money to his principal, he incurs a debt by reason of his breach of trust. For these reasons, I am of opinion that the question reserved should be decided against the prisoners, and that the appeal should be dismissed.

Buchanan and Maasdorp, J.J., concurred.

[Appellant's Attorneys: Fairbridge, Arderne and Lawton.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

APPEALS.

REX V. INFINANA AND OTHERS. 1903. Nov. 27th.

Skins—Unlawful possession.

Six weeks after some natives had occupied a certain hut, which was burned down as soon as they left it, skins were found buried in the site on which the hut had stood.

Held, *that this was not sufficient evidence of possession of the skins by any of the natives.*

This was an appeal against a judgment of the Resident Magistrate of Matatiele, brought by four natives, Infinana, Dangatye, Mtowinski, and Kati.

The charge against the prisoners was of contravening the provisions of Act 35 of 1893, amended by Proclamation 109 of of 1900. They were found guilty, and sentenced to 12 months imprisonment, with hard labour, and to pay a fine of £5 each, or an additional three months' imprisonment. The charge was two-fold: (1) That they wrongfully and unlawfully stole one goat, the property of one Malifani; and (2) that they were wrongfully and unlawfully found in possession of two goat skins, which were found buried in a hut which they had occupied during the native ceremonies of Abakweta.

The Magistrate, in his reasons for judgment, said there was not sufficient evidence to establish the identity of Malifani's goat. The Court believed the evidence of the witnesses for the prosecution; there were minor discrepancies, which, however, were not considered sufficient to make bad the evidence given.

Mr. Benjamin for appellants, Mr. Joubert for the Crown.

De Villiers, C.J. intimated that the Court would first like to hear Mr. Joubert.

Mr. Joubert said he understood that the point made by the appellants was that there was no evidence of possession. The facts deposed to by the witnesses were found to be proved. Taking the evidence as proved, was there not sufficient evidence of possession? The main facts proved were that in May the complainant lost a goat; that in that same month or before he lost the goat, the accused occupied this hut, and that, after the accused had left the hut, the skin belonging to this goat was found buried. Counsel contended that the surrounding circumstances warranted the Court in believing that the skins found there were buried there during the occupancy of the accused.

Mr. Benjamin was not called upon.

De Villiers, C.J.: The charge against the prisoners was that of having been found wrongfully and unlawfully in possession of certain goat skins. Now, what is the evidence to support the charge? That the four prisoners, along with three others, had occupied a certain hut for the purpose of Abakweta, and that, between six weeks and two months after, the hut had been burned down, and they had left it, certain goat skins are found buried there. There is no evidence whatever of possession on their part. It is quite consistent with the whole of this evidence that these skins may have been buried there after the hut had been burned down. If persons act skilfully, they might bury the skins without allowing any of the ashes which were lying about on the ground to fall into the holes. The absence of ashes is the reason upon which the witnesses for the prosecution rely for stating that the hut was burnt down after the burial of these skins. But even if the skins had been buried in the hut while the men were there, it would not necessarily follow that every one of these seven men must be held to be in possession of the skins. There should be some evidence given to connect these men with the theft, that they partook of the meat, or took part in the cooking or some evidence connecting them with the possession of these skins, which were two months afterwards found buried. The Act certainly is not intended to apply to a case of this kind, and to justify the Court in holding that there was possession under circumstances

like the present. The appeal must, therefore, be allowed, and the conviction quashed.

Buchanan, J. said he concurred. There was no actual possession, and there could not be said to be constructive possession.

[Appellants' Attorneys: Findlay and Tait.]

REX v. BILLINKIN. { 1903. Nov. 27th.

Liquor licence — Condition — Natives — Illegal proclamation.

The Licensing Court of K. granted a licence to the appellant subject to the provisions of a Proclamation issued by the Governor, prohibiting the sale of liquor to natives.

Held, *that the condition imposed by the licence amounted to a prohibition to sell to natives, and that as such prohibition could legally have been imposed independently of the Proclamation, the illegality or otherwise of such Proclamation could not affect the question whether the appellant could legally sell liquor to natives.*

This matter came up for review at the instance of the defendant upon a conviction of the Resident Magistrate for King William's Town under the Liquor Licensing Act. Mr. Benjamin was for the appellant; Mr. Nightingale was for the Crown.

Mr. Benjamin said that the summons called upon the Resident Magistrate for King William's Town to produce the records and all proceedings in the case of Rex and Abram Billinkin. The defendant was charged with the crime of contravening section 22 of the Act 28 of 1883, in that on or about the 11th day of April last, he being a licensed dealer in wine and spirits, did wrongfully and unlawfully sell one bottle and one half-bottle of brandy to an aboriginal native within the proclaimed area of King William's Town. The defendant was found guilty, and sentenced to pay a fine of £50, or in default, six months' imprisonment with hard labour, licence to be forfeited, and accused disqualified to hold a retail wine and spirit licence for a period of three years. The said proceedings were brought on the 19th June last for review, before the Hon. Mr. Justice Sheil, who certified the same to be in accordance with real and substantial justice. Mr. Benjamin contended that the Magistrate had no jurisdiction in the matter, that the Proclamation was unlawful, and that the proceedings were irregular.

Without calling upon Mr. Nightingale,

De Villiers, C.J.: The summons in this case alleges two grounds of review — first of all, that the Magistrate acted beyond his jurisdiction, and secondly, that the proceedings were wholly irregular. In regard to the first of these objections, the Magistrate clearly had jurisdiction to decide whether there was a contravention of section 22 of the Act 28 of 1883. In regard to the second objection I fail to see that the proceedings were grossly irregular. The Magistrate may have made a mistake in point of law, but that does not constitute a gross irregularity. Probably the Magistrate was wrong in allowing the prosecution under one section of the Act, instead of under another, and if this proceeding had been by way of appeal, then the Court would have had to consider whether the Magistrate was justified in convicting under the 22nd section of the Act. It is by no means clear that he would not have been justified in convicting under another section of the Act. If the defendant had not taken the licence subject to these provisions, it would have been competent for the Licensing Court to say: "We will give you a licence, subject to the ordinary condition that you shall not sell to the natives." The Licensing Court is put off its guard, it issues its licence subject to the Proclamation, and then the accused goes on selling contrary to the Proclamation. The condition imposed really amounted to a prohibition to sell to natives, and as such a prohibition could be imposed independently of the Proclamation, the illegality or otherwise of the Proclamation cannot affect the question whether

the defendant could legally sell liquor to natives. He sold liquor contrary to the conditions of his licence, and the appeal against the conviction must be dismissed.

Buchanan, J., concurred.

REX V. CLARENCE.

Remittal of cases by Attorney-General—Section 29 of Act 3 of 1861—Reading of evidence taken at preparatory examination.

The reading at the trial of a case remitted to a Resident Magistrate of depositions taken at a preparatory examination, is left to the discretion of such Magistrate by the 29th section of Act 3 of 1861, but such discretion must be judicially exercised.

If at the trial the accused pleaded guilty and the evidence taken at the preparatory examination establishes such guilt, it would be a judicial exercise of the Magistsate's discretion not to read the evidence aloud in the presence of the accused.

This was an appeal against a judgment of the Resident Magistrate of Sutherland, who had convicted the appellant Clarence of the crime of stealing £103 9s., the property of a farmer. Mr. Gardiner was for appellant; Mr. Joubert was for the Crown.

Mr. Gardiner said that the ground of appeal was that the conviction and sentence were contrary to law, inasmuch as the case, having been remitted by the Attorney-General to the said Resident Magistrate under Act 43 of 1885, and his attention having been drawn to section 29 of the Act 3 of 1861, the Resident Magistrate having taken the preparatory examination, although at the trial the prisoner pleaded guilty, the sentence aforesaid was passed without the evidence having been read over to the prisoner; that the said proceedings were irregular, and contrary to law. The charge against the prisoner was that on the 11th September he did wrongfully and unlawfully steal a sum of £103 9s., the property or in the lawful possession of one Gert Johannes Nel, a farmer. The preliminary examination was taken, and at that preliminary examination the accused did not admit his guilt. The accused said he reserved his defence. The prisoner was committed for trial, and the case was remitted by the Attorney-General in the following letter: "I have the honour to remit this case to the Court of the R.M., under Act 43 of 1885, and in doing so to draw your attention to section 29, Act 3 of 1861." He was then brought up before the same Magistrate, and put in a statement in which he pleaded guilty. The Magistrate found him guilty, and sentenced him, but the Magistrate did not comply with the provisions of section 29, Act 3 of 1861, and did not read over the evidence to him, as he (counsel) should show he was required to do by law. The Magistrate, in enclosing the record, said that he had to express his regret for the error that had occurred in using the wrong charge form. It was after the case was over that the attorney for the defence drew his attention to it. Counsel went on to say that it was important in this case to notice that the prisoner, at the preparatory examination, did not admit his guilt.

De Villiers, C.J.: A preliminary examination was taken against the accused for theft before the Resident Magistrate of Sutherland. The papers were sent to the Attorney-General, who then remitted the case to the Resident Magistrate of Sutherland. The trial accordingly took place before the same magistrate who had taken the preliminary examination. The prisoner was informed that the case had been remitted, and he pleaded guilty. The record proceeds thus: Mr. Attorney Marais appears on behalf of the prisoner, but does not intend to call any witnesses for the defence, and puts in a statement by prisoner. The statement is as follows: "I, France Clarence, charged with the crime of theft, hereby admit my guilt in having done the regrettable deed of taking money belonging to another person. It was in an hour of great temptation to which I succumbed. I throw myself upon the leniency of the Court, and plead for mercy, as this is my first offence."

Thereupon sentence is passed, and apparently a lenient sentence, considering the amount which he admitted to have stolen. Now, however, there is an appeal against that decision on the ground that the Magistrate did not read over to the prisoner, and in the presence of the prisoner, the evidence given in the preparatory examination. Reliance has been placed upon the case of the *Queen* v. *Strydom* (1 Juta 60), where undoubtedly this Court held that a simple plea of guilty in a Magistrate's Court, without any corroborative evidence will not justify a Magistrate in convicting a prisoner. In that case there was no evidence whatever beyond the mere admission of the prisoner, and the Court then, following previous decisions, held that that was not enough, and that there ought to be some evidence upon oath that a crime had been committed. In the remarks made by me it was said: "It was stated that before the Superior Courts the confession of a prisoner was continually taken, and upon that confession the prisoner was convicted, and sentenced, but no judge would accept the plea, or at all events sentence the prisoner, until he had been satisfied that the crime with which the prisoner stood charged had actually been committed." But how does he satisfy himself? From reading the preparatory examination, where the evidence is taken on oath. Then being so satisfied, he sentences the prisoner. Then the judgment goes on: "In fact, there can be no committal of a prisoner for trial in a superior court unless the Magistrate and the Attorney-General, or private prosecutor were firmly convinced that a crime had been committed. Even with all these safeguards every judge, before he accepted a plea of guilty, or, at all events, before he sentenced a prisoner, took care to ascertain from the preliminary examinations whether the crime had actually been committed." But then reliance is placed upon the 29th section of the Act of 1861, to which the attention of the Magistrate was directed by the Attorney-General. The provision is as follows: "Cases remitted by the Attorney-General to Courts of the Magistrate shall be proceeded with in Courts in like manner in all respects as if no preparatory examination had been previously taken, save and except that when the Magistrate trying such case shall himself be the person before whom the preparatory examination was taken it shall not be imperative on him to recall any witness, and it shall be competent and sufficient to read as evidence the deposition of such witness." Admitting, then, that if the accused pleads not guilty the evidence should be read aloud in his presence, it does not follow that if the accused pleads guilty the same course is necessary. The section enacts that it shall be competent and sufficient to read the evidence, and thus leaves a discretion with the Magistrate. That discretion would, perhaps, not be properly exercised if on a plea of not guilty the Magistrate were to find the accused guilty without reading the evidence previously taken. On a plea of guilty, however, it appears to me sufficient that there should appear on the record evidence on oath that the accused had committed the offence, and such evidence there certainly was in the present case. For these reasons I think that the appeal should be dismissed.

Buchanan, J., concurred, and added that he thought that the learned Judge who sat in the case of *Rex* v. Mpala and others (Mr. Justice Kotze), was not aware of the practice of this Court. "I know," added his lordship, "that the practice has been to confirm these cases constantly."

SUPREME COURT

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D. (Chief Justice), and the Hon. Mr. Justice MAASDORP.]

HUGO v. HUGO. { 1903. Nov. 30th

This was an application by Elizabeth Hugo, of the Paarl, for an order declaring her husband, Francois Jacobus Hugo, incapable of managing his affairs, and appointing applicant curator of his person and property.

Elizabeth Hugo, the applicant, stated that her husband was in a weak state

of mind, and was not fit to take the charge of his business. He was blind.

Dr. Crakowski said he had attended the respondent during the past two years. He had treated the respondent for paralysis. Witness did not think he was capable of looking after his own affairs. Respondent was suffering from mental weakness, with partial paralysis.

By the Court: He would not say that the case was hopeless.

Mr. Nicholson, Resident Magistrate at the Paarl, in an affidavit, said that, as *curator ad litem*, he had seen the respondent, who he found was quite willing that the management of his affairs should be entrusted to his wife. He was of a weak intellect, though, in deponent's opinion, by no means insane. The respondent's sight was failing. In deponent's opinion, it would be for the respondent's benefit that the management of his affairs should be taken out of his hands.

On the motion of Mr. Benjamin order was granted, declaring the respondent incapable of managing his own affairs, and appointing Mrs. Hugo as *curator bonis*, with leave to the defendant to apply to be released from curatorship, costs of the application to come out of the estate.

Ex parte HURD.

Mr. Buchanan said that this matter had previously been before the Court, but had been ordered to stand over pending the production of further evidence of the petitioner's identity. The petitioner applied for leave to have his correct name entered in certain documents, including a transfer deed, mortgage bond, and an ante-nuptial contract. His name at present appeared as Sidney Hurd—by which name he was commonly known—whereas his correct name was Herbert Hurd. Counsel read several affidavits as to identity and the entry in the documents at present.

Order granted as prayed.

REX V. RUBINSTEIN.

Mr. Gardiner moved for leave for this matter, which was an appeal against a judgment of the Assistant Resident Magistrate of the Cape (Mr. C. W. Broers), to be set down for the 12th December, or such other date as the Court may direct. The affidavit of an articled clerk in the employ of the defendant's attorneys (Messrs. Friedlander and Du Toit) stated that the defendant was tried on the 20th October last on a charge of theft by pocket-picking, and sentenced to three months' hard labour, and the infliction of fifteen lashes. Some 37 days had now elapsed out of the 41 allowed, and it was impossible to set down the matter within the required period, because the term was now over. The defendant was in gaol, and had been prevented from bringing the appeal earlier, owing to lack of funds. Counsel quoted the case of *Queen* v. *Botha* (9 C.T.R., 389), and *Queen* v. *Bruynes* (4, E.D.C., 258), in support of the application.

Mr. Nightingale (on behalf of the Crown) said that he did not wish to offer strenuous opposition to the application, inasmuch as the defendant had been delayed by want of funds, but he contended that the Court would be perfectly justified, following the principle laid down in other cases, in refusing the application. It was entirely a matter of grace. The defendant was convicted on the 11th May of this year, and sentenced to three months' imprisonment. He was discharged on the 10th August, and then on the 20th October he was convicted on a precisely similar offence in Cape Town.

De Villiers, C.J. said that he found, from reading the record of the case before the Magistrate, that the defendant pleaded guilty.

Mr. Gardiner said he thought there must be a mistake. He was very much surprised to hear that the defendant pleaded guilty.

De Villiers, C.J.: He took the purse out of her pocket, and dropped it. There will be no order given in this case.

REX V. RATOWSKY.

Appeal in criminal case—Leave to prosecute appeal.

The defendant, in a criminal case having allowed a full term of the Court to elapse after conviction, applied for leave to proceed with the appeal.

Held, *that in the absence of any statement of the grounds*

on which the special leave was asked for, the application should be refused.

Mr. Gardiner moved for leave for this appeal to be set down for hearing on the 12th December, or such other date as the Court might direct.

The Chief Justice said it was well that counsel should have an opportunity of reading the record before applications of this kind were made.

Mr. Gardiner said the applicant brought the appeal against a judgment passed in the Court of the Assistant Resident Magistrate of the Cape on the 15th October last. Defendant was charged before Mr. Broers with being the owner of certain premises used for immoral purposes, and he was sentenced to three months' imprisonment with hard labour. Counsel had been briefed, and notice served on the Attorney-General, and accepted, but subsequently the notice was returned. He (Mr. Gardiner) was not the counsel retained in the matter, and he made the application in the absence of Mr. Burton, who was away. The specified period of 41 days had elapsed, and, unless the Court would grant the defendant leave to appeal, he would be debarred from doing so, and compelled to serve his sentence. It was purely a matter of grace.

[De Villiers, C.J.: Is there no reason given for the application?]

A mistake on the part of the defendant's attorneys. Unless your lordship will grant him that indulgence, he will have to suffer for the mistake of his attorneys.

Mr. Nightingale (for the Crown) said that this matter differed from the last. The notice of appeal was served on the Attorney-General on the 24th of this month, and it was immediately returned to the applicant's attorneys with an explanation that they were debarred from setting down the appeal in the way they desired by the provisions of the Act. In regard to the merits of the affidavit which had been put in in support of the appeal, there was nothing whatever to show that it was compulsory on the Court to grant this application. The Court, of course, had the right to grant applications of this kind, but in the past it had always been satisfied that there were exceptional grounds. The applicant put this down to a mistake on the part of his attorneys, but that point had already been decided in the case of *Brink* v. *the Attorney-General*, decided in 1898, where it was held that neglect on the part of the defendant's attorneys was not a sufficient ground for grace to be exercised.

De Villiers, C.J.: There is no reason whatever stated in the notice of motion why this Court should grant special grace to the defendant. He has had ample time, the judgment was given on the 15th October, there has been the whole term intervening when the Court would have been prepared to hear the matter. Now counsel, without stating any ground, asks for leave to set down the appeal for a day which, according to the new rules of Court, the Court is supposed to be on vacation. If counsel had said that he had read the record and that there is good reason to believe that an appeal would be successful upon the merits, the Court might have strained a point in favour of the defendant, but there is nothing of the kind to show that there is a possibility or a probability of appeal being successful. Under these circumstances, I am of opinion that leave should not be granted.

Appellant's Attorneys, Friedlander and Du Toit.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

FRANCK V. SACHS, GINSBERG AND OTHERS. { 1903. Dec. 1st.

Common or party wall—Urban servitude—Interdict.

The respondents, with the view to erect a higher building, pulled down a building belonging to them, with the exception of a party wall, which was common to the applicant and

respondents' premises, and the consequence was that the common wall became less safe than it had been before, although it was sufficiently safe for the purpose of the applicant's building. The respondents having been directed by the Town Council either to render the common wall safe or to pull it down, proceeded to take it down.

Held, *that the applicant was entitled to an order restraining the further demolition of the common wall.*

Mr. M. de Villiers moved on behalf of Miss Franck, owner of Madeira House, for a rule *nisi* to be made absolute restraining the respondents from proceeding with the demolition of a party wall between Madeira House and Claridge's Hotel. Mr. Searle, K.C., was for the respondents, Sachs, Ginsberg, and Hoffmann; Mr. Schreiner, K.C., was for the Cape Town City Council.

From the affidavits it appeared that the Town Council acquired certain property in or near Staal Plein, known as Claridge's Hotel, for street improvement purposes, and that they disposed of the surplus ground to the other respondents, who proposed erecting a new hotel. The latter respondents, acting, as they said, under an order from the Town Council, commenced to pull down the party wall, because of its dangerous condition, whereupon the applicant objected, and moved the Supreme Court for an interdict. The applicant desired the wall to be reinstated in its former position, and contended that the acts of the respondents had rendered her building less secure.

Mr. Searle said that the affidavit of Mr. De Korte (who acted for applicant) was very bald, and that no case had been made out by the applicant for an interdict. It had not been stated to the Court that days before the application for a rule was made the Town Council had directed the wall to be removed as it was dangerous. Respondents had made a very satisfactory offer to the applicant. They stated that they intended to put up substantial buildings, and to re-build the said party wall substantially at their own expense, on condition that the proprietor of Madeira House should not be entitled to use the wall more than at present without contributing towards the cost. His clients did not intend to knock down any portion of the Madeira House property. They did nothing except what they were called upon to do by the Town Council, who had condemned the wall.

[De Villiers, C.J.: Are you prepared to give an undertaking that you will not interfere with any portion of this party wall?]

I understand that the portion which does not form part of Madeira House is demolished.

[De Villiers, C.J.: Yes, but what right had you to do it?]

We did it in answer to the Town Council's notice.

[De Villiers, C.J.: But then, you see, this wall became dangerous through removing a portion of your building.]

That may be, but I don't admit it.

De Villiers, C.J. said it was quite conceivable that a party wall might have been quite safe as long as other buildings were joining up to it, but when the other buildings were removed it became dangerous. What was there to prevent the respondents, Ginsberg and the others, from building another wall?

Mr. Searle said he did not see that the respondents were called upon to build another wall. What had happened was this, that no portion of Madeira House had been touched, and all that had been touched was a portion that formed the wall of Claridge's Hotel. The respondents did not intend to pull down any further portion of the wall. They recognised that they could not touch a portion of Madeira House in any way, and they did not intend to do so, unless they came to some arrangement with the applicant, or they should build a wall on their side of the party wall.

De Villiers, C.J. said if that were so it would simplify the matter a good deal, but the impression given by the affidavits of the respondents was that they would proceed with the destruction of the remainder of the wall in spite of the applicant.

Mr. Searle said he did not see how that impression could possibly have been drawn from the affidavits.

Mr. Schreiner said that the position of the Town Council was that they had simply performed a public duty in accordance with their regulations. They directed that this wall, which was a dangerous structure, should be taken down, and counsel thought it was very much to be regretted that this notice from the Town Council did not come before the Court when the rule *nisi* was granted. The City Engineer, in his affidavit, said that the wall was "in a ruinous state, or dangerous to the public, and the occupiers of the adjoining buildings." To interdict the Town Council from proceeding to do their duty was a thing the Court had never hitherto done so long as they were shown to have acted *bona fide*. The regulation under which the Council acted was No. 164, and was framed under the Act 26 of 1893. In this matter the Town Council, *qua* owner, had done nothing; they had simply acted as a Corporation with a public duty to perform. He contended that the motion was very premature, and that it would have been well if the applicants had approached the Council to see if some arrangement could be entered into whereby the wall could be rendered safe and preserved. The logical position was that the rule should be discharged, with costs as against the Town Council.

Mr. De Villiers said that his learned friend had complained that the motion was premature, but already a hole had been made in the lumber room of the Madeira House, of which the present occupier complained. If the wall had been put in a dangerous condition at all, it had been put into that condition by persons for whom the Town Council was responsible. He contended that the regulation under which the Town Council had proceeded did not apply to such a case as this. The applicant asked that the wall should be reinstated in its former position. A certain amount of damage had already been done, making that wall dangerous. His learned friend (Mr. Searle) seemed to forget this. He also forgot that, while they were prepared to arrive at a settlement, the respondents required the applicant to bear a portion of the expenses. He submitted that the applicant had been quite justified in moving for an interdict against the Town Council, who, through Messrs. Ginsberg and Co., had rendered unsafe a wall which had been quite secure.

De Villiers, C.J.: It appears from the affidavits that the Town Council of Cape Town is the registered owner of the premises known as Claridge's Hotel. According to the affidavit of Mr. Finch, the Town Clerk, the Town Council has sold so much of the site as is not required for improvements—that is to say, the portions of the property adjoining Madeira House—to the other respondents, on condition that they should pull down and rebuild the premises, and that, upon the execution of certain work thereon, transfer should be passed to them. In the fulfilment of the conditions so imposed upon the other respondents they proceeded to pull down what is admitted to be a party wall between the applicants' premises and the respondents' premises. They began by pulling down a party wall which does not form any portion of the support of the buildings of the applicant. But still it was a party wall, which the respondents, other than the Town Council at all events, had no right in any way to interfere with. In consequence of the pulling down of the remaining walls of Claridge's Hotel, the party wall in question became less safe than it had been before. I am not satisfied that it is so unsafe as to render the continued existence of Madeira House as a building unsafe, but this I am satisfied of, that it is in consequence of the removal of the walls which acted as buttresses to the party wall, that the party or common wall became less safe than it was before. The party wall being so rendered less safe the Corporation of Cape Town thereupon gave notice to the occupants of Claridge's Hotel, as well as Madeira House, calling upon them respectively to pull down this party wall. The applicant thereupon applied to a Judge in Chambers for an order restraining the respondents from continuing to pull down that party wall, and the question now is, whether the order which was then made, restraining the further demolition, should be made absolute. There is no serious dispute as to the law applicable in the matter. The rights of the owners of two adjoining properties in respect of a party wall which is common to both, although not strictly servi-

tudes, are generally treated in the books as urban servitudes. Without the consent of the one the other is not entitled to pull down the common wall unless, of course, the demolition becomes absolutely necessary for the protection of both properties. In the present case the evidence is wholly insufficient to prove such urgent necessity. It is true that the wall is not quite as safe as before, but it is quite safe enough for the applicant's purposes, and if it is not sufficiently safe for the respondent's purpose, it is because by demolishing the rest of their building they have removed the walls which have hitherto served as buttresses to the common wall. It is true also that the Town Council has directed the other respondents to render the common wall safe, or else to pull it down, but it is clear that they could render the wall perfectly safe by restoring the building to the condition in which it was before. This, however, is not what they intend doing, for their plan is to raise the height of their new building for which purpose the party wall would be insufficient. But surely they cannot effect their improvements at the risk and expense of their neighbours. Nothing would be easier than to build a proper wall on their own property, and next to the common wall. If, however, they choose to pull down a wall to which the applicant has a right equal to theirs, she is entitled, under the practice of this Court, to an order restraining such demolition, that being a more expeditious mode of relief than the ancient *cautio de damno infecto*. For these reasons I am of opinion that the order should be made absolute. It is said that there is no proof that the respondents intended to pull down any portion of the wall which serves as support of the premises of the applicant, but it is admitted that they began by pulling down the party wall which does not serve as such support, and the applicant was quite justified, on seeing this beginning of mischief, in coming to Court to prevent any extension of the mischief. It is said there was no intention on the part of the other respondents than the Town Council to pull down the rest of the wall, but, reading the correspondence carefully, I am not satisfied that it was not their intention ultimately to pull down these walls, even without the consent of the applicant. They would have preferred to have had their consent, they endeavoured to extract a consent, but a hint is given that even if she does not consent the thing would be done in some way or another. At all events, the fact that there was a beginning of the demolition by pulling down a portion of the wall was sufficient justification for the plaintiff to come into Court to prevent any further mischief being done. I am of opinion, therefore, that the rule should be made absolute as against the other respondents than the Town Council. As far as the Town Council is concerned, if that body had not been the owner of these premises, and had not entered into the contract to which I have just referred, I should certainly not have made any order against the Town Council, as the Court would not wish to interfere with their carrying out their regulations, but the Town Council appears in this case in a two-fold capacity. It is by the order of the Council that the alterations were made, and it is impossible to suppose that what was done was not done with the full consent of the Council. There is no allegation that it was not done with their consent, and it is impossible to believe that it could have been done without their knowledge. At any rate, it is part of their contract, according to Mr. Finch's own affidavit, that the respondent should pull down and rebuild the premises, and I consider, therefore, that the Town Council was properly made party with the respondent to the proceedings in this case, and should also be included in the interdict. The rule will, therefore, be made absolute with costs against both respondents.

Replying to Mr. Schreiner,

The Chief Justice added: The regulations were not mentioned at all in the affidavits before the Court, and, therefore, the Court is only now dealing with the Town Council in its capacity as the owner, and as the party who had authorised the demolition of the respondent's premises. Any interdict, therefore, will not affect any powers which the Town Council has under these regulations. In making this remark, I do not wish it to be supposed that, in my opinion, a case has arisen for the Town Council to pull down this wall under the regulations. The order of the Court will be that the rule

be made absolute with costs against both respondents, half the applicant's costs to be paid by the Town Council and the other half by the other respondents, without prejudice to the rights of the Town Council under their regulations.

[Applicant's Attorneys: J. C. De Korte; Respondent's Attorneys: Mc Intyre and Bisset.]

HARRISON V. HARRISON.

Mr. Benjamin (for the applicant) said that this was the return day of a rule *nisi* granted by the Chief Justice in Chambers calling on the respondent to show cause why he should not be restrained from parting with certain assets of the joint estate, pending the result of an action to be instituted by the plaintiff against the defendant; also an order appointing a receiver to receive the rents of the property belonging to the joint estate, and authorising the said receiver to pay to the plaintiff's attorneys £30 to enable her to proceed with the said action. Mr. Benjamin said that the replying affidavit of the defendant had only been handed to the applicant's attorneys this (Tuesday) morning, so that it would be necessary to apply for the matter to stand over to enable applicant to put in a replying affidavit. Applicant had attempted to come to a settlement for a separation, but without success, and applicant was penniless.

Mr. Alexander appeared for the defendant.

The matter was ordered to stand over till the 3rd inst.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice KOTZE.]

HARRISON V. HARRISON. { 1903. Dec. 3rd.

Mr. Benjamin moved for a rule *nisi* to be made final, restraining the respondent, William Edward Harrison, from in any way parting or dealing with the assets of the joint estate, and calling him to show cause why a receiver should not be appointed, and why he should not be directed to pay £30 to the petitioner's attorneys to enable her to institute an action for judicial separation, and a sum for the maintenance of the petitioner and her children. Mr. Alexander appeared for the respondent.

Mr. Benjamin read the petition which set out that the parties were married in community of property in Cape Town in 1881, and that a rule *nisi* had been granted by the Court requiring the respondent to pay to her attorneys £30 to enable her to institute an action for separation. This the respondent had failed to do. He had paid her £31, but said that the money was for household bills.

Mr. Alexander read the answering affidavit of the respondent, which stated that he paid £30 to the respondent on the 30th September to enable her to proceed with the action. He was quite willing to separate from the petitioner and to make her an allowance, but the amount that she specified was unreasonable. In a further affidavit the respondent said that he handed the money to one of his daughters at the house to be given to the plaintiff, who was then in bed, and to be used by her for the purposes of the action. He denied that he had ever evaded a settlement. He denied the plaintiff's allegations as to his cruelty and drunkenness, and squandering the estate, and said that it was owing to the violence of the plaintiff that he had been compelled to leave his house at Sea Point, where the plaintiff now resided and to take up his residence in Cape Town. The plaintiff was already amply provided for. Deponent was very unwilling that the estate should be realised at the present time, in consequence of the state of the money market, and he was of opinion that it would not realise more than half of what it was worth.

[De Villiers, C.J.: If he possesses this estate, it is the least he can do to give her £30.]

Your lordship ordered him previously to pay her £30, and he says that he has paid her that money. She now alleges that he gave her £31 for another purpose, to pay household bills, whereas he says in his affidavit that he pays all household bills himself.

Mr. Benjamin read a further affidavit by the petitioner, in which she said she believed that the estate to-day, notwithstanding the squandering by the defendant, was worth £12,000. She did not wish the estate to be realised immediately, but she said that, in the interests of herself and the children of the marriage, it should be realised by degrees. Owing to the drunken, dissolute habits of the respondent, there was great danger of the entire estate being dissipated.

Counsel submitted that inasmuch as the parties were married in community, and there would be a considerable sum due in the way of rent at the end of the year, which the defendant might dissipate, no injury would be done to the respondent if he were prevented from dealing with the assets of the joint estate.

De Villiers, C.J.: It is to be regretted that the parties did not come to an amicable arrangement, as the Court suggested when the matter was previously before it, and it is to be hoped that before next February the parties will have come to an arrangement, and an opportunity will be given to them, on the 12th, if they come to an arrangement, to have it made an order of Court. The Court will grant an interdict restraining the respondent from parting with any bonds or landed property belonging to the joint estate, pending an action to be instituted forthwith by applicant for judicial separation, the respondent to pay forthwith the sum of £30 to applicant's attorneys to enable her to proceed with the action, and a further sum of £30 per month, until the further order of Court, for the maintenance of the applicant and her children, first payment to be made on the 15th December next. As to the application for the appointment of a receiver, the Court is of opinion that this is not the proper stage for that to be done. The respondent, as the husband, is entitled to the administration of the estate until it has been clearly proved that he is not a fit and proper person to have such administration. Costs will be costs in the cause.

SUPREME COURT

CRIMINAL SESSIONS.

[Before the Hon. Mr. Justice KOTZE and a Jury.]

REX v. CONRAD COHEN AND FOUR OTHERS.

1903.
Dec. 9th.
" 10th.
" 11th.
" 12th.
" 13th.
" 14th.

An application to compel the Attorney-General to produce an affidavit made by a witness in a criminal case refused.

A Judge may, in the interests of justice, call a witness not summoned by either the Crown or the prisoner. Such witness may, with leave of the Judge, be cross-examined by counsel for the party against whom the witness has testified, but only in so far as the evidence of the witness is adverse and no further.

The accused were indicted for the theft of thirty-two tarpaulins and sixty-four sail-covers from the Imperial Ordnance Compound at Fort Knokke. At the trial it appeared that a witness, Charles Banks, had given the police certain important imformation. Banks was not called as a witness at the preparatory examination. He was subsequently arrested in Cape Town as a deserter from the South African Constabulary, a police force in which he was a private at Lydenburg, in the Transvaal. Banks was sent back to the Transvaal, where he was punished for desertion. At the request of his superior officer he made an affidavit in the Transvaal in connection with the above case of ***The King*** v. ***Cohen and Others***. This affidavit was sent to the Law Department, Cape Town. Banks was subsequently brought down to Cape Town under an escort to give evidence at the trial in the Supreme Court. On his arrival in Cape Town he made a statement which was reduced to writing,

and a copy of it was supplied to the legal advisers of the prisoners.

After the case for the Crown had been closed,

Mr. Wilkinson (for the prisoner Conrad Cohen) moved that an order be granted directing the Attorney-General to produce the affidavit made by Banks in the Transvaal.

Mr. Howell Jones (for the Crown) objected, and submitted that a bad precedent would be laid down if such an application were allowed.

Kotzé, J.: The affidavit in question is not an original affidavit upon which the arrest of Conrad Cohen, the prisoner on whose behalf the application is made, took place. No authority justifying such a course has been cited, and I must refuse the application.

At the conclusion of the evidence for the defence, Kotzé, J., who presided at the trial, intimated that he intended, in the interests of justice, if the jury so desired, to call as a witness one Drayson, who had not been summoned as a witness for the prosecution or the defence. The Jury expressed a wish that Drayson should be called. He was thereupon called and sworn, and questioned by the Court as to a certain cheque for £19, which had been put in by counsel for the prisoner Cohen, and which had been endorsed by Drayson, to whom it had been handed by Cohen.

Mr. Wilkinson then asked leave to cross-examine Drayson.

Kotzé, J.: As the witness has given certain answers which are adverse to the interests of the prisoner Cohen, I will allow him to be cross-examined, but only with regard to those answers, and no further. The matter is entirely in the discretion of the Presiding Judge, and I think it will be right and proper that an opportunity be given of cross-examining the witness upon what he has said.

SUPREME COURT

[Before the Chief Justice (the Right Honourable Sir J. H. DE VILLIERS P.C., K.C.M.G., LL.D.) and the Hon. Mr. Justice MAASDORP.]

ADMISSIONS. { 1903. Dec. 12th.

Mr. Schreiner, K.C., moved for the admission of Charles Herman Maasdorp as an attorney and notary.

Application granted and oath administered.

Mr. P. S. T. Jones moved for the admission of Harold Wm. Carolin as an attorney and notary.

Application granted, and oath administered.

Mr. Upington moved for the admission of Arthur Fincham Chaplin as an attorney and notary.

Application granted, oath to be taken before the Resident Magistrate of East London.

Mr. C. W. de Villiers moved for the admission of Arthur Wm. Monkhouse Norton as a conveyancer.

Application granted, oath to be taken before the Resident Magistrate of East London.

Mr. Buchanan moved for the admission of Rufus George Robert MacLeod as a conveyancer.

Application granted, and oath administered.

Mr. Benjamin moved for the admission of George Wm. Dillman as a conveyancer.

Application granted, and oath administered.

Mr. Benjamin moved for the admission of Louis Arthur Mybergh as a conveyancer.

Application granted, and oath administered.

Mr. Schreiner, K.C., moved for the admission of George Frederick Charles Williams as a conveyancer.

Application granted, and oath administered.

PROVISIONAL ROLL.

DOUGLAS AND DOUGLAS V. GLASS. { 1903. Dec. 12th. „ 17th.

Provisional order of sequestration —Return of *nulla bona*—Act of insolvency.

On the return day of a provisional order of sequestration a creditor of the defendant opposed the granting of a final order on the ground that the plaintiff was not a creditor. The plaintiff was a judgment creditor but the defence was that the judgment had been obtained by fraud and collusion.

Held, *that until the judgment was set aside it must be held to be valid, and thatas no proceedings had been taken to set it aside the plaintiff should be regarded as a lawful creditor.*

Mr. Buchanan moved for the final adjudication of the defendant's estate as insolvent, provisional order having been granted on the 14th October. It appeared that the defendant, Herbert Wm. Glass, had failed to satisfy a judgment of the Resident Magistrate of Maclear, given in favour of the petitioning creditors for £250.

Mr. Searle, K.C., on behalf of Francis Bros., opposed the application. He read the affidavit of Albert Wm. Francis, who stated that the debtor was indebted to his firm in the sum of £2,500. Francis Bros.' position was that the judgment was improperly obtained.

De Villiers, C.J., intimated that the case could not be gone into that day. The Court would be prepared to hear it on Thursday next.

Postea (December 17):

Mr. Buchanan stated that when the messenger sought to levy execution, the defendant said he had no money or property with which to satisfy the debt, nor could any goods or property be found by the said messenger. In consequence of the failure of the defendant to satisfy the said judgment, he had committed an act of insolvency.

Mr. Searle, K.C., said he appeared for the firm of Francis Bros., who were apparently the largest creditors of the defendant, and to whom, it appeared, Glass had made over practically the greater part of his property, on condition that they should pay all his debts, though this debt of the plaintiffs was not named at that time. Counsel read the affidavit of Albert W. Francis, which was to the effect that he was a member of the firm of Francis Bros., who were general merchants in the district of Maclear. They had had dealings with Glass, and on the 11th August last he owed them £2,500 more or less, as shown in the deed of sale to be hereafter referred to. In August last they were approached by the said Glass, with a view of raising a further sum of money. On that date a writ had been issued against Glass by one McKenzie for £400. As Glass was heavily indebted to deponent's firm, they made him an offer to purchase certain properties, both movables and immovables, belonging to him, and after satisfying his debts, to hand over any balance that there might be in their possession. On the 12th August a deed of sale was prepared and signed by the firm and the said Glass to give effect to this arrangement. After the deed had been signed, they received an application for the sum of £250, which would become due and payable to the plaintiffs, in terms of a certain agreement entered into between Douglas and Douglas and the debtor on the 28th May, 1903. Francis Bros. absolutely declined to have anything to do with that debt. Glass said that the money had not become due to the plaintiffs. Counsel explained that the agreement between the plaintiffs and the debtor was to the effect that a certain sum should be paid to Douglas in the event of a certain property being sold.

[De Villiers, C.J. (interposing): Has there been an act of insolvency? If there has been, what is the use of reading the affidavits?]

We say not. The question is whether the debt on which this suit was brought was really due.

[De Villiers, C.J.: Have they got judgment for the amount?]

Yes, he confessed judgment. We say there really was practically collusion be-

tween Glass and the petitioning creditors.

[De Villiers, C.J.: We must assume that the judgment was properly given.]

With great submission, not if we can prove that the return was not a proper one.

[De Villiers, C.J.: Now, upon the question of the debt; so long as that judgment stands, the debt stands.]

Then we may have to take action to set aside the judgment. We have had no opportunity up to the present.

[De Villiers, C.J.: The judgment stands, and somebady must first set it aside.]

The question is whether judgment was properly obtained, and whether there was a return of *nulla bona*. The object of our opposing the sequestration is this, that we have entered into this agreement to pay all the debts of Glass that we know of, and we have already paid debts of Glass amounting to several hundreds of pounds.

[De Villiers, C.J.: Were the plaintiffs parties to that arrangement?]

No, but it is common cause that we took over the property and agreed to pay the debts.

[De Villiers, C.J.: Are you prepared to give up your rights under that agreement?]

No, but we are quite willing to let the agreement go through and to pay all Glass's debts. We have already paid some of them.

Mr. Searle said he would proceed with the reading of the affidavits. The deponent, Francis, went on to say that with regard to the plaintiff's debt the defendant took up the position that no sale had taken place, and, therefore, the claim of Douglas could not have accrued. Deponent had reason to believe that the statement was a correct one. Interviews took place between deponent's firm and the plaintiffs in regard to his debt, but no arrangement was come to. When the deponent's firm applied for the transfer of the property of Glass into their name, defendant refused to sign the papers. Deponent's firm had paid £480 upon the writ issued against Glass at the instance of MacKenzie. Sales of Glass's property took place, at which the Douglass's were present. Deponent was satisfied that the petition was being presented with the connivance of the defendant. He now thought he could get more for his farms. Counsel also read affidavits by Hugh Taylor, Messenger of the Court of the R.M., at Maclear, and others. The Messenger, in his affidavit, said that Glass confessed judgment. Immediately on completion of the hearing, plaintiff's attorney took up the writ and handed it to deponent. He informed deponent that he would seek Glass, and that he could make the demand upon him. Deponent saw Glass who said that he had nothing, and deponent then made the usual return. Afterwards the attorneys of Francis Bros., pointed out certain property as belonging to the defendant, and on the Magistrate's advice he telegraphed asking where it was situated? Nothing was heard until a few days afterwards, when the Magistrate showed him a letter from the debtor, in which he said that the property belonged to his father-in-law, Mr. Stephenson. Counsel urged that the Messenger had not made diligent inquiry to find out whether the debtor had property, and for that reason the return was not a proper one, and the provisional order should therefore be discharged.

Mr. Buchanan (for petitioners): This raises quite a new point. This offer is now made for the first time, and I am not instructed either to accept it or to refuse it.

[De Villiers, C.J.: The affidavits do not touch the point; if a return of *nulla bona* has been made we cannot go behind that.]

Surely it is open to us to show that the return was incorrect. It does not follow that a man is insolvent because he does not point out sufficient property to the messenger to satisfy the writ. Here Glass has a considerable amount of landed property. The same attorney was acting for Glass and for us; but now he tries to put us off. Surely this affords a strong presumption of collusion. The messenger ought to have made enquiry whether the property pointed out belonged to Glass or not. The messenger's own affidavit shows that he did not perform the duty imposed upon him by Section 4 of the Insolvent Ordinance. Only a few months before Glass confessed this debt, he wrote denying it. We are not bound to assume that the messenger's return is correct.

[De Villiers, C.J.: I think we are. Was there any sentence of a competent Court?]

Yes.

[De Villiers, C.J.: Did he point out sufficient property to satisfy the writ?]

He was not asked to do so. It was the duty of the messenger to enquire and to look after the property. He is bound to make diligent enquiries, and his own affidavit shows that he did not do this; in fact, it contradicts the terms of his return.

De Villiers, C.J.: If there have been fraud and collusion between the plaintiff and the defendant, any judgment which the Court may now give may still be set aside upon proof of such fraud and collusion. The question now to be decided is whether there has been an act of insolvency on the part of the defendant. The first objection raised is that the plaintiff was really no creditor at all. In my opinion, the Court is bound to assume that the plaintiff is a creditor. There can be no better proof of a debt than a judgment of the Magistrates' Court, or of this Court, and there stands on record the judgment of the Magistrates' Court for the plaintiff against the defendant. Until that judgment is set aside, we assume that it is a valid judgment. The plaintiff must, therefore, be assumed to be a creditor of the defendant. The act of insolvency relied upon is a return of *nulla bona*. I have the original return before me by Taylor, the Messenger of the Magistrates' Court: "On the 29th September, 1903, I made demand on the defendant, personally for payment of this sum and costs, but was informed that he had no money to pay with or property to realise, either in this district or elsewhere, and I certify that I made diligent and careful inquiries, and could not find any property to attach to pay the whole or any part of this judgment and costs." If the defendant himself had raised this objection, which is now raised by some creditors, it is quite clear that he would have failed because in every respect the terms of the Insolvent Ordinance have been complied with. One of the acts of insolvency is: "If the debtor, having against him a sentence of any competent Court being thereunto required, shall not satisfy the same or shall not point out to the officer charged with the execution thereof sufficient disposable property to satisfy the same, if it shall appear from the return made by such officer on his affidavit that he has not found sufficient disposable property to satisfy such sentence." Well, there is that return that he has not found it He now does state in an affidavit of his, made subsequently, not forming any part of that return by which alone the Court should be guided, that there appeared to be a desire on the part of the plaintiff that such return should be made. But, how does that affect the question of whether the return was properly made or not? The defendant's failure, under the circumstances, to satisfy the judgment was an act of insolvency upon which the estate was properly sequestrated. The provisional order must be made final, but as an offer has been made by the opposing creditors to pay the plaintiff's claim, the final order might be delayed for that purpose.

Mr. Searle: I was instructed, if the Court was against me, to make that offer. I have no instruction in the matter of costs.

[De Villiers, C.J.: Well, then, that may be considered, and then, of course, the Court might stay its hand, because the petitioner can have no interest beyond getting his debt.]

Mr. Buchanan: The attorneys of the plaintiffs are willing to consent to that upon payment of £250 in full, and, of course, all their costs.

Mr. Searle: I have no instructions as regards costs, but I suppose it will be better for me to take that upon myself.

De Villiers, C.J.: The Court will order that the provisional order be made final on the 12th January, 1904, unless the opposing creditor shall before that day pay to the plaintiffs the amount of the debt owing to the plaintiffs and their costs, including costs of this action, in which case the provisional order shall be discharged.

[Applicant's Attorneys: Syfret, Godlinton and Low; Respondent's Attorney: F. H. B. Moore.]

LITHMAN, LANDSBERG AND CO. v. SIERADZKI.

Mr. Simpson moved for provisional sentence on a certain promissory note for the sum of £66 9s. 9d. The note became due on November 7,

Order granted,

SMITH AND HOLDEN V. FOX.

Mr. Greer moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment of the Supreme Court for the sum of £33 16s. 11d., with interest and taxed costs.

Order granted.

BOSMAN, POWIS AND CO. V. WHYTE.

Mr. M. Bisset moved for provisional sentence on the sum of £53 13s., with interest from September, 1903, and costs. The amount became due under a bill of exchange, which was drawn on "W. H. Whyte," but the acceptance was signed "E. A. Whyte," and counsel was informed that they were one and the same person.

Order granted.

SPILHAUS AND CO. V. SALKWODIEN.

Mr. Close moved for a writ of civil imprisonment against the defendant upon an unsatisfied judgment of this Court.

Defendant did not appear.

Order granted.

FLETCHER'S WHOLESALE AND OTHERS V. GORDON. { 1903. Dec. 12th.

Mr. Struben moved for the provisional order for the sequestration of the defendant's estate to be made final.

Order granted.

ROWLAND HILL AND CO. V. KRYNAUW.

Mr. Struben moved for provisional sentence on eight separate promissory notes, amounting in all to £520 17s. 2d., less £243 9s. 2d. paid on account, and interest from the respective due dates at the rate of 6 per cent., less £51 11s. 10d. paid, and also for interest at the rate of 2 per cent. to be paid in addition in accordance with an agreement between the parties.

Order granted as prayed.

HOFFMAN V. BLACK.

Mr. Benjamin moved for a final order of sequestration of the defendant's estate. The provisional order was granted on the 19th November, 1903. The ground on which the provisional order was granted was that an agreement to submit to a deed of inspection had been broken.

Mr. Schreiner, K.C., for the defendant, opposed the application on the ground that his client had committed no act of insolvency, and the necessary requirements of the Act of 1884 had not been fulfilled. If the affidavits of the plaintiff were to be taken as new matter the defendant would require more time than Thursday to answer them, and if the right course, which he submitted was to exclude them altogether, was not acceded to, he would apply for a postponement until the 1st February next.

Mr. Benjamin said that the objection which the plaintiff had to the matter standing over was that the business of the defendant consisted of an extensive consignment of toys, which it was essential that the trustee should have power to dispose of at Christmas.

[De Villiers, C.J.: Couldn't the Court appoint a curator?]

Mr. Benjamin: Yes, my lord. Mr Gibson is at present acting as curator.

Mr. Schreiner suggested that Mr. E. R. Syfret's name should be coupled with Mr. Gibson's in order to make a fair representation to both parties.

[De Villiers, C.J.: For the purpose of selling toys surely one curator would be sufficient.]

Mr Schreiner: It is a large estate, my lord; the assets run into £5,000 or £6,000, and the debts amount to £4,000 or £5,000.

Mr. Benjamin pointed out that Mr. Gibson was already acquainted with the business.

De Villiers, C.J.: This case will stand over until next term. In the meanwhile, the estate should be realised for the benefit of all concerned, and as Mr. Gibson has already been appointed by the Master as *curator bonis*, the Court will authorise him to continue the business on behalf of the creditors. If the appointment had not already been made, the Court might have appointed two curators, but, as the appointment has been made, the person so appointed should realise the estate, and Mr. Gibson will therefore be authorised in the interval to continue the business.

TRUTER V. MCMULLEN.

Mr. M. Bisset moved for provisional sentence for £200 on a promissory note, together with interest and costs.

Order granted.

LITHMAN, LANDSBERG AND OTHERS V. GOLDSTEIN, CORKLAND AND CO.

Mr. Benjamin moved for the final adjudication of the defendants' estate as insolvent.

Order granted.

ADSHADE V. FREDERICKS.

Mr. C. W. de Villiers moved for provisional sentence for £2 1s., together with costs, amounting to £3 10s. 7d., on an unsatisfied judgment of the Resident Magistrate's Court at Swellendam, and also for the landed property set out in the summons to be declared executable.

Order granted, execution to be confined to one of the properties specified in the summons.

LANDSBERG V. WUSNACH.

Mr. Pyemont moved for provisional sentence for £108, interest due for the eighteen months, 1st January, 1902, to 30th June, 1903, at the rate of 6 per cent. upon the capital sum of £1,200 sterling, on a mortgage bond, dated 26th November, 1898.

Order granted.

ROBERTSON AND CO. V. HENDRICKS BROS.

Mr. P. S. T. Jones moved for judgment on a promissory note for £160 5s. 3d., due on the 15th November, with interest and costs.

Order granted.

CAPE MARINE SUBURBS V. STAPLES.

Mr. Benjamin moved for provisional sentence for £307 10s. upon certain conditions of sale, plaintiff tendering transfer of the property. The first instalment had been paid, but upon subsequent instalments the defendant was in default, and by reason of that, the full purchase amount had become due, and also by reason of the absence of surety and a mortgage bond.

Defendant said he would like three months' time to be allowed to him to pay the second instalment. The property cost £415, and he had paid £110. He thought he should be able to pay the balance in that time.

Provisional sentence granted, with stay of execution for a period of three months.

BARTRAN V. BURRILL AND ANOTHER.

Mr. Gardiner moved for a decree of civil imprisonment upon a judgment of this Court for £190 19s. A return of *nulla bona* had been made.

Mr. Upington, for the defendant Charles S. Burrill, said he was instructed to apply for a postponement, to enable the defendant to file an affidavit. The defendant, who was at present in Port Elizabeth, was practically without means, and counsel understood that he would be prepared to offer £2 a month.

[De Villiers, C.J.: What is the amount of the debt?]

Mr. Upington: About £200, I believe.

Mr. Gardiner said that he could not consent to the application by his learned friend, as the defendant had had ample time in which to prepare his affidavit.

De Villiers, C.J., said that if the Court subsequently decided to order the defendant to pay £2 a month, it would be upon the plaintiff to pay costs of the postponement.

Mr. Gardiner said he would leave the matter in the hands of the Court.

De Villiers, C.J.: According to the new rules, no case should be heard on the 12th December or the 12th January, unless in the opinion of the presiding judge it would prejudice either party if the case were not so heard. The Court is of opinion that it will not be to the prejudice of either party to postpone the case until the first day of term.

MCKENZIE AND CO., LTD., V. STEENSMA.

Mr. De Waal moved for provisional sentence for the sum of £109 1s. 4d. on a certain mortgage bond which had become due and payable, and by reason of non-payment of interest, and for interest at the rate of 7 per cent., and that the property should be declared executable.

Order granted.

BOYES AND BROWN V. FOURIE.

Mr. Sutton moved for provisional sentence for the sum of £50 on a certain note for value received, with interest at the rate of 6 per cent.

Order granted.

ESTATE HUDSON V. ABDOELA DOLLIE.

Mr. Upington moved for provisional sentence on certain five mortgage bonds, for the sums of £300, £50, £350, £600, and £50, with interest at the rate of 7 per cent., and that the property be declared executable.

Order granted.

ESTATE HUDSON V. PAGE.

Mr. C. de Villiers moved for provisional sentence for the sum of £400 on a certain mortgage bond, with interest at the rate of 7 per cent., and that the property be declared executable. The bond had become due by reason of non-payment of interest.

Order granted.

GINSBERG V. DAVIES AND CO.

Mr. Alexander moved in the first case for provisional sentence for the sum of £130, being rent on a certain lease signed by the defendant, and in the second case to make absolute the rule *nisi* calling upon the respondents to show cause that day why they should not be restrained from disposing of any stock on the plaintiff's premises, pending an action to be brought to recover the arrear rent.

Orders granted.

D.C., OUDTSHOORN V. ESTATE APPEL.

Mr. M. Bisset moved for provisional judgment on an unsatisfied judgment of the R.M. of Oudtshoorn, for the sums of £20 16s. 9d. and £2 11s. 10d., with costs, and that certain property should be declared executable.

Order granted.

MORSER AND CO. V. AWTY.

Mr. Benjamin moved for provisional sentence on certain promissory notes for the sums of £18 12s. 8d. and £25, with interest.

Order granted.

HOFMEYR V. IZAAKS.

Mr. De Waal moved for provisional sentence for the sum of £375 on a certain mortgage bond, dated January 19, 1902, together with interest at 6 per cent. on £500, the amount of the bond, and that the property should be declared executable. The bond became due and payable by virtue of non-payment of rent.

Order granted.

WIENER AND CO. AND OTHERS V. ALLAN AND CO.

Mr. Benjamin moved for a final order of sequestion against de defendants' estate. The provisional order was granted on the 5th December.

Order granted.

BETHE AND VON EHREN V. DREYER AND SUSMAN.

Mr. Upington moved for the discharge of a provisional order of sequestration.

Order granted.

SCOTT V. CHIAT.

Mr. De Waal moved for provisional order for the sum of £6 17s. 6d., which became due under certain conditions of sale, with interest at the rate of 6 per cent.

Order granted.

BOSMAN, POWIS AND CO. V. LATEGAN.

Mr. De Waal moved for provisional sentence on three promissory notes, amounting in all to £782 17s. 11d., less £213 17s. 6d. paid before issue of summons, and £350 paid thereafter, with interest on the various sums from the due dates.

Order granted.

PURCELL, YALLOP AND EVERETT V. NILSEN.

Mr. Upington moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £97 1s. 1d., together with the sum of £7 6s. 9d., costs.

Defendant said he should be prepared to pay £3 a month.

Mr. Upington said he would accept the offer.

Decree granted, with costs, to be suspended pending payment of £3 a month, first payment to be made on January 1.

PURCELL, YALLOP AND EVERETT V GOODMAN.

Mr. Upington moved for a decree of civil imprisonment for £74 7s., together with £9 costs.

Defendant did not appear.

Decree granted with costs.

GREEN AND CO., LTD, V. SHANAHAN.

Mr. J. E. R. de Villiers moved for the final sequestration of the defendant's estate.

Order granted.

JAGGER AND CO. V. SCHAPIRO AND GOODMAN.

Mr. J. E. R. de Villiers applied for the provisional order for the sequestration of the defendants' estate to be discharged, a settlement having been arrived at between the parties.

Application granted.

GARLICK AND OTHERS V. RABINOWITZ AND ANOTHER.

Mr. J. E. R. de Villiers moved for the final sequestration of the defendants' estate.

Order granted.

DUNDAS V. HYMAN COHEN.

Mr. Smith moved for provisional sentence for £1,350 on a mortgage bond, with interest thereon, the bond having become payable after three months' notice, and also for the property specially hypothecated to be declared executable.

Order granted.

S.A. FIRE CO. (IN LIQUIDATION) V. BOARD OF EXECUTORS. { 1903. Dec. 12th. „ 17th. „ 18th.

Provisional sentence — Account stated.

Provisional sentence granted on account which plaintiff had objected to as incorrect and which defendant had thereupon withdrawn. Subsequently in an action defendant had pleaded that this account was true and correct and the Court had found that it was so.

Mr. M. de Villiers moved for provisional sentence for £4,336 19s. 2d., being the amount of the balance of account stated and rendered to the defendants by the plaintiff (C. C. de Villiers) in his capacity as surviving liquidator of the life branch in liquidation of the South African Fire and Life Assurance Co., in respect of certain funds which were in the hands and under the administration of the defendants.

The Chief Justice: Does this arise out of the previous case?

Mr. M. de Villiers: Yes, my lord.

Mr. Searle, K.C. (for the defendants) said that they had had certain affidavits prepared, which they proposed to read.

Mr. M. de Villiers submitted that no affidavits should be read. He believed the defendants' plea would be *res judicata*. The plaintiff likewise relied upon *res judicata*, and he therefore submitted that it was unnecessary to hear any affidavits.

[De Villiers, C.J., said that the matter would have to stand over.]

Mr. M. de Villiers said that a very large amount was involved, and interest was running.

[De Villiers, C.J.: I think the Board of Executors will be able to pay it.]

Mr. M. de Villiers: At present they refuse to do so.

[De Villiers, C.J.: Yes, but ultimately, if they are ordered to pay, they will be able to pay. It is impossible to take the case now.]

Mr. M. de Villiers asked if the Court would fix a day for the hearing.

[De Villiers, C.J.: I think we shall be able to take it on Thursday.]

Postea (December 17th).

Mr. De Villiers said that when the matter was last before the Court, his learned friend (Mr. Searle) proceeded to read some affidavits, to which he objected, and he submitted that his learned friend should intimate what his defence was, in order that the Court might be put in a position to judge whether the objections counsel would raise were valid or not.

Mr. Searle said he would read affidavits showing, before the action was brought, that the account was withdrawn.

Mr. De Villiers said he did not know whether that could be pleaded. The whole of the proceedings went on the supposition that the only question before the Court was whether, for the period of three years, interest should be paid, and whether after that the account should be stated half-yearly or not.

Mr. Searle read the affidavits of Johannes Roos, secretary of the respondent Board, which set forth that the summons had been served on him on the 18th September last, calling on him to pay £4,336 15s. 9d., which it was alleged the Board of Executors owed by virtue of a certain account. Deponent attached minutes of a meeting held on the 18th September, 1896, at which the administering liquidator, the late Mr. Hofmeyr, was present, when it was resolved to give notice that interest would not be allowed after 31st December, 1896. On the 18th September, 1903, the plaintiff claimed interest at the rate of 4 per cent. on the amount in the hands of the Board. Before issue of summons, the defendants' attorneys addressed a letter to the plaintiffs' attorneys, stating that the offer of £4,336 15s. 9d. was withdrawn, and the capital only was tendered. On the 26th September, the plaintiffs' attorneys were tendered a cheque for £3,817 9s. 1d., which was refused. Certain correspondence between the respective attorneys was then read, in which it appeared that the defendants tendered the sum of £4,336 on July 18, and they claimed the right to withdraw it when it was refused. The Board of Executors was not prepared to pay the interest claimed. Counsel said that thereafter judgment was given for the Board of Executors, with costs. The account now sued on had already been before the Court, the Court holding that the agreement come to between Mr. J. H. Hofmeyr that no interest was to be paid was a valid agreement. Since judgment had been given, the defendant Board sent a cheque to the plaintiff for the amount of the capital without interest, but this was refused. An affidavit was read from Mr. Buissinne stating that the offer of payment of £3,817 9s. 1d. was verbally admitted by plaintiffs' attorney to be a legal tender.

Mr. M. de Villiers read the affidavit of Charles Christian de Villiers, which set out that as a result of an action instituted by him to amend certain accounts rendered by the defendant, bringing up interest for the years 1897, 1898, and 1899 (the defendant having admitted his liability to pay interest from 1st January, 1900, to 30th June, 1903), the defendant rendered a true and correct account to the 30th June, 1903, and that the balance on hand then was £4,336 15s. 9d. When judgment was given for the defendant with costs, the deponent interpreted it to mean that the accounts rendered by the defendant were true and correct, and that the Court refused deponents' claim to have such accounts amended or debated. He pointed out that no plea of tender was placed on record by the defendant, nor was any evidence led to prove any tender beyond the admission of the amount in the plea. He denied most emphatically that he concurred in the agreement made by the administering liquidator with the defendant board on the 18th September, 1896, deponent having been in Europe at the time. Counsel then read a letter from the plaintiff to the defendant Board, abiding by the judgment of the Supreme Court, and offering, as they had refused to do so, to take over further payments of premiums, and pointing out that the action of the Board appeared not to be in conformity with the agreement entered into between them and the late Mr. Hofmeyr. Plaintiff was desirous of avoiding further disputes, and he would be glad to be informed whether the Board intended continuing the administration under the terms, and with payment of the interest allowed in the accounts since January 1, 1900. He was willing to allow the funds of the life branch to remain with the Board under those terms, the agreement to that effect to terminate upon three months' notice on either side. In reply, the defendant's attorneys wrote on the 4th December that it was correct that the Board refused to accept any further premiums. There was no intention of continuing the administration, and the Board had no desire to keep the fund one moment longer than was necessary, nor had they any intention of paying any interest. They enclosed a cheque for £3,686 15s. 11d., being the amount ten-

dered on the 18th September, 1903, a tender which he agreed in person to the writer to admit as a legal tender, less the taxed costs amounting as per enclosed bill, which was taxed on the 3rd December, 1903, to £130 13s. 2d. The cheque was returned by plaintiff's attorneys on the 8th December, and the defendant's attention was drawn to paragraphs 12 and 13 of the plea.

Mr. Searle, K.C. (for defendant): In this case we ask for judgment on an account stated. The account was not accepted, and was withdrawn. In September summons was issued, asking for an account from January 1st, 1897, to June 1st, 1903. The Court did not give judgment in terms of any tender. (See 13, C.T.R., 1019.) I submit that the form of this action is incorrect: the plaintiffs might sue on a judgment, but not on an account which has been withdrawn.

Mr. M. de Villiers (for plaintiffs): The defendant's procedure in this case is most dangerous. He varies his defence, and then reverts to his original defence. We say that this matter is *res judicata*, and that now it is simply a question of interpreting the judgment. (See paragraph 15 of the declaration. The only defence was that a true and correct account had been rendered. We admit the account, as far as it goes, but we ask for some additional interest. The pleadings, to which we must adhere, disclose no tender. The only point argued was that we claimed interest as a matter of legal right, while they held that it was a matter of grace. In their affidavit the Board say that they agreed to let us have interest: now they refuse to let us have it, and want practically to re-open the case.

Mr. Searle in reply.

De Villiers, C.J., intimated that his brother Maasdorp would like to consult Mr. Justice Kotze before giving judgment. He simply wanted to hear from him whether he concurred as to the facts.

Postea (December 18):

Maasdorp, J.: The plaintiff prays for provisional sentence against the defendant for the sum of £4,336 15s. 9d., upon an account rendered and signed as true and correct by the defendant on the 30th June, 1903. The account referred to is an account of the funds of the life branch in liquidation of the South African Fire and Life Assurance Company in the hands of the defendant on the 30th June, 1903, which was rendered to the plaintiff in his capacity as liquidator of the life branch. The defendant admits that he rendered the account in question, but says that upon the plaintiff refusing to accept the account as correct, and to accept a settlement upon the basis of that account, the account was withdrawn. Upon that ground he opposes the granting of provisional sentence. If that were all that passed between the parties the defendant may be quite within his rights to withdraw a disputed account, and the plaintiff may be barred from suing for provisional sentence upon an account, which he had disputed after its withdrawal by the defendant. It appears, however that the plaintiff sued the defendant for an account in an action, which has been already decided by this Court. In that action the plaintiff stated in his declaration that the account now in question was rendered by the defendant, but that it was insufficient and incomplete, in that it did not bring up certain interest due upon the funds to the plaintiff. The defendant in his plea to that declaration alleged that the account rendered by him was a true and correct account to the 30th June, 1903, including interest allowed the Board after the 1st January, 1900, and that the balance in hand on the 30th June, 1903, was £4,336 15s. 9d. As a matter of course, the plaintiff in that case was entitled to a true and correct account of the administration of his funds by the defendant, and the only issue was with respect to the correctness of his account. If it had appeared to the Court that the account upon which he relied in his plea, as rendered before action brought was incorrect, an amended account would have been ordered. But the Court gave judgment for the defendant upon the ground that he had already rendered a proper account, which the parties might debate in detail if they desired. In that account the defendant admitted that he was liable to the plaintiff for interest on the funds in hand after 1899, and in opposing provisional sentence now he disputes, as appears from the affidavits, his liability for such interest. If at the trial the plaintiff had claimed judgment for the amount appearing due upon the account which the defendant in his plea alleged to be true and correct, he would, in my opinion, have been entitled to it.

The account in question is signed by Roos and Hoffman, on behalf of the Board of Executors, but it was contended that as it was withdrawn provisional sentence ought not now to be granted upon it, whatever other right of action the plaintiff may have. It seems to me, however, that the account was again revived by the defendant's plea in the former action. Mr. Searle, moreover, stated that there was no wish on the part of the defendant to insist upon any technicality, and that the object of the parties was to ascertain whether the Court intended when judgment was given in the case, to hold that the account of the defendant must be taken as true and correct. Judgment will be given as prayed with costs.

Mr. M. de Villiers (for the plaintiff) applied for costs from the time the defendants refused to give up the money, *i.e.*, the 30th June last.

Maasdorp, J.: The usual judgment will be given for the amount claimed, with interest *a tempore morae*.

[Plaintiff's Attorneys: Van der Byl and Van der Horst; Defendant's Attorneys: Van Zyl and Buissinné.]

ESTATE LANDSBERG V. RAHINAN AND ANOTHER.

Mr. Benjamin moved for provisional sentence for £400 on a mortgage bond due by reason of non-payment of interest, and for the property specially hypothecated to be declared executable.

Order granted.

CHAPLIN V. DEECKER.

Mr. Buchanan moved for provisional sentence for £100 on a promissory note signed by the defendant to and in favour of the plaintiff. Defendant had, in a letter to plaintiff, offered to pay instalments of £5 a month.

Order granted.

MARAIS V. ROSSOUW.

Mr. Benjamin moved for provisional sentence on a mortgage bond due by reason of non-payment of interest, and for interest from the 10th March, 1902.

Order granted.

BRUYNS V. ACHMATT AND ANOTHER.

Mr. Upington moved for a decree of civil imprisonment upon an unsatisfied judgment of this Court for £28 3s. 9d., together with £7 10s. 6d. costs. Counsel put in a certified copy of judgment and return of *nulla bona*.

Mr. Benjamin said he appeared for the first-named defendant, and was instructed to offer £3 a month from the 1st January. The second-named defendant, he believed, had gone to India. An arrangement was entered into between the first-named defendant, who was now in court, and the plaintiff, by which he was to pay £10 down and £5 a month afterwards, payable on the second day of each month. The instalment which fell due on the 2nd December was not paid. A letter was sent to the plaintiff's attorney by the defendants' attorney, saying that the money would be paid on the 7th inst. That, however, was not done, and the plaintiff thereupon took out the summons.

Mr. Upington said plaintiff's information was that the defendant was possessed of considerable property.

Mr. Benjamin said the properties were bonded, and the man owed other debts.

The first-named defendant said he offered £10 a month to the plaintiff. He paid £10 in November. He was to pay £5 on the 1st December, but he could not get the money, and he promised to make the payment on the 8th. He raised the money on the 8th, and paid it to his attorney. He had not then received a summons. He could afford to pay £3 a month. He had other creditors, to whom he owed money —£63 to one firm, £58 to another, £163 to a third. Lawrence and Co. had taken out judgment against him. The £5 he had handed to his attorney had been absorbed by costs.

Cross-examined by Mr. Upington: He owned a landed property in Cape Town, and he had an interest in property at Wynberg, Lakeside, and Claremont. He and his partners received about £30 to £35 a month in the way of rent.

Decree granted, with costs, to be suspended pending payment of £5 per month until the debt and costs be paid, first payment to be made on the 1st January.

KANNEMEYER V. CHETTY BROS.

Mr. Buchanan moved for provisional sentence for the sum of £600, less £69

18s. 6d., rent from July 1, 1903), which was due and payable on the first day of each successive month, and for the cancellation of the lease, in which there was a clause stipulating that if the rent was not paid within seven days of the date when it became payable, the lessor had the right to take over occupation.

Order granted.

FISHER V. ADRIAANSE.

Mr. Upington asked for a decree of civil imprisonment against the defendant, on an unsatisfied judgment of the Supreme Court for the sum of £52, together with interest and costs.

The defendant appeared in person, and said that he was prepared to pay £3 per month.

Mr. Upington: I am instructed that on the 17th November he made an offer of £5 per month.

The Chief Justice: Is that so?

Defendant: That is so. The plaintiff declined to take it.

Why didn't you repeat the offer?—I am not in the same circumstances at the present moment, my lord. I have other liabilities to meet by the end of the year, and £3 per month is as much as I am able to pay.

Mr. Upington: I think that the defendant should go into the box and say so.

The defendant then entered the witness-box, and stated that he had no property whatever. He was a missionary, attached to the African Methodist Episcopal Church, and had no means. He had to live on collections.

Mr. Upington: You purchased an erf, and you have erected a building on that erf worth £600?—The building is not at all worth £600. It is a two-roomed house, and the people living in it pay no rent. At the present moment, the conditions of things are very bad. The collections have fallen off. The £50 was for money that was lent to me. If things go better, I may be able at the end of January to offer a little more.

The Chief Justice said that the Court was satisfied that the defendant had no means, and there would be no order.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), the Hon. Sir JOHN BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

REX V. DU PLESSIS. { 1903. Dec. 14th.

Court of appeal in criminal cases —Special entry—Question reserved—Misdirection of Judge —Verdict of Jury.

Although it is a salutary practice on the part of judges presiding at criminal trials, where witnesses give evidence adverse to the accused and differing from their evidence given at the preparatory examination, to point out the danger of convicting on such adverse evidence, the omission to do so does not constitute a misdirection or illegality, if the discrepancy was brought to the notice of the jury.

After two witnesses had given such adverse evidence differing from their previous evidence the counsel for the accused asked the judge whether he would be allowed to call a Mrs. B. to contradict the statement of the two witnesses that she had intimidated them before they gave their evidence at the preparatory examination, to which the Judge assented. Thereupon counsel for the prosecution asked whether, in such case, he would be allowed to call rebutting evidence, to which the Judge also assented. The counsel for the accused accordingly did not call Mrs. B., but after a verdict of guilty he raised the question for the consideration of the Court of

Appeal whether judgment should not be arrested on the ground that the judge's ruling was wrong.

Held, *that as Mrs. B. was not produced as a witness the judge's alleged ruling as to what he would do in case she should be examined could not be called in question.*

This was an appeal under the terms of the Act 35 of 1896, section 32. In this case the accused had been charged with the crime of murder and convicted, and an application was then made by his counsel under section 34 of the same Act, which enacted that in case any question of law should arise it should be lawful for the Court to reserve for the consideration of the Court of Appeal such point, etc. Application was made to the Court for an arrest of judgment under that section until such time as the Supreme Court should have decided upon certain points to be reserved for the consideration of that Court, and that meanwhile it should be ordered that the prisoner should be detained in the prison at Graham's Town until the Supreme Court should have determined thereon. The Court, however, refused to grant this application.

The points reserved were:

(1.) That inasmuch as the value of an estate is to be ascertained from the liquidation and distribution account, or from the evidence of some person having the administration of the estate and not from the mere inventory of the estate; inasmuch as there was no evidence produced to show that the estate was solvent; inasmuch as the terms of the mutual will of the accused and his wife should have been taken into account; and inasmuch as the burden of proving motive rests upon the prosecution, the presiding judge, after counsel for the defence had pointed out that there was no such evidence mis-directed the jury in saying, "Now, I shall deal with the motive. He (the accused) obtained through her death control of a large sum of money. The sum of money in the inventory was £10,300. There was the insurance policy also. There was to be nothing done in the way of giving security, and he could still retain the money in case of re-marriage."

(2.) That in face of the fact proved at the trial that most material witnesses for the Crown (not including Hazel du Plessis, whom the counsel for the defence carefully excluded from his remarks) had made declarations at the trial strictly at variance with the declarations made at the preliminary examination, or evidence given at the inquest, the presiding judge should have pointed out to the jury the danger of accepting such evidence.

(3.) That the presiding judge misdirected the jury in saying: "The prisoner could either himself or through his assistants have accounted for the disposal of the knife" (meaning thereby one of a set of knives bought at an auction sale by accused, and offered for sale by him in his shop), the prisoner having in his shop knives similar to the knife with which the murder was alleged to have been committed; inasmuch as if the evidence of such assistants was required, they should have been produced by the prosecution.

(4.) That certain two of the witnesses, named Lessing and Jansen, gave evidence at the trial directly in conflict with their evidence given at the preliminary examination, and stated that such variance was due to intimidation on the part of a certain Mrs. Botha, counsel for the defence (in consequence of certain remarks made by the presiding judge), before calling the said Mrs. Botha as a witness, to contradict such statements, inquired from the presiding judge, whether if he called her as a witness the prosecution would be entitled to call rebutting evidence, the presiding judge held that he would be so entitled, and that this holding of the Court was contrary to law.

Mr. M. de Villiers (with him Mr. McGregor) for the appellant; the Solicitor-General for the Crown.

Mr. De Villiers said that Stevens, in his Digest of Appeal Authorities, laid it down that where the judge's notes were defective reference ought to be made to other means of supplying what was defective in the judge's remarks. The judge's notes and remarks were not considered to be part of the record. The record was the official notes taken by the Registrar, and what was deficient in the judge's notes could be supplied from elsewhere

[Buchanan, J.: But that does not apply to the judge's summing up?]

Mr. De Villiers: I am speaking now with regard to the evidence. There are several points in which certainly the judge's notes are incorrect, and where we have other reports——

[De Villiers, C.J.: Have you seen this pamphlet report, because it is sent up as a statement that is fairly representative of what took place?]

The Solicitor-General: I must say that I cannot accept a newspaper report, however accurate it may be generally, as authentic.

[De Villiers, C.J.: The newspaper report is fuller than the judge's notes.]

Mr. De Villiers pointed out certain discrepancies between the judge's notes on the one hand and the newspaper report and his own notes on the other.

[De Villiers, C.J.: Will those discrepancies have any bearing on the question reserved?]

Mr. De Villiers: Yes, my lord. I think so to a very material extent. Counsel said he took a note word for word practically of what the learned judge said, and he found that the newspaper report agreed with it, and that the judge's note was at variance with that record.

[De Villiers, C.J.: You cannot go beyond the judge's notes.]

Mr. De Villiers: I shall ask my learned friend to read the record.

[Buchanan, J.: Surely, we are not going to re-try the case?]

[De Villiers, C.J.: I do not see for the purpose of arguing questions reserved that it is necessary to read the whole of the evidence.]

Mr. De Villiers was referring to the judge's remarks, when

De Villiers, C.J., asked whether the inventory was put in during the trial.

Mr. De Villiers: I believe so.

The Solicitor-General said it was conceived by himself that the inventory was put in at the same time as the will. Apparently that view was taken by his learned friend, who appeared for the defence, and it certainly was the view taken by the learned judge who tried the case. As a matter of fact, the inventory was never put in.

[De Villiers, C.J.: But it was produced to the jury.]

The Solicitor-General: It was not produced to the jury.

[De Villiers, C.J.: The learned judge says that the inventory was used to show what the assets were.]

The Solictor-General: It was referred to by me in my address to the jury that the inventory showed the assets to be about £10,000.

[De Villiers, C.J.: But was not it practically put in? It was admissible as evidence.]

The Solicitor-General: Yes, that is so

[De Villiers, C.J.: Surely it was put in.]

The Solicitor-General: I can only state the facts as they are, because your lordship must see, on looking at the exhibits, and on reading also through the judge's notes, that the word inventory is not referred to.

[De Villiers, C.J.: Surely we must treat it as put in, for it was used.]

The Solicitor-General said it would have been the easiest thing in the world to put in the inventory. The man who valued the property, whose name was stated in the inventory as the valuer of the immovable property, himself gave evidence. The prisoner himself also could have given evidence as to whether the assets were or were not of the value of £10,000.

Mr. De Villiers said that this was the first word that he had heard about the inventory not having been put in. He had always understood up to that moment that it was put in. It was represented to the jury that the prisoner was to get £10,000, and besides that there was an insurance policy of about £1,000.

[De Villiers, C.J.: He says, "I further directed their attention to that fact."]

Mr. De Villiers said he did not think it was so much what the judge intended to say, but what the jury must have understood the judge to say. Now, he thought that the newspaper reports were of importance, as showing what the newspaper reporters, as members of the public, understood the judge to say, and his own note was to this effect, that the judge said that, in addition to what appeared on the inventory, there was also the life insurance. The impression therefore produced certainly was that there was the inventory, and there was also the matter of the insurance. Now, what led up to the question of motives? He supposed counsel would not object to his

reading from the newspaper report what the learned judge stated.

The Solicitor-General: There is the judge's note. I think once we begin to let in newspaper reports we don't know where we shall end.

Mr. De Villiers: I think my learned friend should allow me to read what he said to the jury.

The Solicitor-General: Now I do object. I know that in one respect it misrepresents me.

[De Villiers, C.J.: I think it far better to confine ourselves to the judge's remarks.]

Mr. De Villiers said he did not think his learend friend would deny that he said the prisoner would reap an immense advantage from the death of his wife.

The Solicitor-General: I do completely deny that. That is the misrepresentation I referred to.

Mr. De Villiers said that there was a presentation of the case in regard to the property that he could not agree to. It was not stated whether the assets were liquidated or unliquidated. He maintained if they had been liquidated, not only the assets, but also the liabilities should have been shown. Then it might have been proved that the estate was virtually insolvent. No idea was given to the jury what was really the estate that remained in the hands of the accused after the death of his wife. He (counsel) urged before the judge that the motive must be of an overpowering character. Here was the motive supplied—viz., by the Solicitor-General—that he said the accused would gain a great advantage by his wife's death. If he did not gain the advantage, then where came the question of motive? There was no motive if he could gain nothing by his wife's death. He contended that under that will the accused would gain no advantage by his wife's decease, and that if anything he would be in a worse position than before. In the first place, by the terms of the will, whereas, before the property was under his entire administration and control as husband, he would become joint heir with the children of one-half. The other half would be his. As regarded the other half, he was really in a worse position, because he became joint heir with the children of the other half. In the first place, it was subject to the limitations of a life usufructuary, there was the life interest of the children, and the Supreme Court would be very vigilant with respect to the rights of minors, and so, if the one-half remained his, it remained under his control with limitations which did not exist before the death of his wife? Where, then, did the advantage come in that would accrue to the husband by the death of his wife? It was said he would have to give no security, but that fact would not cause any advantage to him. The Solicitor-General compared what the accused would get with what his wife would get. The question, however, was what would he get relatively before and after his wife's death? He submitted that the points were not put distinctly to the jury, so that they could properly grasp them. As a matter of fact, there was nothing really now to prove that a single penny would accrue to the prisoner on the death of his wife.

[Buchanan, J.: Those are the arguments to use to the jury, not to this Court.]

Mr. De Villiers: I am now referring to the motive as put before the jury. Continuing, he observed that, as to the second objection, the learned judge said that he was not sure whether he did use the word "danger," but he pointed out the discrepancies, and left it to the jury whether they did or did not believe any particular witness they had heard. Counsel said he was placed in a very difficult position by not being able to read the newspaper reports which he understood were sent in, as showing pretty fairly what was said by the learned judge.

[De Villiers, C.J.: It was stated that the newspaper record fairly represented what took place at the trial. That is signed by the Registrar.]

Mr. De Villiers said that what he objected to in the judge's remarks was this: the judge said to the jury "all the witnesses for the Crown are supposed by the defence to be liars, including Easton." With all due deference to the judge, he said that that was an exaggerated statement. He certainly considered that the majority of the witnesses for the Crown spoke truthfully, and it was only in regard to the two boys that he used the word advisedly, as he did now. There was no doubt that they were liars. He (counsel) thought it was the duty of the

judge to point out to the jury the discrepancies in the evidence. He thought the language of the judge was somewhat exaggerated, and even sarcastic.

[De Villiers, C.J.: But supposing the judge believed the two witnesses?]

Mr. De Villiers: Then, in any case, my lord, I would submit that it is for the judge to say to the jury that there is a conflict of evidence, and the jury should be very cautious in accepting the evidence of such witnesses.

[De Villiers, C.J.: He called their attention to the discrepancy. Counsel on both sides mentioned the discrepancy.]

Mr. De Viliers said that the witness Seina gave different evidence at the trial to that given by her at the preliminary examination, and that she admitted that she had altered her story at the instance of her mistress, Miss Truby. Mr. De Villiers called attention to the discrepancies in the evidence given by the boys Lessing and Jansen between the preliminary examination and the trial.

[De Villiers, C.J.: Where does it appear that he accepted their evidence?]

Mr. De Villiers: I can only refer again to the printed record.

[De Villiers, C.J.: It is sent up by the Registrar as a fairly accurate report.]

The Solicitor-General: I did not know that that was so. I do not feel myself justified in saying that the Court should give the same value to a newspaper report as to the judge's notes. If, however, it would help the Court in any way to refer to the newspaper report, I shall not raise any objection.

Mr. De Villiers said that at the preliminary examination the witness Jansen said they were, to identify any per- could not distinguish whether it was a white man or a black man. Then at the trial he said the man was the accused. It was a very cloudy night, and it was a physical impossibility for anyone at the distance where these boys said they were, to identify another person. Counsel pointed out in regard to the evidence of Seina that at one time she said she was in the passage, and at another that she was sitting down in the room. It was admitted by the Crown that prisoner could not have committed the crime if it were done from the inside, and there were a dozen facts which, to his mind, clearly and uncontestably proved that it was not committed from the outside.

[Buchanan, J.: But the facts proved to the minds of the jury that the crime was committed from the outside.]

Mr. De Villiers said that the judge accepted Seina as a credible witness, and directed the weight of his remarks on the side against the prisoner.

[De Villiers, C.J.: Surely there is evidence that the crime was committed from the outside. How could it have been otherwise than from the outside from all the facts of the case?]

Mr. De Villiers: There are about a dozen distinct facts which, to my mind, prove the contrary.

[De Villiers, C.J.: Yes, but after all, it is the jury who have to decide that fact; not counsel for the defence.]

Mr. De Villiers: I say the judge overleapt physical impossibilities. There was evidence that the window was closed.

[De Villiers, C.J.: Was there a button on it.]

Mr. De Villiers: No.

[De Villiers, C.J.: Then what would be easier than to push the window open? Of course, it does not follow that because the crime was committed from the outside, that the prisoner did it.]

Mr. De Villiers: If the window were once opened, it would have remained open. The prisoner was in the room afterwards. That assumes that the prisoner did it.

[De Villiers, C.J.: I am not saying that. There is no evidence that this window was buttoned before the murder was committed.]

Mr. De Villiers: There was evidence that it was closed before the murder, and closed after the murder, and there is not a particle of evidence that it was ever opened. Continuing, counsel contended that the nature of the wound and the force required to have inflicted it, taken in association with the character of the window, were opposed to the theory that the murder was committed from the outside.

De Villiers, C.J., said that the greatest difficulty seemed to him to be the accuracy of aim with the bars in the window, and wire netting a few inches up.

Mr. De Villiers pointed out a change in one of the doctors' evidence as between what he said at the preliminary exam-

ination, and inquest, and at the trial. In the first place, this doctor seemed to think that whichever way the wound was inflicted, it was not done through the window.

[Buchanan, J.: These facts were all brought to the notice of the jury by you, I suppose?]

Mr. De Villiers: Yes, my lord.

[Buchanan, J.: You see, this is not the trial of the accused.]

[De Villiers, C.J.: You must first prove the irregularity or illegality, and we will then go into the whole of the evidence.]

Mr. De Villiers contended that the whole ground for saying that this was done from the outside was the discovery of a scratch on a bar of the window three weeks after the crime was committed. That might have been done by anyone before or after the crime.

[De Villiers, C.J.: It is hardly the thing to say that this was the only ground. Very little weight was attached to that. It was more the evidence of the doctors that went to prove this than anything else. The doctors' evidence was very strong. This scratch was a very minor point, and I don't think it was relied upon very much by the judge, or by the Solicitor-General.]

Mr. De Villiers, reverting to the first ground of appeal, said he would like to point out how entirely absent there was any motive, how Miss Trubie contradicted herself, and how the witness Coutts gave his evidence. The solicitor did not seem to have a very flattering opinion of Coutts; yet the learned judge, in his summing up, relied upon Coutts' evidence as showing certain relations to have existed between Miss Robinson and the accused. If the Court would refer to the evidence, it would be seen how little evidence there was with regard to motive. The accused said that he did not visit Miss Robinson for two and a half months after the murder; that was left out of the judge's notes. He (Mr. De Villiers) would liked to have gone into all the evidence, and especially the police evidence, because undoubtedly the police evidence must have made an impression on the jury. Dealing with the third objection, referring to the identity of the stick, counsel said His Lordship had said that accused denied that he had any acquaintance with the stick. He contended that His Lordship could not assume that he had any acquaintance with the stick. The judge seemed to reason in a circle: that because he was guilty, prisoner must have had acquaintance with the stick, and that because he had acquaintance with the stick, and denied it, he was therefore guilty. Accused recognised the fact that there were similar sticks in his shop, but he said he did not know that particular stick. This was one of the grounds used to assist in bringing the jury to the conclusion that prisoner was a guilty man. The same in regard to the knife. Then as to the supposed difference between the prisoner and his wife, the evidence all went to show that there had not been the slightest upset between accused and his wife. Yet, in order to credit the police evidence as to this, they must believe that prisoner acted the part of a lunatic, and went to the police, and manufactured evidence against himself. Pitt-Taylor, in his work, gave a warning against accepting the evidence of the police, saying that even if they had tried to speak the truth, nevertheless they were bent upon convicting a man.

[Buchanan, J.: Do you say the judge ought to have said that to the jury.]

Mr. De Villiers: No, my lord. I am now discussing the point that the learned judge said that the prisoner denied any knowledge of the stick. I am pointing out now that we have no evidence except what the police said I submit that the police evidence could not be accepted as correct. As regarded the knife the circumstances must be remembered. It must be remembered that the prisoner was badgered by the police about it. The police could have gone to the shop, and inquired whether there was such a knife as that in the shop. They probably did so, and then they came to prisoner even after his arrest, and again badgered him about the knife. They said to him, 'Do you stock knives like that?" and in the irritation of the moment, or perhaps with a certain amount of sarcasm, he said, "I don't know." Of course, it was most dangerous for a person to speak in that manner, but certainly with regard to the knife, there was no evidence, I would maintain, upon which the learned judge could go in saying prisoner denied having such knives in stock. As to the supposition that this knife was from the

stock of the accused, there was absolutely no reason at all to suppose that it was ever in the possession of the accused. On the occasion when the accused bought the knives twenty other people purchased similar knives, and there was probably no more common pattern of knife than this. Surely, accused could not be required to prove these knives had not been sold from his shop. I contend further that the knife should have been preserved in the state in which it was found after the murder, instead of which it was carefully washed and cleaned by a constable. As far as the evidence went, the knife was an old one. The judge seemed almost to have assumed that this knife must have been one of the five in the prisoner's shop. I submit that the Crown should have led the evidence of the assistants in the shop as to whether they did not know what had become of the knife. The onus was not on the prisoner to prove that the knife had not been sold. With regard to the fourth point, I contend that if there had been intimidation, the Crown should have called evidence as to the use of threats. This talk of intimidation appears to me to be absurd.

[De Villiers, C.J.: The point is whether the learned judge was wrong in deciding beforehand that if rebutting evidence were called as to Mrs. Botha's statement, it would be admitted. Mrs. Botha's evidence would not be evidence for the Crown; it might be evidence for the defence.]

There is no doubt that if Mrs. Botha's evidence had been called, Wm. Jansen's would have been admitted on behalf of the Crown.

[De Villiers, C.J.: If Jansen's evidence was not admissible, the proper time to make objection to its admission was when he was produced.]

I say the judge had no right to assume that Mrs. Botha's evidence would in any way have been prejudicial.

[De Villiers, C.J.: He doesn't assume that. He simply says he allows Mrs. Botha's evidence to be taken, and if the Crown wished to produce rebutting evidence he would allow that.]

Mr. De Villiers said that representations had been made to the judge asking him to amplify the special entry, and his (counsel's) instructions were that the judge said it would not be necessary to amplify the entry, that he would admit the statements made, and would adhere to them.

[De Villiers, C.J.: Which statements?]

Certain statements which appear in the newspaper reports.

[De Villiers, C.J.: How does that affect this question as to the admissibility of evidence?]

Mr. De Villiers said his submission was that if these threats were made they must be proved by the prosecution.

[De Villiers, C.J.: When evidence was proposed to be given as to the threats you properly objected. How can you now object that the Crown did not lead the evidence?]

The judge told the jury that threats were used to Mrs. Botha, and the Crown was uncontradicted on that point.

[De Villiers, C.J.: The point is not so much whether threats were used, but whether the boys believed at the time they gave their evidence that such threats were made.]

These things show the imperative necessity of a shorthand writer being present. I am anxious that there should be before the Court the instructions of the judge to the jury when the jury came back after retiring.

[De Villiers, C.J.: Is that point before the Court? The Court cannot consider any question not reserved.]

It is very difficult for counsel in a moment of hurry to so formulate a statement that it exactly embraces the whole of the objections. I took the judge's remarks as a ruling. I asked his Lordship the question: "If evidence is brought that no such threats were used, that nothing in the way of intimidation was exercised, do I understand your lordship will allow rebutting evidence?" and the judge replied in the affirmative. That was a positive ruling, and I do not see how I could have done otherwise than be guided by such a ruling. That at once deterred me from bringing evidence. If Mrs. Botha had been called, the Crown would have called Jansen, who was going to give evidence of hearsay.

[De Villiers, C.J.: And it would have been properly stopped. You should have objected when it was proposed to admit it. You should have objected to the illegal evidence.]

I took the judge's remark as a ruling.

[De Villiers, C.J.: You could not as-

sume that the judge would allow hearsay evidence, illegal evidence.]

I have completed my remarks on the four points. If the Court will allow me, I would like to deal also with other points which were really most important.

[De Villiers, C.J.: We haven't power to consider anything except what has been reserved.]

I would like to argue two further points in regard to the judge's direction. One is the statement of the judge that each juror must consider his fellow-juror's opinion, and the other was the judge's remark that he could not give any opinion at present, but, after the jury had brought in their verdict, he might be in a position to state his opinion, and to state it strongly. I contend that these were improper remarks for the judge to have used.

[De Villiers, C.J., said there was nothing in these two points which need be reserved for the consideration of the Court.]

De Villiers, C.J., said that the Court would like to hear the Solicitor-General on the three first points of the appeal.

The Solicitor-General said that an endeavour had been made to secure before their lordships a re-trial of a case that had been the subject of trial before a jury in Graham's Town. There was, of course, no such thing as a re-trial, and therefore he took it that his duty would be, as it was the duty of his learned friend, to confine himself to those points on which the special entry had been made, and also to deal with the judge's remarks thereon. Now, the first point was as to the question of inventory. He must deal with that from two points of view, because, as he stated at the outset, the inventory was never put in. But, even if the inventory were not in, if their lordships perused the minutes of the evidence, as taken down by the judge, they would find that there was in the evidence given before him plenty of material to show that, although the estate could not be fixed at a particular amount, still it was of a very substantial amount. The evidence went to show that the accused was, *prima facie*, at all events, the owner of at least four houses in the town of Middelburg. There was plenty of proof of property, and, besides, there was the insurance for over £1,000. Then, again, there was the fact that at the time when these transactions took place Manley had taken over the business. There was also the further fact that the accused was proceeding or intending to proceed with all his family to Europe, there to live and complete the education of his children. He also said that if there were any deficiency it could easily have been supplied by his learned friend, because both the auctioneer, who was the valuator of the immovable estate, went into the box, and the accused himself was in the box. Referring to the will, counsel pointed out that the interests of the accused under the will were very large, and the interests of his wife were only small. A further and important portion of the motive in this case was the relationship which was in the evidence established between the accused and a certain Miss Robinson, whose name had been mentioned in the case. He did not know whether their lordships wished to go into the facts in connection with that.

De Villiers, C.J., said he did not think it was necessary.

The Solicitor-General also proceeded to deal briefly with the other portions of the objections taken by the defence.

Mr. M. de Villiers, in reply, said that with regard to the first point he did not know whether their position was not really stronger after the statement of his learned friend. He (the Solicitor-General) said that there was a consensus of opinion with regard to the inventory being in. He (Mr. De Villiers) denied that. He said there was a failure on the part of the Crown to put in the inventory to prove the case, and there was a wrong impression on the other side that it had been put in. There was no proof of the property of the accused. *A fortiori* there was therefore a misdirection to the jury.

De Villiers, C.J., said he understood that it was agreed between the parties that the inventory had practically been put in.

Mr. De Villiers said that his learned friend had used the words "consensus of opinion." He contended that the Crown had failed to prove the property of the accused. Even if the inventory had been put in no proof had been given as to liability. Therefore, no proper evidence of property had been given. He claimed that the comparison between the position of husband and wife under the will introduced by the Solicitor-General was

not a proper one. The Solicitor-General should have compared the position of the accused after the death of his wife with his position before her death. He acknowledged that the question of motive was left to the jury, but it was after they had been wrongly instructed. The evidence as to the accused's relations with Miss Robinson was to the effect that he once winked his eye at her and nudged her elbow. It transpired that the accused was fond of cracking a joke. That was all the evidence of this great fondness for Miss Robinson. Counsel again commented on the evidence of the boys Lessing and Jansen, and said it was impossible to believe that on a dark night the boys could at a distance of 50 yards identify any passer-by. It was curious that all the variances as between the evidence given at the preliminary examination, and the evidence given at the trial were strongly detrimental to the accused. Counsel cited "American Decisions and Reports" (Vol. 3, p. 237). He contended that the Crown had utterly failed to show any connection between the accused and the knife used, and that, as regarded the circumstantial evidence throughout, it tended, if not more, as much to the advantage of the accused as to his detriment.

De Villiers, C.J.: There are two modes in which the verdict of a jury can be brought on appeal before this Court, either by means of a special entry in terms of the Act of 1896 on the ground of some illegality or irregularity, or by reserving a question of law for the consideration of the Court of Appeal. In strictness, neither of these courses seem to have been taken in the present case. Certainly there has not been a special entry on the ground of irregularity or of illegality, but a paper containing a series of objections to the rulings of the presiding Judge was put in by learned counsel for the prisoner, after the jury had found prisoner guilty. Unfortunately the learned judge did not himself reserve the questions, nor did he then and there state whether that paper correctly represented the charge which he had made to the jury. It therefore became necessary to have a statement from the judge as to the charge which he had made to the jury, so far as that charge bears upon the objections raised. Upon that statement sent by the learned judge, it is now competent for the Court to ascertain more or less the questions to be decided by this Court. The first question relates to motive, to the motive which the accused must have had in committing the murder as alleged. It is not necessary in any case of a criminal offence to prove a motive. It frequently happens that there is no apparent motive, that people commit crimes without a discoverable motive; but that is no reason for acquitting a prisoner, if, by the evidence, the offence is clearly brought home to him. In every case where circumstantial evidence has to be relied upon, it becomes very important to ascertain whether the accused had or had not a motive for committing the crime with which he is charged. In the present case there is certainly evidence of motive, quite independently of any question of pecuniary benefit to the accused through the death of his wife. It was amply proved that there had been some degree of familiarity between the accused and Miss Robinson before the death of his wife, and there is certainly evidence that within a few months after the death of his wife, the accused made an offer of marriage to Miss Robinson, which, so far as one can judge, although she denies it, must have been accepted, seeing that she kept the ring which he had given to her. Now here, at all events, there is some motive which was properly introduced into the case for the purpose of ascertaining whether in addition to the other circumstances there was a reason why the accused should wish to have his wife out of the way. Then there was some evidence led as to property. It seems that at the preliminary examination an inventory of the joint estate of the accused and his wife was put in, that inventory being signed by the accused himself. It seems to have been assumed throughout the trial that that inventory was also put in at the trial. It does not now form part of the record, but it was used by all parties, by counsel for the prisoner, and by counsel for the Crown as well as by the judge, and referred to as though it actually had formed part of the record. But I think that quite independently of the state of the estate, as disclosed by that inventory, there was some evidence which might

justify the jury in finding that there was a motive so far as pecuniary benefit also was concerned. It was proved that a considerable sum of money had been received by the accused as insurance on the life of his wife, one half of which would come to him and the other half to the estate of his wife. It was proved also that the accused and his wife had made a joint will by which the accused was to have, in addition to his half share, the sole control over the half share of his wife for his life. That, in itself, would be some advantage to be derived by the accused through the death of his wife. I consider that after all that has taken place that inventory must be regarded as part of the record. It would have been legal evidence; it was treated as legal evidence, and it was referred to by the judge, because it had been referred to by counsel on both sides. The judge might fairly say: "This inventory having been referred to by counsel for the Crown and counsel for the prisoner, it is my duty to inform the jury what the contents of the inventory are." There was no attempt made by the accused to show that his estate was insolvent. It is suggested now that his estate might have been insolvent. Surely, it would have been much easier for the accused to prove that his estate was insolvent, if it really was insolvent, than it would be for the prosecution to prove that it was solvent, if it was solvent. Upon the question of the accused's guilt, no doubt the onus lies entirely upon the prosecution, but upon a side question of this kind where once it is proved that the accused would have the administration of his wife's estate, and where he would gain some benefit through the death of his wife, it certainly would not be too much to expect of him that, if the fact was that he was insolvent, he should prove that fact. No evidence of that kind was given, and, at all events, as I said before, there was some evidence before the jury that the accused would derive some degree of pecuniary benefit through the death of his wife. But quite independently of that pecuniary benefit, there was other evidence of motive, far stronger evidence of motive, to my mind, arising out of the relationship between the accused and Miss Robinson. That disposes of the first question. With regard to the second objection it is stated as follows by counsel for the accused: "That in face of the fact proved at the trial that most material witnesses for the Crown (not including Hazel du Plessis, whom the counsel for the defence carefully excluded from his remarks) had made declarations at the trial strictly at variance with the declarations made at the preliminary examination or evidence given at the inquest, the presiding judge should have pointed out to the jury the danger of accepting such evidence." The remark of the judge upon that is as follows: "I am not sure whether I did use the word 'danger,' but I pointed out the discrepancies and left it to the jury to say whether they believed or did not believe any particular witness they had heard." It is quite clear that whatever discrepancy there was was pointed out to the jury, and that counsel for the accused pointed it out. Now I confess it would have been much more satisfactory if the learned judge had laid more stress than he did upon the discrepancy between the evidence given by the boys Lessing and Jansen at the preparatory examination and their evidence at the trial. It would have been more satisfactory also if he had pointed out to the jury that at this time—at a quarter to seven on a winter's night—on the 25th May—a dark, cloudy night, it would have been extremely difficult for any witnesses to swear positively as to who the person was whom they saw going on tiptoe at a distance of 15 yards. It is a salutary practice for judges presiding at criminal trials where witnesses give evidence adverse to the accused and differing from their evidence previously given to point out to the jury the danger of convicting on such adverse evidence. It does not follow, however, that where this practice is departed from, the Court of Appeal would be justified in holding that there was an irregularity or a mis-direction. After all, it is the function of the jury alone to decide upon the guilt or otherwise of the accused. The responsibility is wholly theirs, and if, after the discrepancy has been pointed out, they still believe the evidence of the witnesses, as given before them, it would be extremely dangerous for a Court of Appeal to usurp their functions by holding that they ought to have disbelieved the witnesses. The evidence as to the physical impossibility of identifying a person

at the time and place when and where the witnesses are said to have seen the accused is very unsatisfactory. They do not say whether they used railway time or local time, nor does this Court know whether any local conditions existed which would have increased the duration of twilight at Middelburg on the evening of the 25th of May. The third objection is: "That the presiding judge misdirected the jury in saying: 'The prisoner could either himself or through his assistants have accounted for the disposal of the knife (meaning thereby one of a set of knives bought at an auction sale by accused and offered for sale by him in his shop), the prisoner having in his shop knives similar to the knife with which the murder was alleged to have been committed'; inasmuch as if the evidence of such assistants was required they should have been produced by the prosecution." The learned judge's statement upon that point is as follows: "As to the third objection, the knife with which the murder was committed might have belonged, as far as the blade was concerned to a set of five. Four of these sets were accounted for, and prisoner attempted to account for the fifth by saying he had sold it to one Forbes. Now this statement which the learned judge makes to this Court is not, I think, strictly accurate, because the accused did not say he had sold it to one Forbes. He only expressed the opinion—his belief—that he had sold it to Forbes; so that this statement to the Court is not strictly accurate; but the fact that the statement was made by the accused that he believed he had sold the knife to Forbes was quite a sufficient justification for the prosecution calling Forbes, and Forbes positively denied that he had bought such a knife from the accused. Then the learned judge goes on: "The fifth knife was certainly gone, and I remarked that, as Forbes denied he ever purchased such a knife, it was for the jury to consider this fact: that neither the prisoner nor his assistants had said what had become of it. If there had been other knives of the same kind, prisoner could easily have taken off the blade of one of them. Even if he did not use one of the five, he said he had the same kind in stock. In the first instance, he denied ever having kept such knives in stock, and also denied having any sticks of the kind found in the passage, both which latter statements were untrue." The general principle is undoubtedly true that it is for the Crown to prove the guilt of the accused, but, if certain knives are traced to the possession of the accused, then there was certainly nothing wrong in the judge simply commenting on the fact that the accused had not accounted for all the knives which had been traced into his possession, and that seems to me the learned judge did in the present case. He did not tell the jury they were to infer from this possession that the accused was guilty; he only called their attention to the fact that these knives had been traced to the possession of the accused, and that he had not been able to account for all these knives so traced to his possession—to account for his non-possession of them. Of course, it was still competent for the jury to take into full consideration all the other circumstances, which were strongly impressed on the jury in regard to these knives, especially the circumstance that it would be exceedingly difficult for any person, and especially a person who had a large business like the accused, to account for every article which comes into and leaves his possession. That was brought to the attention of the jury, but on the other hand it was not wrong to draw the attention of the jury to the fact that the accused had not accounted for all the knives traced to his possession. Then, in regard to the fourth point, objection is taken as follows: "That certain two of the witnesses, named Lessing and Jansen, gave evidence at the trial directly in conflict with their evidence given at the preliminary examination, and state that such variance was due to intimidation on the part of a certain Mrs. Botha. Counsel for the defence (in consequence of certain remarks made by the presiding judge), before calling the said Mrs. Botha as a witness to contradict such statements, inquired from the presiding judge whether, if he called her as a witness, the prosecution would be entitled to call rebutting evidence. The presiding judge held that he would be so entitled, and that this holding of the Court was contrary to law." Here then is an admission that the judge would have allowed Mrs. Botha to give her evidence to contradict the two boys

Lessing and Jansen. It appears that after the judge intimated that Mrs. Botha could be called, the public prosecutor asked whether, if she were called, he could produce evidence to rebut her statement. It seems that the judge stated that the Crown Prosecutor could do so. Thereupon the counsel for the accused did not call Mrs Botha. Now, in my opinion, not having called Mrs. Botha, it is impossible for him now to raise the objection. The proper course would have been to call Mrs. Botha, and if, after she had given her evidence, witnesses were called on behalf of the Crown to rebut the evidence given by Mrs. Botha, then would have been the time to object to such rebutting evidence. The fourth objection, therefore, in my opinion, also falls to the ground. There has been a great deal of argument upon other points, which have not been raised by these objections. Most of these arguments were very properly addressed to the jury, and I have no doubt they considered these arguments before they took upon themselves the responsibility of finding the accused guilty. Some of these arguments may be no doubt be properly presented to His Excellency the Governor, on whom the responsibility lies whether the sentence of death is to be carried into execution or not, but, so far as this Court os concerned, it can only decide the legal questions which have been raised. There is no proof on the record of illegality or irregularity of the proceedings or of misdirection on the part of the learned judge, and the appeal must therefore be dismissed.

Buchanan, J.: I concur in the decision just pronounced. At the same time it ought to be clearly stated that by the common law of this Colony there is no right of appeal in criminal cases from the verdict of a jury. Until recently even questions of law could not be brought under review. Statutory provision, however, has from time to time been made which is now to be found in Act No. 35, 1896, to which counsel has referred. By the 32nd section of that Act, where a trial is had of a prisoner before a judge and jury, if the accused thinks any of the proceedings are irregular or illegal, he may apply to the Court for a special entry to be made on the record showing the nature of the alleged irregularity or illegality. I am not now prepared to say whether or not the Court is bound to make such special entry. The section cited goes on to say that "if such a special entry be directed to be made," which seems to imply a discretion in the Court. It is only questions so raised, and points of law which, under a subsequent section of the Act the Court may reserve for the consideration of the Court of Appeal, that may be brought under review, and even then an irregularity or illegality is not fatal to the verdict where the Appeal Court is of opinion that no substantial wrong was thereby done to the accused. In this instance there has been no special entry on the record and no point of law reserved. The main argument has been directed against the verdict of the jury, and it cannot be too emphatically stated that we have no power to re-try the case. The statements made by prisoner's counsel were not accepted or settled by the presiding judge, on the contrary he has expressed his dissent therefrom. However, he raised no objection to their being brought before the Court, together with his remarks thereon; and though an irregular proceeding it has been treated substantially as if a special entry had been made. I need not now go into the details of these statements, as they have been so fully dealt with by the Chief Justice. I will content myself with expressing my concurrence with his lordship's comments. They may be summed up as being a complaint against the presiding judge for not having done his duty in summing up the case in that he did not condemn the evidence for the Crown in terms sufficiently strong to satisfy the prisoner's counsel. I concur in confirming the judgment of the Court below.

Maasdorp, J., concurred.

[Appellant's Attorneys: Van Zyl and Buissinné.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

REX v. KRIGE. { 1903. Dec. 15th.

Appeal — Question reserved — Theft by means of false pretences — Variance—Theft by member of firm.

On the trial of an attorney for theft by means of false pretences the false representation alleged in the indictment was that the accused had stated to the prosecutor that he had paid certain money received by him on behalf of the prosecutor to his Cape Town attorneys, whereas the evidence shewed that he, without the knowledge of the other members of the firm, had stated that the firm had paid such money to its Cape Town Attorneys.

Held, on question reserved, *that such variance was no ground for setting aside the conviction.*

Held, further, *that the fact of the accused having committed the theft on behalf of the firm was no ground for disturbing the verdict to the effect that he was himself guilty of the theft.*

This was an appeal on a point reserved from the Circuit Court of Worcester.

The appellant, Evelyn William Krige, was an attorney resident at Ceres, and was a member of the firm of Weitz and Krige. There existed an agreement between the two partners of the firm that Krige should attend to the Court work, and that the profits were to be equally shared. A certain Kotze engaged the services of the firm through Krige to recover from a certain Devenish a wagon or its value. Krige, on behalf of the firm, instructed the Cape Town agents of the firm, Moore and Son, to institute proceedings in the Supreme Court. Before anything, however, was done by Messrs. Moore and Son, a compromise was effected with Krige, acting on behalf of Weitz and Krige, to the effect that Devenish should pay £40 for the wagon and half of the costs. Krige wired this to Moore and Son, and in his wire mentioned that he thought their bill of costs need not be taxed. Moore and Son, according to the evidence of Mr. Moore, jun., did not acknowledge these letters or in any way give directions for the summons to be drawn. Krige, acting on behalf of the firm, brought up in the firm's account against Devenish the half of two guineas, as being payable to Moore and Son, viz., a guinea. In the first count, he was charged with having converted this guinea to his own use. He was convicted, and the following point was reserved for the consideration of the Supreme Court: "That whereas the indictment alleged that the accused had falsely pretended that he had paid to his Cape Town attorneys certain money, counsel prosecuting on behalf of the Crown had led evidence to the effect that the accused had falsely pretended that the firm of Weitz and Krige (of which he was a member) had paid such money to their Cape Town attorneys, the accused personally having none such and in general; whereas counsel prosecuting on behalf of the Crown had led evidence to show that the firm Weitz and Krige were concerned in matters as to which in the indictment it is alleged that the accused was concerned, the jury should have been instructed that there was no case against the accused."

Mr. M. de Villiers for the appellant; Mr. Joubert for the Crown.

Mr. De Villiers stated that his questions to the witnesses were to a great extent directed to this point, whether they dealt with Krige individually or Weitz and Krige, the firm. He presumed it was common cause that Krige was not engaged personally, but that it was the firm that was engaged through him. If there was any conversion of money, it was not a conversion by him, but by the firm of which he was a member. Throughout the transactions, Krige did not act personally, but on behalf of the firm.

Mr. Joubert said that their position was that the defendant was acting on behalf of the firm of which he was a member, but without the knowledge of the other partner.

[De Villiers, C.J.: But that is not alleged in the indictment?]

But there is evidence to that effect.

Mr. M. de Villiers: If Krige converted money it was not to his own use, but to that of his firm.

[De Villiers, C.J.: Of which firm he himself was a member.]

Mr. De Villiers: And this he did without the knowledge of the other partners. Moore and Son were not the agents of Krige, but of the firm. Our first point is that the firm, and not Krige personally, are concerned in this case. As to obtaining money by false pretences, see *Stevens' Digest of Criminal Law* (p. 221), *Archbold's Practice* (232, 21st edit); *Rex* v. *Kopetzo* (1, Camp., 494). The question of motive raises a very important point. It is most material whether a man converted money to his own use, or to that of the firm of which he was a member. Very possibly a man may run risks for the sake of, say, £50, which he would not run for ten shillings. In this case the money was received by Krige for the firm. As to the second count, if I secure an acquittal on the first count *a fortiori*, he must be acquitted on the second count. The second count alleged that Krige agreed with Devenish that the latter should pay the sum of £40, as value of the wagon, and that the said Krige received the said sum of £40. It was alleged that he was entitled to retain the sum of £2 9s. for services rendered, and that he was to have paid over to Kotze the remainder of the said sum, viz., £37 11s., and that he did wrongfully and unlawfully appropriate to his own use the sum of £5, and thus committed the crime of theft. The accused actually paid to his client Kotze the sum of £32 11s., and alleged that he was entitled to deduct the sum of £7 9s. from the amount paid to him by Devenish.

Mr. Joubert: The objection raised by appellant's counsel, I take to be that, not the appellant, but the partnership was guilty of this fraud; but then neither the other parties of the firm nor the appellant's legal adviser, knew anything about it. The whole question is: can a man be convicted of fraud if he has not benefitted personally, but a firm of which he is a member has done so?

[De Villiers, C.J.: But he is charged with converting money to his own use. Does the evidence support that?]

We must assume the facts of the case, some of which do not appear on the record.

[De Villiers, C.J.: You cannot go into facts, you can argue only on the points of law reserved. What is your argument?]

W. E. Moore and Son were the attorneys, not only for the appellant, but also for the firm. He said he had paid money to the firm's attorneys, but then they were also his own attorneys. As to the second count, I confess I do not quite understand the point reserved. There is no allegation of false pretences in the second count.

[De Villiers, C.J.: Suppose a man is charged with stealing £5, can he be convicted under that charge of stealing £3.]

Yes; see Section 12 of Act 3 of 1882. I will add that there can be no partnership in crime. The appellant took the money and benefitted thereby; to what extent is quite immaterial.

Mr. M. de Villiers (in reply) submitted that the variance between the charge laid and the offence proved was fatal to the indictment.

De Villiers, C.J.: For the purpose of deciding the question reserved for the opinion of the Supreme Court, it is necessary that the Court should confine itself to the statement of counsel, which was accepted by the Court as raising the question actually reserved. Now, it is said on behalf of the Crown that the evidence did not show that the money had been paid to the attorneys of the firm, or that there had been a representation to that effect. But that objection was not raised when the questions were reserved in the following form: That, whereas the indictment alleged that the accused had falsely pretended that he had paid to his Cape Town attorneys certain money, counsel prosecuting on behalf of the Crown had led evidence to the effect that the accused had falsely pretended that the firm of Weits and Krige (of which he was a member), had paid such money to their Cape Town attorneys, the accused personally having none such and in general, whereas counsel prosecuting

on behalf of the Crown had led evidence to show that the firm Weitz and Krige were concerned in matters as to which in the indictment it is alleged that the accused was concerned, the jury should have been instructed that there was no case against the accused. On this objection the Court has been referred to the case of the *King against Preston*, which was decided nearly a century ago, and I am not at all clear that at the present day the decision would have been the same. In that case, an indictment for obtaining money by false pretences stated that the defendant pretended he had paid a sum of money into the Bank of England. It appeared he said generally that the money had been paid into the Bank of England. It was held to be a fatal variance. I can quite understand that there might be a very material difference to the accused as to whether he had said he had paid the money, or that the money had been paid, The facts of the case are not clearly stated, but I can quite imagine that there may be cases in which that matter would be very material. In the present case, however, it is a question as to the meaning of these words: "That he had paid to his Cape Town attorneys." In one sense, undoubtedly, the Cape Town attorneys of the firm were his attorneys. He is a member of the firm, and as a member of the firm, at all events, the Cape Town attorneys are his attorneys. Then the case stated makes the point perfectly clear by saying that the accused personally had no Cape Town at- The Cape Town attorneys of the firm would be the attorneys of Krige himself, and in my opinion, a representation to the effect that his firm had paid certain moneys to their attorneys might fairly be held to embrace a representation that he, as a member of the firm, had made the payment to his attorneys. If the point were material it might have been advisable to reserve it for further consideration, but as there is no doubt whatever in regard to the second count, the matter may be disposed of at once. The second count charges the accused with theft. Now, if a person steals on behalf of a firm he must, in my opinion, be held to steal on his own behalf, for there can be no partnership in the crime. If a man commits theft and hands over the proceeds of the theft to a firm of which he is a member, it is not the handing over of the proceeds that constitutes the theft, but the original taking of the property without the consent of the owner. The offence consists in depriving the owner of the possession of his property, and that offence was committed in regard to the whole amount, and it was an offence committed by the accused himself, quite independently of the partnership, and, therefore, in my opinion, the second objection would not hold good in regard to the second count. In the opinion of the Court, therefore, the objections to the indictment raised cannot be sustained, and the judgment of the Court below must be confirmed.

Buchanan, J.: The question presents itself to my mind in this way. The essence of the fraud consists in the false representation that the costs payable by Devenish amounted to so much when, in fact, it was a smaller sum. The fact whether the amount paid to Moore and Son, the Cape Town attorneys, had been paid by prisoner to Moore and Son as prisoner's attorneys, or whether it had been paid by prisoner's firm to Moore and Son as the attorneys of the firm, was purely incidental to the issue. It was not a question upon which a fatal variance could arise. It could not cause any prejudice to the prisoner which statement was the correct one. I therefore concur in upholding the judgment of the Circuit Court.

Maasdorp, J., concurred.

[Appellant's Attorneys: Dempers and Van Ryneveld.]

PROVISIONAL ROLL.

YATES V. VAN BLOMMESTEIN. { 1903. Dec. 15th.

Mr. Benjamin, for the plaintiff, asked that this matter should be allowed to stand over until the 12th January, in order that answering affidavits might be obtained.

Mr. Alexander objected to the costs of the postponement being costs in the cause.

Ordered to stand over until the 12th February, the question of costs to stand over.

KEITH V. DELL.

Mr. Struben moved for the final adjudication of the respondent's estate.

The provisional order was granted on the 3rd November.

Order granted.

CELLIERS V. KETS.

Mr. Upington moved for provisional sentence upon a mortgage bond for the sum of £3,000, passed in favour of the estate of the late Edward Holloway. The bond had become due and payable by reason of the non-payment of interest, and counsel also asked that the property should be declared executable.

Order granted.

ESTATE EATES V. ERASMUS.

Mr. Upington moved for provisional sentence upon a certain bill of exchange, of the amount of £123 12s. 5d., dated 15th July, 1903, and accepted by the defendant, and also under Rule 329d, for the sum of £43 for goods sold and delivered, with interest and costs.

Order granted.

CARSTEN V. KENN.

Mr. Nightingale moved for provisional sentence for the sum of £567, upon a certain promissory note, with interest from the 20th September, 1903.

Order granted.

TETLEY AND FLEMING V. HILL.

Mr. J. E. R. de Villiers moved for provisional sentence on a certain cheque signed by the defendant for the sum of £862 19s.

Order granted.

JANISCH V. WEINBERG AND ANOTHER.

Mr. Sutton moved for provisional sentence on a mortgage bond for £450, and for the property to be declared executable, with interest at the rate of 6 per cent. The bond had become due and payable by reason of the non-payment of interest.

Order granted.

ILLIQUID ROLL.

ALVORD WILLS AND ABBOTT V. MILLEN. 1903. Dec. 15th.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £134 6s. 11d., goods sold and delivered, interest *a tempore morae*, and costs of suit.

Order granted.

LANCASTER V. ROUS.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £40, being balance of account due by defendant for money lent and advanced, interest at 6 per cent. from the 22nd May, 1902, and costs of suit.

Order granted.

DOMINICUS V. TAYLOR AND STERNER.

Mr. De Waal moved for judgment, under Rule 329d, for £2,100, purchase price of a certain piece of land near Elsie's River Halt, interest and costs of suit.

Order granted.

BROMEHEAD V. MORRIS.

Mr. J. E. R. de Villiers moved for judgment under Rule 329d, for £22, board and lodging, £3 for washing charges, interest *a tempore morae*, and costs.

Order granted.

IMMELMAN V. VISSER.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £50 sterling, being purchase price of certain one-half share of land in the township of Fraserburg, interest from the 26th October, 1896, and costs of suit. There was an application to sue by edictal citation, but the Court was not satisfied that the defendant had left the Colony, and directed that, in addition to service at the last known place of residence, the summons should be published in a Dutch paper, circulating in the Fraserburg district. Such publication has been made.

Order granted.

MORSER AND CO. V. LYTMAN.

Mr. Pyemont moved for judgment, under Rule 329d, for £8 15s., balance of account, £6 16s. 4d. attorney's fees, and disbursements, interest *a tempore morae*, and costs of suit, upon an agreement with regard to a certain order of sequestration that was withdrawn on condition

that they would pay a certain sum and the costs. A certain sum had been paid, and there remained the balance of £8 15s. and the costs

Order granted.

CORTESE AND WEBSTER V. HEDDLE BROS.

Mr. Rowson moved for judgment, under Rule 319 for £111 5s., under a liquidated demand, and also for delivery of a certain promissory note for the said sum.

Order granted.

WAY V. EDGCOMBE.

Mr. Searle, K.C., moved for judgment in default of plea for £200 sterling, due in terms of clause 3 of a certain contract entered into between the parties, and for interest and costs. The parties entered into an agreement of service, whereunder the sum of £200 had to be deposited by plaintiff to be repaid by the defendant within a month of the termination of contract. Notice was given, and the contract had been terminated, but the defendant had not repaid the sum of £200.

Order granted.

CROTE V. PARROTT.

Mr. Searle, K.C., moved for judgment in default of plea, or an order compelling the defendant to transfer to the plaintiff a certain piece of land, with buildings thereon, sold by the defendant to the plaintiff in terms of agreement. The declaration stated that the sale took place of a certain erf in the village of Piquetberg, and that the money which was to be paid under the contract had been paid, and the plaintiff now tendered to pass bond required for the balance, on the defendant passing transfer, as he was bound to do under the agreement. Although the plaintiff was now in possession of the property, the defendant had failed and neglected to pass the transfer.

Order granted as prayed.

MCDONALD AND CO. V. STEPHAN.

Mr. Buchanan moved for judgment in default of plea for £140 6s. 7d., being the amount due by the defendant to the plaintiff for money lent and advanced, and for goods sold and delivered.

Order granted.

ROBERTSON AND CO. V. ROBERTSON AND TROW.

Mr. P. S. T. Jones moved for judgment, under Rule 329d, for £40 12s. 4d., for goods sold and delivered, and interest and costs.

Order granted.

COLONIAL GOVERNMENT V. OCHSE.

Mr. Howel Jones moved for judgment under Rule 329d, in terms of summons for £22 8s., balance of purchase price of certain land, and £7 11s., fine and interest; £26 8s., purchase price of land, and £7 11s., fine and interest; also for £40, balance of purchase price, together with £7 11s. fine; and for an order declaring that if payment be not made within one month after judgment, the sale of the said lots of ground shall be null and void, and the land forfeited.

Order granted as prayed.

COLONIAL GOVERNMENT V. BAILEY.

Mr. Howel Jones moved for judgment for £606 14s. 5d., claims paid in respect to goods stolen by the defendant, also for the payment of £134 5s. 9d., expenses incurred in connection with the goods stolen by the said defendant.

The Chief Justice: That second item, I think, is a very unusual one?

Mr. Jones: It is an unusual one, but the defendant has had notice of the application.

Order granted.

PRINCE V. COPPIN.

Mr. De Waal moved for judgment, under Rule 329d, for £667 8s., balance due to the plaintiff for and by virtue of a certain contract entered into between the Rev. J. Spawn, acting for and on behalf of the African Methodist Episcopal Church, for the erection of certain buildings at Claremont, on the 27th August, 1903, with interest *a tempore morae*.

Mr. Alexander, for the defendant, Levi Jenkyns Coppin, put in an affidavit in which the latter said that he was the

Bishop and head in South Africa of the said Church, but that he had nothing to do with the temporal affairs of the Church, that he was in no way consulted in connection with the said contract, and that building would not vest in him, but in the trustees for the time being of the Episcopal Mission at Claremont. He had been away in Basutoland, and he found the summons awaiting him on his return. He had taken steps with a view of entering an appearance against the application and defending the case. He believed that the persons who should have been sued were the trustees for the time being of the mission at Claremont.

Mr. De Waal put in a replying affidavit by Mr. De Villiers, of the firm of Michau and De Villiers, who stated that they had applied to the Rev. Mr. Spawn for the payment, but had received no reply. The summons was subsequently issued against the defendant as the head of the Church in South Africa. The Bishop had petitioned this Court for the transfer of the property in question, and had obtained a rule *nisi*, returnable on the 1st February.

Mr. Alexander said that that was not before the Court, and that, as a matter of fact, the defendant did not petition the Court to have the property transferred to himself, but to the trustees for the time being of the Claremont Mission.

De Villiers, C.J., said that the question was too important to be decided at the present stage, and the Bishop must have an opportunity of defending the case. Leave would be granted to the defendant to enter appearance and defend the action, costs to be costs in the cause.

BURSLEM V. BURSLEM.

Mr. Greer moved for judgment, under Rule 329e, for judicial separation, in terms of the consent paper signed by both parties and duly witnessed.

Order granted.

WIPNER V. HOLLAND.

Mr. Pyemont moved for judgment, under Rule 319, in default of plea, for the sum of £46 3s. 6d., for rent, money lent, and goods supplied between December, 1901, and December, 1902, with interest *a tempore morae* and costs of suit.

Order granted.

LAMPRECHT V. KIRSTEN.

Mr. Benjamin moved for judgment, under Rule 329d, for the sum of £17, being the balance due on the purchase of a certain bicycle.

Order granted.

HARRIS V. HESSELL.

Mr. Close moved for judgment, under Rule 329d, for the sum of £25 for rent due, with interest and costs of suit.

Order granted.

LAW V. ROBINSON.

Mr. Close moved for judgment, under Rule 329d, for the sum of £31, for rent and taxes due, with interest.

Order granted.

TROTT BROS. V. DEKENAH.

Mr. Alexander moved for judgment, under Rule 329d, for £91, for goods sold and delivered, with interest *a tempore morae* and costs of suit.

Order granted.

JOHNSON AND CO. V. SWAEBE AND ANOTHER.

Mr. Sutton moved for judgment, under Rule 329d, for £90 5s., less £30 paid on account for work and labour done.

Order granted.

VIENNINGS AND ANOTHER V. EDWARDS.

Mr. Struben moved for judgment, under Rule 329d, for £3,000, being the balance of the purchase price of certain property.

Order granted.

HOFFMAN AND CO. V. JAFFE.

Mr. Greer moved, under Rule 329d, for £39 0s. 4d., for goods sold and delivered, with interest *a tempore morae* and costs of suit.

Order granted.

SHARP V. HADDOCK.

Mr. Smith moved for judgment, under Rule 329d, for £21, being rent for a certain shop, less £10 paid on account.

Order granted.

VAN DER BYL AND CO. V. EBRAHIM.

Mr. Smith moved for judgment, under Rule 329d, for £633 14s., less £73 paid on account, of the purchase price of goods sold and delivered, and also for the sum of £35 11s. 8d., being the balance of an account for goods sold and delivered, with interest on £669 5s. 8d. at 8 per cent., less a rebate of £2 3s. 6d. and the £73 paid on account.

Order granted.

WIENER AND CO. LTD. V. SCHOCHER.

Mr. Smith moved for judgment, under Rule 329d, for £121 4s. 4d., for goods sold and delivered, with interest *a tempore morae*, and costs of suit.

Order granted.

ALLIE AND ANOTHER V. O'DOWD.

Mr. Benjamin moved for judgment, under Rule 329d, for £13, for rent due.

Order granted.

WATERMEYER V. LOUW.

Mr. Buchanan moved for judgment in default of plea for £60 for rent on a certain farm let to the defendant.

Order granted.

CAPE TOWN TOWN COUNCIL V. VAN DYK

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £35 14s. 5d., being the balance of rates and taxes and costs of suit.

Order granted.

FAIRBRIDGE AND ANOTHER V. PETHEL.

Mr. Rainsford moved for judgment, under Rule 329d, for £31 15s., with interest *a tempore morae* and costs of suit.

Order granted.

LYONS V. THORNTON.

Mr. Rainsford moved for judgment, under Rule 329d, for the sum of £30, being rent due, and costs of suit.

Order granted.

ZEEDERBERG AND DUNCAN V. LEWIS.

Mr. Buchanan moved for judgment, under Rule 329d, for £35, being the price of goods sold and delivered.

Order granted.

ESTATE HATTINGH V. OELOFSE AND ESTATE OPPERMAN V. OELOFSE.

Mr. Schreiner, K.C., moved in these matters for an order setting aside certain transfers, and placing them in the names of the trustees.

Judgment in terms of the consent paper.

TOWN COUNCIL V. SOEKER.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for the sum of £15 12s. 10d. for rates, and 4s. 10d. for water supply, with costs.

Order granted.

TOWN COUNCIL V. ADAMS.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for £6 15s., for water supply, with costs.

Order granted.

CAPE TOWN TOWN COUNCIL V. ARON.

Mr. J. E. R. de Villiers moved for judgment, under Rule 329d, for costs since the issue of summons.

Order granted.

FARMERS' COMPANY V. HOWLETT AND ANOTHER.

Mr. Upington moved for an order in default of plea compelling the defendant to render a full and fair account of a certain transaction, in which the defendant undertook to sell a quantity of potatoes on commission, had sold the potatoes, and had rendered no account.

Order granted, account to be rendered this day month.

BOYCE V. PAUL AND OTHERS.

Mr. Rowson moved for judgment for the sum of £31 18s. 1d., which was made up of £22 2s. 1d., judgment and taxed costs obtained in the R.M.'s Court. There were also fees and disbursements in respect of a mortgage.

Order granted.

BANK OF AFRICA V. COHEN AND OTHERS.

Mr. Searle, K.C., moved for judgment in default of plea. The third defendant in the case signed a certain guarantee, on which the Bank sued for £298 4s. 1d., with interest at 8 per cent. The first two defendants were sued for 6 per cent., and now judgment was asked against the third defendant at the rate of 7 per cent. on all the guarantees. The third defendant had engaged to pay the amount by instalments of £75.

Order granted.

DE WAAL AND CO. V. DU TOIT.

Mr. De Waal moved, under Rule 329d, for judgment for £15 16s. 8d., balance due on goods sold and delivered, with interest *a tempore morae*.

Order granted.

REHABILITATIONS. { 1903. Dec. 15th.

Mr. De Waal moved for the rehabilitation of Frederick Albertus de Meillon, whose estate disclosed a deficiency of over £3,000. The trustee complained of the insolvent's abandonment of his farms and his mysterious absence for a while. Insolvent afterwards made his appearance at Victoria West, and, on being served with notice to attend a third meeting of creditors, he went away to Kimberley, and had not since been heard of. The sequestration was dated 1879.

Granted.

Mr. Sutton moved for the rehabilitation of Maria Elizabeth du Plessis, in whose estate no dividend was paid.

Granted.

Mr. Buchanan moved for the rehabilitation of J. G. A. Rawstone, of the firm of Rawstone and Leach. The trustee's report was only unfavourable with regard to Leach, though some complaint was made as to the books.

The Chief Justice said that no order would be granted at present, but leave would be given to apply again in three months.

Mr. C. W. de Villiers moved for the rehabilitation of Eduard Robinson, whose estate was sequestrated previous to July, 1899.

Granted.

Mr. C. W. de Villiers moved for the rehabilitation of Johan David Gerhardus Robinson, brother and partner of the previous applicant.

Granted.

Mr. Alexander moved for the rehabilitation of Johannes Francois Marais

Granted

Mr. M. Bisset moved for the rehabilitation of Johannes Christian Henning.

Granted.

GENERAL MOTIONS.

SWANEPOEL V. SWANEPOEL. { 1903. Dec. 15th

Mr. C. W. de Villiers moved for a decree of divorce with custody of the children and forfeiture of the benefits of the marriage, in default of defendant's compliance with an order to restore conjugal rights.

Decree granted as prayed.

DE KOCK V. DE KOCK.

Mr. Buchanan moved for a decree of divorce, in default of defendant's compliance with an order to restore conjugal rights.

Decree granted.

DE VILLE V. DE VILLE.

Mr. Russell moved for a decree of divorce, with right of access to the child of the marriage, in default of the wife's compliance with a rule calling upon her to return to or receive the plaintiff.

The Chief Justice said that the Court could only make the rule absolute, and they could make no order as to access without a further application.

Order accordingly.

Ex parte MEINTJES.

Mr. De Waal moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Order granted.

Ex parte SMUTS.

Mr. C. W. de Villiers moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Order granted.

Ex parte JOUBERT.

Mr. Russell moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Order granted, subject to production of the proper papers.

Ex parte ESTERHUIZEN.

Mr. Smith moved for a rule *nisi* under the Derelict Lands Act to be made absolute.

Order granted.

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

GENERAL MOTIONS.

DALVI AND ANOTHER v. AHMED. { 1903. Dec. 16th.

Ejectment — Motion — Rights of partners.

This was an application for a writ of restitution made by Ibraim Baba Dalvi and Sheik Ahamed Jaffer against Shaik Ahmed, in respect of the shop No. 75, Rochester-road, Salt River.

An order had been granted in Chambers restraining the respondent from parting or in any way dealing, by selling or otherwise, with the goods in the said shop, and furthermore interdicting him from paying over to one Mahomed Agmoedim such balance as may still be due in respect of the sale of the goodwill, etc., to Ahmed.

The applicants, in their affidavits, stated that in September last they entered into partnership with Mohamed Agmoedim to carry on business as shopkeepers at Salt River. Two shops were opened—21 and 75, Rochester-road. Applicants had been forcibly ejected from the premises in favour of the respondent, who said that he had purchased the goodwill and stock of the shop from Mohamed Agmoedim for £98. The deed of partnership contained a clause to the effect that none of the partners could deal with the business without the consent of the others. Deponents believed that Agmoedim's object was to defraud them of the proceeds of the shop.

The affidavit of Mahomed Agmoedim said that he purchased the goodwill and stock in the shop from Ibraim Noradem, on the 24th August, 1903. He paid £93 for the goodwill and stock. The rent was paid by witness. He sold the goodwill and stock to Shaik Ahmed for £98 9s. 8½d. He denied that he ever entered into a partnership with the applicants. The signature to the agreement purporting to be his was not his.

The affidavit of Shaik Ahmed supported the preceding affidavit as to the sale from Agmoedim to himself.

The affidavit of Ibraim Noradem said that he sold the goodwill and stock to Mahomed Agmoedim, who represented that he was acting for himself and the two applicants. Counsel also read affidavits from two witnesses, who spoke to Agmoedim having been a signatory to the deed of partnership.

Mr. J. E. R. de Villiers for applicants; Mr. McGregor for respondent.

Mr. J. E. R. de Villiers submitted that on the affidavits he had clearly shown that there was a partnership between the applicants and Mahomed Agmoedim. Agmoedim had signed documents, which had been brought into the case first under one name, and then under another, and finally he seemed to have forgotten how to sign and he made a cross. Counsel contended that the applicants had been forcibly ejected, and they were entitled to restitution on the ground of spoliation.

Mr. McGregor: See *Story*, Section 94, as to sale of moveables by a partner. In Section 95 he cites Roman Law authorities, but our law does not quite coincide with Roman Law on this point. See also Section 101. As to the rights of Partners, see *Kent* (par. 102, p. 172). Here there was an extension of the partnership to sell goods from two shops. But that was not equivalent to an assignment of the entire business, but only of the goodwill of the one shop. If the entire control of a business is left to one man he must be held responsible, and the interests of the innocent purchaser must be protected. The licence in respect of No. 75, Rochester-road

was taken out only in the name of Mahomed Agmoedin, and he was held out by the partnership as having full authority to dispose of this shop. Even the last month's bills paid for the shop show that Agmoedin was the responsible owner. I therefore submit that this is not a case to which the *Mandament van Spolie* applies.

[De Villiers, C.J.: If he gives security he might remain in possession of the shop.]

I think the partner would be able to give security.

Mr. De Villiers (in reply): English law as to holding over is very stringent. See *Lindley on Partnership* (p. 133, 6th edition). A partnership is not bound if a stranger deals with a partner not knowing him to be a partner. In this case one of the chief witnesses to the partnership and to the violent ejectment is a policeman, whom we cannot identify unless a muster of the entire force of the Cape District Police should be held, and it is practically impossible to obtain this.

De Villiers, C.J.: It is sought by motion to eject the respondent Shaik from the premises in question. The practice of the Court has been where a clear case has been made out to grant an order for ejectment, even on motion, but the case should be perfectly clear. In the present instance, the case is not so clear as to justify the Court in granting an order on motion. It is said that there has been conduct on the part of the respondent equivalent to spoliation. There is no evidence at all of spoliation on his part. He accompanied Agmoedim to the shop, and according to his statement, the person whom he found in the shop was quite willing to allow him to go into possession. On behalf of the applicant, it is stated that they were forcibly dispossessed, but the terms in which they state that are very vague. They say that the respondent was accompanied by a policeman, whom they would be able to identify. Well, why not identify him? I suppose the policeman is there still; the police force at Woodstock is not so large that they would not be able to find out who was the policeman who accompanied the respondent. There is a total absence of proof on their part that there was this spoliation, which is relied upon. In regard to the general question which has been argued, I certainly think that the weight of evidence is in favour of the existence of the partnership, and I am not at all prepared to accept the view urged by Mr. McGregor that one of three or four persons for the purpose of carrying on a business is justified in selling the whole of that business, including the goodwill and everything else, and it would, in my opinion, make no difference that there were two shops under the control of the partnership; there would be no right on the part of one partner to sell one of those shops. As it is put by Lindley in his work on Partnership: "Whatever is usual may be done by one of the partners, but certainly not what is unusual in the course of business." But the difficulty in this case is that, as far as one can judge from these affidavits, the applicants held out Agmoedim as the sole owner, and if the Shaik believed that the man was the sole owner, and dealt with him, then the question may arise now whether the applicants would be entitled to an order of ejectment. But the Court will not prejudge that matter; the question must be decided by action. There will be no order on the motion for ejectment, applicants to proceed by action, and pending such action, the Court grants an interdict restraining the respondent from dealing with any of the goods in the shop, or from paying out to Agmoedim any portion of the purchase price of the shop, unless he shall give security to the satisfaction of the Registrar for the sum of £100 and for the costs of any action to be brought by the applicants, applicants to go to trial during the February term, and costs of these motions to be costs in the cause.

Ex parte MABUYA. { 1903. Dec. 16th. „ 18th.

This was an application to have a rule *nisi* under the Derelict Lands Act made absolute. Mr. Close was for the petitioner, and Mr. Benjamin appeared for one Julius Hillner to oppose.

Mr. Close said that the first rule granted in connection with the matter was on 24th October, 1903, calling on all persons to show cause why a rule *nisi* should not be granted authorising transfer in favour of the petitioner of cer-

tain lots 19 and 34 in Stutterheim; and the second rule called upon his client to appear to show cause why transfer should not be restrained, pending a further order of Court in respect of lot 106. Upon the 15th April this year a rule was granted upon the petition of Mark Mabuya for title under the Derelict Lands Act, and was published in due form. That was in respect of a large number of lots. The applicant had been in possession in most cases for over thirty years, and in the others for seventeen years or more. On that date Mr. Buchanan appeared in respect of lots 33 and 106, to oppose transfer on behalf of the heir of one Moss, who was stated in the petition to be the registered owner of 33 and 106, and in that case the Court came to the conclusion that the petitioner was entitled to the order asked for, and made the rule absolute in respect of all the lots mentioned in that particular rule. On this order of the Court being proceeded with, the Registrar of Deeds at King William's Town discovered that certain lots were registered in the names of persons other than those described in the petition. There appeared to be some difficulty about the mode of discovering matters of this kind at King William's Town. Then the Registrar wrote a letter on the 3rd June, and on the strength of that letter, application was made to this Court. On the 24th October an amended petition was filed with the Court, and an application made and order granted. That order authorised the registration under the Act of lots 19 and 34, after the Court's attention had been drawn to the discrepancies that existed, so that those lots were for a second time confirmed in the name of the petitioner. He hoped the Court would permit him to make a correction of that statement. Republication was ordered in respect of lots 19 and 34, and it was lots 32, 33, and 106 that were confirmed. His learned friend (Mr. Benjamin) now appeared in respect to lot 106. There was an allegation made in the petition which he had filed, to the effect that his attention had been called to the rule granted on the 24th October, to the effect that lot 106 was his property, having been purchased by him from the original grantee, by whom it was transferred through the Registrar at King William's Town in 1865. He said that the land was still registered in his name. He had since been informed that this said piece of land was in 1881 again transferred by the original owner Hartz to one Moss. It appeared that in respect of this particular lot there had been double transfer registered in the Deeds Office at King William's Town. It appeared that the grantee sold the property in the first instance to Julius Hillner on the 10th August, 1863, and transfer was passed on the 2nd October, 1865.

[De Villiers C.J.: If once ownership has gone out of the original owner to Hillner, how can there be a second transfer?]

The mere fact of property being registered in the name of a person does not establish transfer, because it might have been registered under some agreement which might never have been carried out.

[De Villiers, C.J.: The transfer stands, and until it is set aside, it is good, and it holds good against all subsequent purchases.]

My client has been in possession of the property for seventeen years, and has paid rent and taxes, and he is still the person in possession.

[De Villiers, C.J.: But you have not had thirty years' possession.]

Mr. Close said he claimed transfer because the person who gave his client the right was the registered owner, and *prima facie* he contended that he was just as much entitled to the land as the other man.

[De Villiers, C.J.: Surely not; he is the later transferee from a person who has no property.]

Mr. Close said he quite appreciated the force of that answer. He was driven then to this point that the matter was one which was *res judicata*.

Mr. Benjamin submitted that an error of fact had been committed, and that it was competent for the Court to amend that error.

De Villiers, C.J., said that the Court would like an opportunity of looking into the papers, and seeing whether there was any way of settling the matter without putting these unfortunate people to further expense.

Postea (December 18):

De Villiers, C.J., asked if counsel had ascertained the value of the property that was in dispute, viz., lot 106.

Mr. Benjamin (who appeared for the

respondent Hillner) said his learned friend, Mr. Close, appeared for the petitioner, and he (Mr. Benjamin) was unable to say what the value was.

De Villiers, C.J.: He suggested on the last occasion that the Court should order pleadings to be filed. There is no opposition in regard to the other two lots, I suppose?

Mr. Benjamin: Not on the part of this respondent. He only opposes in regard to lot 106.

De Villiers, C.J.: As to Lots 32 and 33, the rule *nisi* will be made absolute; as to Lot 106, the rule must be discharged. It would appear that there had been a previous rule applying to 106, and the Court had made that rule absolute, but subsequently, when the matter was again mentioned in the Court, with the consent of all parties, including the applicant, a fresh rule was issued, applying also to 106. I take it that this amounted to a consent that the previous order should not be treated as binding on the parties, on the ground that no notice had reached the respondent Hillner to enable him to oppose the rule being made absolute. There was no opposition at the time to a fresh rule being issued, and that practically amounted to an abandonment of any right under the previous rule. Notice has been given in terms of the order as to rule 106, and thereupon the respondent Hillner appeared to object to the rule as to 106 being made absolute. The statement made—and it is uncontradicted—was that the property stands registered in the name of Hillner, and that the transfer to his predecessor in title was made before its transfer to the persons in whose name the transfer is now made. It is clear, therefore, that Hillner has a prior claim to this property. It is suggested that it might perhaps be shown that Hillner is not entitled to retain the transfer, but there is no ground stated for this suggestion. So far as appears, Hillner is the registered proprietor, and there is nothing to show that the applicant has a prior right; but, on the contrary, there is everything to show that it is Hillner who has a prior right to the property. The rule, therefore, as to 106 will be discharged, with costs.

Mr. Benjamin applied for costs for the application for an interdict against Mabuya.

De Villiers, C.J.: I think that the costs would fairly include the costs of the interdict.

Ex parte BRISTER.

Mr. Buchanan applied to have a rule made absolute, calling upon all persons interested to show cause by the 12th December why a certified copy of a certain bond should not be issued as prayed.

Rule made absolute.

Ex parte SIPIKA.

Mr. Russell moved to make absolute a rule granted on October 23, calling on all persons interested to show cause why certain lots of ground should not be transferred in the name of the petitioner. The land in question was registered in the name of the petitioner's father.

Rule made absolute.

Ex parte DU PLESSIS. { 1903. Dec. 16th. „ 18th.

Will—Distribution of estate—Life-usufruct of surviving spouse.

Mr. Burton moved for leave to the executors testamentary to pay out at once certain money to the heirs of the estate. A certain farm was bequeathed in the will to the children, but they were not to have any claim on it until the death of the survivor. A bondholder had called up his bond, and the realisation of the farm left a large sum of money in the hands of the executors, and the survivor had executed a deed of renunciation of her rights. There was another piece of ground, and the executors now asked that they might be allowed to dispose of it, and distribute the proceeds. The Master's report pointed out the clause in the will, but he did not oppose the proposal.

De Villiers, C.J., said that the Court would like to take time to read over the papers in connection with the case.

Postea (December 18):

De Villiers, C.J., said there was a difficulty in ordering the money to be paid at once to the children, as desired. The money was not to be paid until the death of the survivor.

Mr. Burton (for the petitioner): Yes, so the will says.

De Villiers, C.J.: Well, then, how can the Court make any order contrary to the terms of the will?

Mr. Burton said that all he could urge upon the Court with regard to the vesting of the property was that it would appear that there was, in the first place, a clear pre-legacy or bequest to the children of the property. The position he put before them on behalf of the executors, who were the applicants, was that they came before the Court representing the estate, and the executrix —who was the person on whose behalf these clauses postponing enjoyment were made in the will—had herself executed a deed of renunciation of all her rights.

The will merely postpones the enjoyment of the bequest. The direct legatee was the surviving parent, and the children came in only by representation.

[De Villiers, C.J.: Should the mother die before the children, what would be the position of the children?]

Their rights depend upon the rights of the mother. In the case of *Schoombie* v. *Olivier* (8, C.T.R., 196), the Court refused to authorize the distribution of the estate before the time fixed by the will; that I grant. The sale of the piece of Government ground in this case stands upon quite a different footing from that of the rest of the property.

Mr. C. W. de Villiers (as representing the minor) stated that he did not oppose the application.

De Villiers, C.J.: The Court will order that the proceeds of the farm Zuurfontein be deposited with the Graaff-Reinet Board of Executors, to be administered by such company in terms of the will, subject to the life usufruct of the survivor. As to the Government ground, the Court will make an order in terms of the Master's report.

[Applicant's Attorney: S. Mostert.]

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

GENERAL MOTIONS.

SEKELINI V. SEKELINI. { 1903. Dec. 17th.

This was a motion for an order declaring the applicant entitled to certain property. Mr. Schreiner, K.C., was for the applicant, Mr. Upington for the executors, and Mr. Buchanan for the *curator ad litem* of the minor.

[De Villiers, C.J.: Will this matter take long?]

Mr. Schreiner said he thought it would.

[De Villiers, C.J.: I think it had better stand over.]

Mr. Schreiner said that he did not think a postponement to the 1st February would interfere with the course of justice. He did not know of any urgent reason why the case should be heard now.

Mr. Upington agreed that there would be no injustice if the case stood over.

Mr. Buchanan had no objection to the case standing over.

The case was ordered to stand over until the February term.

Ex parte THE LIQUIDATORS OF THE SOUTH AFRICAN NATURAL MINERAL WATER CO.

Mr. Searle, K.C., moved for a rule *nisi* to be made absolute for the cancellation of a certain sale of property. Publication of notice had been given as directed.

Rule made final accordingly.

SWEETNAM V. QUIN.

Mr. Benjamin moved for an order for the removal of the respondent Joseph Quin from his appointment as one of the executors testamentary in the estate of the petitioner's father, and also for the payment of costs of this application. The petitioner stated that he was appointed co-executor with his mother and the respondent in the estate of his father, the late James Sweetnam, in the district

of Fort Beaufort. His mother was left in possession of the estate. It was not to be administered until her death, which took place in August, 1902. Before her decease the said Quin had left this colony, and had taken up his residence in the Transvaal. The respondent had been requested to assist in the administration of the estate, but he had come in an intoxicated state, and he was unfit to transact business. He had rendered the applicant no assistance, and had manifested no interest in the estate. Petitioner was informed that he was now resident in Johannesburg. A second liquidation and distribution account had been called up, but the Master would not pass it without Quin's signature.

Order granted as prayed.

Ex parte VAN DER WALT.

Mr. J. E. R. de Villiers moved for leave to the petitioner to take transfer of certain property in the estate of one John Albert Sweegers, in the district of Hope Town, of which he was co-executor. Petitioner and another person bought for £1,000 a third share in certain farms belonging to the estate, and they subsequently purchased the remaining two-thirds at public auction for £2,925. The Registrar of Deeds in Cape Town declined to register the transfer, on the ground that the petitioner, in his capacity as executor, was seeking transfer to himself in his private capacity, unless the Court first granted an order.

Order granted as prayed.

ALLIE V. HADIE.

Mr. Benjamin moved to make final a rule *nisi*, granted on the 27th November, restraining Messrs. Arderne and Wolfe from parting with the balance of the purchase price of certain property transferred by them on behalf of the respondent, pending the result of an action about to be instituted by the applicant against the respondent, claiming £325 upon and by virtue of a promissory note and £188 15s. lent to the defendant, rule operating as an interdict in the meantime. Mr. Benjamin said that the only question between the parties at the present stage was the amount to be interdicted. Counsel suggested that the amount, in order to cover the claim and the costs, should be £650.

Mr. McGregor, for the respondent, urged that a sum of £600 would be sufficient.

Rule made absolute, the conveyancers to retain in their hands £650 to meet the demand and costs, costs to be costs in the cause.

STAUDE V. STAUDE.

Mr. Russell moved on behalf of the petitioner (the wife) for leave to sue her husband by edictal citation for restitution of conjugal rights, or failing compliance, for divorce on the ground of malicious desertion. The parties, it appeared were married in community of property at King William's Town, and in August, 1902, the defendant went away to East London, and was now believed to be in Pretoria. He said at the time he left that he was going to Beira. He had not since contributed to the petitioner's support.

Leave granted, citation to be returnable on the 1st February, personal service to be effected.

RETIEF V. RETIEF.

Mr. M. Bisset moved on behalf of the petitioner (the wife) for leave to sue her husband *in forma pauperis*. Her husband, petitioner said, had been convicted of the crime of bigamy in the district of Swellendam.

De Villiers, C.J. (to Mr. Bisset): Will you take the reference in this matter?

Mr. Bisset consented.

HALL V. HALL.

Mr. De Waal moved on behalf of the petitioner (the wife) for leave to sue her husband by edictal citation for restitution of conjugal rights, failing that, divorce on the ground of malicious desertion. The petitioner said that she was married to the respondent, Sidney Evan Hall, at Sea Point, in community of property. A month after their marriage, the petitioner discovered that her husband was wholly unable to support her, and she joined the nursing staff of the Somerset Hospital. He visited her on several occasions in a drunken state, and asked her for money, which she gave to him out of

her earnings. Thereafter, she informed her husband that she did not intend to support him any longer. He then joined the Army Service Corps, and left Cape Town in June, 1902, since which date petitioner had not seen or heard from him. She had since received information that he was in Johannesburg, but she was not certain that he was still there.

Leave granted, citation to be returnable on the 1st February, personal service to be effected.

Ex parte WILSON.

Mr. Searle, K.C., said he had to ask that a certain undertaking signed by the defendant and his attorney with the indorsement of the applicant's attorney, be filed with the Registrar, in which he undertook to pay over a certain sum of money to the applicant's agent, without prejudice to the rights of either party in an arbitration now pending. It was desired that this undertaking should be made a rule of Court.

Mr. Upington (for the defendant) assented.

Order granted as prayed.

ESTATE MARSH V. SAVAGE.

Mr. Rainsford moved on behalf of the Rev. Thomas Edward Marsh, as executor of the late William Marsh, for leave to sue Kate Savage, widow, by edictal citation, in respect of a mortgage bond for £900, due by reason of the non-payment of interest. Petitioner was not acquainted with the whereabouts of the respondent.

Leave granted, citation to be returnable on the 1st February, one publication to be made in a Cape Town newspaper.

Ex parte ODENDAAL.

Mr. Pyemont moved for leave to the petitioner to sell the share of his two minor children in certain landed property, bequeathed to them. The Master, while approving the application, recommended that the proceeds of the sale should be paid into the Guardians' Fund.

Order granted in terms of the Master's report.

SUPREME COURT

[Before the Chief Justice (the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice MAASDORP.]

Ex parte EITNER. { 1903. Dec. 18th.

Mr. De Waal moved on behalf of the petitioner, as representing a minor, for leave to sell certain property, the proceeds to be paid into the Guardians' Fund.

Order granted as prayed.

Ex parte DE WET.

Gift to minor child—Revocation of gift.

W. had made a donation of £200 to a minor son and secured the money by lending it on mortgage. W. had to borrow the £200, which he subsequently repaid. The mortgage was in the son's name. W. now applied for an order, authorizing him as natural guardian of his son to cancel the said mortgage.

The Court refused the order.

Mr. J. E. R. de Villiers moved for the cancellation of a certain mortgage bond. The petitioner is the father and natural guardian of Nathaniel Jacobus de Wet, aged 12 years. He had had an intention of investing a sum of £200 for the benefit of his son, and had thereupon lent £200 to one Joseph Johannes le Roux upon mortgage upon certain land. After passing the bond, the petitioner found that he was not in a position to make the provision that he proposed, and he had to borrow £200 in order to complete the mortgage. The mortgage to Le Roux was made in favour of the petitioner's son. Petitioner had now repaid the money that he had borrowed, and he desired to cancel the mortgage bond that he issued to Le Roux, as he found that, through severe losses during the war, he was unable to carry out his original intention towards

his son. He asked for an order of Court authorising him to cancel the said mortgage bond. The Master had seen the petition, but had made no report.

[De Villiers, C.J.: From whom did he borrow the money?]

I don't know.

[De Villiers, C.J.: No; we want a little more information.]

I submit that it is not very material from whom he borrowed the money.

[De Villiers, C.J.: It might not be very material if the whole thing were *bona fide* and above board. I should like to know from whom he did borrow. Did he borrow it from his son?]

He is a man without property altogether.

[De Villiers, C.J.: Then what business has he to make a gift of £200 to his son?]

He suffered great losses on account of the war.

[De Villiers, C.J.: But when he makes the gift, he has no property, and he has to borrow the money in order to make the gift to his son, and then this bond is made in favour of his son. It is a most extraordinary bit of business, and is quite unintelligible to me. There is apparently something behind it. Why do you come to Court now?]

We can cancel the bond as the natural guardian on behalf of the minor son, but we cannot be said to be cancelling it on behalf of the minor, seeing that we are cancelling it on our own behalf. The debtor who passed the bond has paid it back to the father, and the father has paid it to the man from whom he borrowed it, so that the gift of £200 was never in existence at all.

[De Villiers, C.J.: The petitioner has got himself into this fix, and he must try and get out as best he may.]

He can cancel the bond as natural guardian.

De Villiers, C.J.: Then let him do so. If he wished to make this arrangement, then he must try and get out of it as he can. There will be no order.

[Applicant's Attorneys: Dempers and Van Ryneveld.]

ESTATE BASSON V. UNION ASSURANCE CO.—ESTATE BASSON V. LAW ACCIDENT INSURANCE SOCIETY.

Mr. Searle, K.C. (with him Mr. Benjamin and Mr. M. Bisset) moved for leave to appeal to the Privy Council against the judgments of this Court in the recent actions arising out of the drowning of the plaintiff's son, Jasper Basson, at Gordon's Bay.

Mr. Burton (with him Mr. J. E. R. de Villiers), on behalf of the plaintiff in the actions, said he raised no objection, provided the usual conditions as to the execution and security were complied with.

Leave granted on the usual conditions.

HUTTON V. STRYDOM.

Mr. Buchanan moved for leave to sue the defendant on a mortgage bond for £400, passed on the 1st November, 1897, due and payable by reason of the non-payment of interest, and for the attachment of the property specially hypothecated *ad fundandam jurisdictionem*, the defendant, who was formerly a farmer in the district of Vryburg, being now resident at Klerksdorp, Transvaal.

Leave granted, citation to be returnable on the 1st February, personal service to be effected, and the property specially hypothecated to be attached as prayed.

Ex parte DON.

Mr. De Waal moved on behalf of the petitioner, Eliza Jane Don (born Mitchell), for leave to sell certain property without the assistance of her husband, Alexander Don, to whom she was married in community at Kimberley. There were born of the marriage four children. After the first few years the respondent gave way to intemperate habits, and ill-treated the petitioner, with the result that in June, 1898, they mutually decided to separate, and from thenceforth they had lived apart. Respondent had not contributed anything since June, 1898, towards the support of petitioner and the children. The latest information that she had as to his whereabouts was that he was at Port Elizabeth about twelve months ago. Under the will of her father, she had had certain property at Port Elizabeth bequeathed to her, and as she was living in the Cape Peninsula she desired to have power to sell the said property by public auction, and to invest the money in property in the Cape Peninsula.

Mr. Benjamin (for the respondent) read the latter's affidavit, in which he claimed

one-half share of the proceeds of the sale of the property by virtue of the community of property. He had never been asked for leave to sell or transfer the said property, but he had no objection to the sale and transfer, provided he was duly secured as to one-half of the proceeds. It was not true that they had been living apart since June, 1898, as he lived with his wife until June, 1902.

Mr. De Waal read a replying affidavit by the petitioner, who said that it was true that she had not asked her husband's assistance to the documents, because she had been unacquainted with his whereabouts. It would be doubly hard upon the deponent if her husband were allowed one-half of the proceeds, as he had not contributed to the support of applicant and her children during the last five years. She had no intention of living again with the applicant.

De Villiers, C.J., asked if the petitioner had applied to the Court at any time for maintenance from her husband.

Mr. De Waal said he believed that she had not.

Counsel having been heard in argument on the facts,

De Villiers, C.J.: I think that the sale should proceed as proposed, and that half of the proceeds should be paid to the Registrar of the Supreme Court, to be held by him pending a further order of Court.

Ex parte EINTRACHT AND ANOTHER.

Mr. De Waal moved on behalf of the petitioner, who was the executor thorising the completion of an ante-nuptial contract. The petitioners, it appeared, were married at the Jewish Synagogue, Gardens, Cape Town, on the 22nd November, 1903, and had signed an antenuptial contract prior to the ceremony, but had neglected to obtain witnesses.

Order granted as prayed.

Ex parte ELLIOTT.

Mr. Benjamin moved on behalf of the petitioned, who was an executor under a will disposing of a certain estate, for the appointment of a *curator ad litem* to certain minors in the estate. The executor proposed to submit a special case with a view of interpreting the will.

Order granted as prayed, Mr. Advocate Buchanan being appointed *curator ad litem.*

Ex parte MEYER.

Mr. Russell moved for an order authorising the petitioner (the second son) to assist his father, Hendrik Jeremias Meyer, in the negotiations for the division of certain property in which he was interested. The petitioner's father, it was stated, was not of sufficiently strong intellect to enable him to transact business, and for that reason he had already been removed from the executorship of the estate.

De Villiers, C.J.: The Court will grant a rule calling upon Hendrik Jeremias Meyer to show cause on the 1st February why he shall not be declared incapable of managing his own affairs, and why the petitioner shall not be appointed *curator bonis*, rule to be served on the said Hendrik Jeremias Meyer and his eldest son, if the latter be in the Colony, the petitioner to be authorised in the meantime to act as *curator bonis.*

HARRISON V. HARRISON.

Mr. Benjamin moved for a fresh order as to the service of citation. The petitioner, it appeared, had obtained leave from the Court to sue her husband by edictal citation for restitution of conjugal rights, or in the alternative, for divorce; but the Court directed that the citation was to be served personally on the defendant, who was believed to be at Aldershot, England, and to be a member of the Royal Army Medical Corps. Inquiries by petitioner's legal representatives in England elicited the information that the defendant deserted from the R.A.M.C. on the 27th August, 1900, and had not since been heard of by the authorities.

An order was granted authorising substituted service, one publication to be given in the London "Daily Telegraph," citation to be returnable on the 1st day of the May term.

Ex parte NBULEKAZI.

Mr. Benjamin moved for an order for the seizure of certain cattle and sheep, in default of the respondents' com-

pliance with a rule issued by the Court directing them to restore possession to the petitioner of the said stock, pending an action to be brought by her in the Court of the Resident Magistrate at Herschel. The petitioner alleged that the respondents, who were brothers of her late husband, took the cattle by spoliation, that they had disregarded the order of Court to reinvest her with possession, and she now asked that the Chief Constable or the Messenger of the Resident Magistrate's Court be directed to seize the said animals and hand them over to the applicant, pending the action.

Order granted as prayed, with costs, petitioner undertaking not to part with any of the cattle or sheep until her right to the same shall have been duly established by judgment of the Court below.

Ex parte SIMPSON AND ANOTHER.

Mr. P. S. T. Jones moved for an order authorising the Registrar of Deeds to sanction the sale of certain property to the petitioner from an estate of which he was executor. The petitioner had bought the property by private treaty for £590.

Order granted as prayed.

KOENIG V. LANDESHUT.

Mr. M. Bisset moved for the appointment of a commission to take the evidence of the defendant on commission, as she was not likely to be fit to give evidence when the case came on for hearing in the February term.

Order granted as prayed, Mr. Advocate P. S. T. Jones to be commissioner, costs of the application to be costs in the cause.

Ex parte HURTER.

Mr. Benjamin moved for an order authorising the transfer of a certain piece of property at Somerset East, belonging to the estate of the late J. Hendrik Hurter, to the petitioner, who was executor. Petitioner and three others bought a farm for £2,030 at public auction, and petitioner proposed to take one-fourth share.

Order granted as prayed.

PASHA V. HADIEN.

Mr. Benjamin moved for the attachment of the defendant for contempt of Court, by reason of his failure to comply with the terms of an order of this Court, dated 12th October, 1903, by which he was required to give transfer to the plaintiff of certain property in Clifton-street, Cape Town, within one month.

Mr. Russell (who appeared for the Board of Executors) said that they had obtained provisional sentence against the defendant on a mortgage bond, and that certain property, including two pieces of land in Clifton-street, were attached by the Board. The land was now in the hands of the Master.

Defendant said that he had been ill for a period of four months, and that he was willing to pass transfer if given further time.

De Villiers, C.J., said that the Court would grant an extension of the time allowed for transfer until the 1st February.

STANDARD FLOUR MILLS V. COHEN.

Mr. Greer moved as a matter of urgency to make absolute a rule *nisi* restraining one Arendson from dealing with the goods of the defendant, G. Cohen, pending proceedings to be brought by the plaintiff for the compulsory sequestration of the defendant's estate.

Rule made absolute accordingly.

SUPREME COURT

[Before the Chief Justice, the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G., LL.D.]

GENERAL MOTIONS.

LAW SOCIETY V. KRIGE. { 1903. Dec 19th.

Mr. Gardiner moved, on behalf of the Law Society, for the respondent, Evelyn William Krige, attorney and notary, of Ceres, to be removed from the rolls and to be ordered to place his certificate in

the hands of the Registrar in consequence of his having recently been convicted of the crime of theft.

Mr. M. de Villiers, for the respondent, said he would ask his lordship to be as lenient as possible, and that he proposed to call his attention to certain previous cases. In one of these the attorney concerned was struck off the rolls for six months, with leave to apply for re-admission, and in another case the attorney concerned was suspended for a certain term. Counsel quoted the case of *the Incorporated Law Society* v. *Lloyd* (7 Cape Times Reports, p. 12). He went on to say that his lordship was, of course, aware of the facts, but there were certain uncontroverted points in connection with the case that he thought were of importance. The first was the youth of the attorney concerned in this case, Krige being a mere youth, who had been only admitted a few months when this occurrence took place. In the second place, he was in partnership with another attorney, in regard to whom his lordship said at the trial that the accused had had a very bad training indeed. The accused was, technically, found guilty of having misappropriated first a guinea, and, secondly, an amount of £5. He understood that his lordship took up the position that only half of these amounts had been misappropriated by the defendant, viz., 10s. 6d. and £2 10s. It was quite true that the defendant had conducted himself in a way that he ought not to have done, but, on the other hand, it was very difficult for such a young man, with these concomitant circumstances to withstand the influence brought to bear on him.

Mr. Gardiner said that this was a case of fraud practised on an ignorant man, a fraud which very possibly might not have been found out. It was the appropriation of client's money. The only palliation for the offence was the youth of the attorney in question. He submitted that although he might be a young man it was well that even young attorneys should be warned of the serious offence they had committed when they tampered with their clients' money.

De Villiers, C.J.: Under ordinary circumstances, the Court deals very severely with the attorneys who are guilty of anything in the way of embezzlement or defalcation. There are, however, certain circumstances in this case, which must induce the Court not to deal as severely with the respondent, as it otherwise would. He is only just of age, and the amount taken was very small indeed, and it was in consideration of these facts that the sentence passed was comparatively lenient. It is quite true also that I did state, when I passed sentence, that the accused had been in a very bad school, and being in that school at his age he was probably misled into doing a thing which he otherwise would not have done. I made that remark because of what was said by his partner in cross-examination. The admissions made by Krige's partner in cross-examination were such as to satisfy me that his partner was not a man who had any scruples in dealing with his clients. Under all the circumstances, therefore, I shall deal very leniently with the respondent, and order him to be suspended from practice for a period of six months, and to pay the costs of this application.

RUSSELL v. RUSSELL.

Mr. Rowson moved, on behalf of the petitioner, for leave to sue her husband, Charles Stewart Russell, by edictal citation for restitution of conjugal rights, failing which, divorce, by reason of his having deserted her in Cape Town in 1898. The parties, it appeared, were married in community at Johannesburg, and subsequently lived in Cape Town. In 1898 the defendant left petitioner to go to Beira, and his present whereabouts could not be ascertained.

Leave granted, citation to be returnable on the first day of the May term, personal service to be effected if possible, failing which one publication in a Beira newspaper and one in a Cape Town newspaper.

Ex parte BADENHORST.

Mr. C. W. de Villiers moved for the discharge of the petitioner from an order of Court appointing him to the office of *curator bonis* of his brother, Johannes Joseph Badenhorst, who had formerly been an inmate of the Valkenberg Asylum. The respondent had been discharged from the asylum, and had since been attending to his own affairs.

Order of release granted.

Ex parte HARDY AND INGGS.

Mr. Benjamin moved for an order appointing the petitioners liquidators of the Loyal Oak Lodge of Odd-Fellows at Uitenhage, an unregistered company, with unlimited liability, with full powers to wind up. The company had ceased to carry on business since 1885, and had for all practical purposes been non-existent. It now consisted of thirteen shareholders. It had been decided to sell the asset of the lodge, a piece of land at Uitenhage, for £700, to wind up the affairs of the company, and appoint the petitioners as liquidators. Counsel said the application was made under the Act 25 of 1892 (section 216).

The Chief Justice questioned whether the lodge could be called a company, and remarked that he supposed that next they would be asked to dissolve a lodge of Freemasons. He thought it would have been very well if counsel had considered the Cape Town Club case. No order would be made at present, but counsel might mention the matter again.

MAX V. MAX.

Mr. Alexander moved for the petitioner for leave to sue by edictal citation for divorce, on the ground of the defendant's adultery with one Mrs. Annie Simmonds, in the Transvaal and also at Bloemfontein, O.R.C., and for custody of the minor child of the marriage. It was stated that the parties were married in London, England, in 1894, and subsequently resided in Johannesburg and Cape Town. The respondent left the petitioner in December, 1902, and proceeded up-country in search of work, and had since lived at Bloemfontein with the said Simmonds.

Leave granted, citation to be returnable on the last day of February term, personal service to be effected.

ESTATE SCOTT V. SYDSERFF.

Mr. Gardiner moved for an order for the removal of the respondent from office as sole surviving executor testamentary in the estate of the late Alexander Scott, and for a meeting to be convened of the next of-kin to appoint someone to fill the office of executor dative. The respondent, it appeared, some time ago wrote to the Master stating that, owing to his advanced years, and the fact that he was living in the Orange River Colony, he wished to be released from the office. He took up the position that he had already, in consequence of that notice to the Master, ceased to be executor of the estate.

Order granted as prayed, costs to come out of the estate.

Ex parte WESSELS.

Mr. Gardiner moved for leave to sell certain property on behalf of a minor.

Order granted as prayed.

Ex parte MATTHEE.

Mr. Buchanan moved, on behalf of the petiitoner, who is executrix in her husband's estate, for leave to the Registrar of Deeds to pass transfer to her of certain property in the estate, which she had bought at public auction. The property consisted of two erven at Napier, left by the joint will of the parties to their two minor sons, and it appeared that the debts exceeded the amount of the value of the property.

Order granted as prayed.

Ex parte VAN WYK.

Mr. De Waal moved for leave to sell certain property in which minors were interested.

Order granted as prayed.

HYMAN V. HYMAN.

Mr. P. S. T. Jones applied for leave to extend the return day of a certain citation. He stated that they had now ascertained that the respondent was at Delagoa Bay, and they applied for leave to effect personal service, failing which, substituted service.

Return day extended to the first day of February term, personal service to be effected if possible, failing which, one publication in "O Futuro" and in a Cape Town newspaper.

Ex parte KNIGHT AND ANOTHER.

Mr. Schreiner, K.C., moved on behalf of petitioners, husband and wife, for leave to execute a post-nuptial contract. The petition stated that the parties were domiciled in this colony, and that they were married in England while on a

visit to that country. They were informed at the time that it would not be necessary to execute an ante-nuptial contract to be married without community in England, but they had since found that they were misinformed, and they now applied for leave to execute a contract excluding community, and enabling the first-named petitioner to settle on the second-named petitioner £6,000.

Order granted as prayed, subject to an affidavit being filed showing that the settlement was agreed upon prior to marriage.

GRAHAM V. FIRTH.

Mr. Schreiner, K.C., moved for judgment on behalf of the defendant in default of proceeding with the action on the part of the plaintiff, and also asked for the discharge of a certain interdict granted on August 13.

De Villiers, C.J., said he was informed by the Registrar that notice had been given that the plaintiff had withdrawn the summons. There was a difficulty in signing judgment upon proceedings which had been withdrawn.

The interdict was discharged, with costs, including costs of the present application, and the summons issued by plaintiff

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Ex parte MYBURGH.

Mr. Gardiner moved, on behalf of the minor, for leave to sell, as co-legatee, certain shares in a farm.

Order granted as prayed.

Ex parte SMUTS.

Mr. M. Bisset moved, on behalf of the minor, for leave to raise £300 mortgage on certain property, in order to meet certain obligations due on the minor's share.

The Master's report was favourable.

Order granted in terms of the Master's report.

Ex parte NEL.

Mr. M. Bisset moved for the appointment of a *curator ad litem* to a minor, in order that the said minor should participate in arbitration going on in connection with certain property at Oudtshoorn. The matter had previously been before the Court, and his lordship had directed that a certificate should be obtained from the R.M. as to the fitness of the curator suggested. Certificate was now handed in.

Order granted as prayed.

Ex parte GRESSE.

Mr. P. S. T. Jones moved for leave to raise a sum of £800 on mortgage bond to pay off certain promissory notes. The Master, in his report, recommended that the amount to be allowed should be £613 od l.

Order granted in terms of Master's report.

Ex parte THE AFRICAN MERCANTILE CO., LTD.

Mr. Schreiner, K.C., moved, as a matter of urgency, for the appointment of Mr. John Edwin Hall Close as sole liquidator in the matter of the voluntary winding up of the African Mercantile Company, Ltd., upon the dissolution of partnership in the firm of Gibson, Close and Co. Counsel said that the application was made under sections 186 and 189 of the Companies Act.

Order granted.

Ex parte THE SECRETARY OF THE GRIQUALAND WEST BOARD OF EXECUTORS.

Mr. McGregor moved, as a matter of urgency, for an order authorising the cancellation of a certain mortgage bond, or the issue of a certificated copy of the same for the purpose of having consent to cancellation endorsed thereon. The bond had been passed by one Brand upon a farm in the division of Worcester for £1,000 in favour of one Archibald Cochran, of Glasgow, Scotland, and formerly of Kimberley, whose power of attorney was held by the petitioner. The mortgagor desired to pay off the bond, but the document seemed to have been lost or mislaid, and no trace of it could be obtained.

A rule was granted calling upon all concerned to show cause on the 12th January why an order should not be granted as prayed, rule to be published once in a Cape Town English newspaper and once in a Dutch newspaper,

Re THE WORCESTER BUTCHERY CO.

Mr. Buchanan presented the second report of the liquidator, from which it appeared that the receipts up to the present were £1,600 5s., and the payments £804 5s. 11d., leaving a sum of £845 odd available for distribution. Counsel moved for an order authorising the payment of a dividend of 5s. 6d. in the £, and fixing the remuneration payable to the liquidator.

Order granted as prayed, liquidator to receive the usual remuneration.

SUPREME COURT

[Before the Chief Justice (the Right Hon Sir J H. DE VILLIERS, P.C., K.C.M.G., LL.D.), and the Hon. Mr. Justice KOTZE.]

ADMISSION. { 1903. Dec. 21st.

Mr. Buchanan moved for the admission of William Knox Baxter as an attorney-at-law and notary public.

Application granted and oaths administered.

APPEAL.

REX V. NEWMAN.

Liquor licence—Selling to native —Increase of penalty by Proclamation after issue of licence.

The applicant obtained a licence for the sale of liquor in a native territory subject to the Proclamation then in force, which prohibited the sale of liquor to natives, and the licence contained an indorsement to the effect that the sale of liquor to natives would subject him to a penalty of £50. After the date of the licence the Governor, by Proclamation, increased the penalty to £100.

Held, *that the appellant, on conviction, was liable to the increased penalty.*

This was an appeal against a conviction by the Resident Magistrate of Matatiele, for contravening section 30 of the Proclamation 104 of 1903. The accused, Arthur Charles Newman, was charged with wrongfully and unlawfully selling, giving, supplying, or delivering or causing to be sold, given, supplied, or delivered by Thomas Nolan, a barman in his employ, to a prohiibted person one bottle of brandy, to wit, one Jack, alias Katiba, a native, who was a prohibited person, as defined by section 37 of the Proclamation.

From the evidence for the prosecution in the Court below, it appeared that the accused was manager of the Royal Hotel, at Matatiele, during the absence of Mr. Payn. The native Jack, a detective in the employ of Charles Henry Forrester, acting inspector of licences, was sent by his master to purchase a bottle of brandy. The native was supplied with liquor by the barman, and he afterwards put the liquor into a bottle and took it to his master. The accused, who pleaded not guilty, was found guilty, and sentenced to a fine of £100, or in default, three months' imprisonment. In his evidence, Newman said that if Nolan had supplied liquor to natives, it was distinctly against his instructions.

The Magistrate made the following remarks at the end of the record: "Attention is invited to Proclamation No. 294 of 1902, and to the second paragraph of the preamble to Proclamation 104 of 1903. The Court considered the evidence of the witnesses for the prosecution sufficiently reliable to convict, the discrepancies in their evidence being of a trivial nature."

Mr. Benjamin for appellant; Mr. Joubert for the Crown.

Mr. Benjamin said that the prosecution was instituted under the provisions of Proclamation 104 of 1903. He thought the reason why the Magistrate called particular attention to the second paragraph of that Proclamation was that all licences previously issued were made

subject to the provisions of this Proclamation.

De Villiers, C.J., remarked that it seemed odd that a man should pay for his licence under certain conditions and then the Governor should issue a Proclamation to make the conditions more onerous.

Mr. Joubert said that the licence was issued under the Proclamation 238 of 1902, but the penalty for supplying prohibited persons was the same in both Proclamations.

Mr. Benjamin said that the penalty provided in the licence was £50, or six months' imprisonment. There was also, however, the endorsement on the licence. The system under which the accused was prosecuted was the trapping system, and he wished to ask their lordships to very carefully consider the evidence that was given.

De Villiers, C.J., pointed out that one of the witnesses called for the defence was a Mr. Frank Payn, who seemed to have been getting his dinner at the hotel when the alleged offence was committed. If this Mr. Payn were the holder of the licence, and if the liquor had been supplied by Nolan, why should Newman have been prosecuted?

Mr. Benjamin said he was informed that Mr. Frank Payn was not the Mr. A F. Payn in whose name the licence had been issued. The manager was responsible for the acts of the barman. Counsel went on to urge that the trapping system was of a most objectionable character, and that if there were any discrepancies in the evidence the defendant should have the benefit of the doubt. The record, he added, did not seem to have been kept so well as it might have been

[De Villiers, C.J.: You must take it that the evidence has been correctly taken down. You can only argue upon the record.]

Mr. Benjamin read the section defining prohibited persons, amongst those embraced being Basutos, Fingos, Natives of South and Central Africa, and Asiatics

[De Villiers, C.J.: And Chinese.]

Mr. Benjamin said he was not sure whether the Celestial was embraced, but he noticed that the provision was very sweeping—"and other Asiatics."

[De Villiers, C.J.: Very well, that would include Chinamen.]

Mr. Benjamin contended that the licence should not have been subject to more onerous conditions under a Proclamation issued subsequently to the licence being taken out. He submitted that it was not within the power of the Governor, in issuing this Proclamation to interfere with existing licences, and that such Proclamation should only apply to new licences issued subsequent to the Proclamation.

De Villiers, C.J., asked Mr. Joubert under what section the manager was held to be liable for the acts of the barman.

Mr. Joubert replied section 16 of the Proclamation 104 of 1903. Counsel went on to say that the point had not been raised now, which was raised in the Court below that Newman had specifically instructed Nolan not to sell to natives. If the Magistrate had found that Newman had given such instructions he (Mr. Joubert) thought that the accused would not have been convicted. If he had found that the sale had taken place in the teeth of the opposition of Newman, the Magistrate would probably have dismissed the case. That point, however, was not now raised. Counsel also addressed the Court in regard to the endorsement on the licence.

Mr. Benjamin, in reply, urged that if the Court were against him on the main question there were grounds for reducing the sentence.

De Villiers, C.J.: The main ground of appeal in the present case is that the evidence was not sufficient to justify a verdict of guilty. But, before considering the main defence, I may say a few words in regard to the preliminary objections which have been taken in this case. The first preliminary objection is as to the person by whom this offence is alleged to have been committed. Newman was the person who, under the Proclamation, which was in force at the time when the offence was committed, was authorised by the Magistrate, in the absence of the holder of the licence, to carry on the business, and he, therefore, under the 16th section of the Proclamation of 1903, became liable to all the duties, obligations, and penalties of the original holder of the licence. Payn was the original holder, but the accused now became liable to the same penalties to which the holder would have been liable. The sale, however, was not effected by the accused, but, apparently, by the barman employed by him, and if it had been proved that there was an

express prohibition by the accused against the barman selling the liquor, then an important question would have arisen as to whether the accused could be held liable for the act of his servant committed against this express instruction. That question does now arise, because we must take it that the Magistrate disbelieved the statements made by the accused and by his barman as to such express prohibition. The Magistrate, apparently, did not believe the rest of their evidence as to the sale of the liquor to the native and I take it that the Magistrate must be taken to have disbelieved the statement made by them in regard to the prohibition. If there was no such prohibition no clear proof of such prohibition, then it is clear that the accused is the person who is now subject to the same penalties as the original holder. The sale took place by the hands of the barman, but we must take it that the accused was a party to that sale, and was aware of that sale. Then the next preliminary question raised is as to the amount of the penalty. It is said that under the licence, as originally issued, the penalty was to have been not exceeding £50, or six months' imprisonment. But upon the licence there is this endorsement: "This licence is issued subject to the provisions of Proclamation No. 238 of 1902, if such Proclamation shall have the force of law in this territory." By that Proclamation, the penalty is increased to £100, but it is said that it never became law in this territory, and therefore the case may be decided quite independently of that Proclamation of 1902. But, in point of fact, in 1903 a Proclamation was issued which seems to have taken the place of the Proclamation 238 of 1902, and the 30th section of this Proclamation of 1903 enacts that any person contravening this regulation, *i.e.*, selling intoxicating liquors to natives without a proper permit, shall be liable, on conviction, for the first offence, to a penalty not exceeding £500. Now, in my opinion, it was in the power of the Governor by Proclamation to increase the penalties for contravening any condition of the licence. It is simply adding to the punishment, not adding a further condition to the licence, but adding to the punishment which might be inflicted for a contravention of any of the recognised conditions of the licence. The accused must be taken to have been aware of the existence of this Proclamation, and in spite of the knowledge which the law presumes, he chose to sell to a native. I think he must bear the consequences. The penalty, therefore, of £100 for the offence that was committed was a legal penalty. Coming then to the main question raised by counsel as to the evidence in this case, the Magistrate is the best judge as to the credibility of the witnesses. A native had been employed by the Inspector of Licences to go to the bar and purchase liquor. He was examined before going, and money was given to him. He was watched—closely watched—by the inspector; he was seen to go into the canteen, and he was seen to come out again, and the inspector lost sight of him for only half a minute, and when he came back he had in his possession a little bottle, in which he had put brandy which he had taken into his mouth, and he had no money. The money which he had been given was gone, and there was this brandy in the small bottle. The trap distinctly states that it was the barman who sold this liquor to him, and his evidence is corroborated by the fact that when he came to the inspector shortly afterwards, he had this little bottle with the brandy. There is no possibility suggested as to the man having been able to obtain this brandy elsewhere. He must have obtained it at that bar, and he could only have obtained it by purchasing. There is no trace of the money he had received, and therefore I think that the Magistrate properly disbelieved the barman and the accused himself as to the impossibility of this sale having taken place. Upon the merits, therefore, also I am of opinion that the accused should fail, and that the appeal must be dismissed.

Kotzé, J.: I am of the same opinion.

[Appellant's Attorneys: Findlay and Tait.]

REX V. TATE.

This was an appeal against a conviction by the Resident Magistrate of Knysna, under which the appellant, Peter Tate, had been sentenced to one month's imprisonment, with hard labour.

on a charge of having stolen a 9-carat gold buckle ring. The ground of appeal was that the conviction was not supported by the evidence given before the Court of the Resident Magistrate, and was contrary to law.

The evidence for the prosecution was to the effect that Solomon Saba, a hawker residing at Cape Town, went to Bracken Hill, with a box of jewellery, that the accused took out the ring and refused to return it, and wanted to fight the hawker. Accused went into the box, and emphatically denied that he stole the ring. He declared that he bought the ring (produced) at Sterkstroom. He admitted that he threatened to fight the hawker, but said it was because he had been falsely accused of stealing the ring.

Mr. Gardiner for the appellant; Mr. Joubert for the Crown.

Mr. Gardiner said that the case for the Crown depended entirely on the evidence of the hawker, and he submitted that it was unsafe to convict solely on the hawker's testimony. There was no evidence that the hawker had a buckle ring before going to this place. He contended that the Court, on the uncorroborated evidence of the hawker, ought not to have convicted the accused. There was some proof, at any rate, that a similar ring was bought by accused up-country.

Without calling upon Mr. Joubert,

De Villiers, C.J.: The case depends entirely upon the credibility of the hawker, Solomon Saba. He gives a detailed account of the circun stances under which he lost the ring. He said: "I had a box of jewellery with me when the accused came up and took a 9 carat gold buckle ring out of my box. He looked at it, but did not return it. I asked him to return the ring, when he took a Mizpah ring, and said that was the ring. I asked him several times for my ring, but he wanted to fight me." Here is an express statement that a gold buckle ring was taken out of the box by the accused, and not returned. There can be no mistake about this. It is suggested that the hawker should not be believed, but the Magistrate, who saw this witness, and heard him give his evidence, is the best judge as to his credibility. Then when we come to the evidence for the accused, we find that he attempted to prove that the ring which he had been seen wearing was a ring which he had previously bought at Sterkstroom, and the brother was called, who stated that the ring that had been bought at Sterkstroom had been worn by himself. "I have often been wearing it for a period of six months, and I wore it on my middle finger." There can be no mistake about the finger on which he wore it. Then he is asked to fit the ring on, and it does not fit the middle finger, and yet the accused afterwards, when he gives his evidence, says that the ring which he had bought at Sterkstroom was the ring which his brother had worn. His brother must have worn a different ring from the one that he bought at Sterkstroom, so that the brother does not support the defence. But, quite independently of that evidence, the evidence of the hawker is conclusive if true, and, as the Magistrate believed it, I do not see that the Court can disturb the finding. The appeal must be dismissed.

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„ 3 of 1879—Prescription.

In 1863 M. purchased from one W. a certain piece of land. About a year after this purchase had been completed, W.'s estate was sequestrated (as it appeared). The heiress of W. now opposed a rule nisi *in favour of M. being made absolute.*

Held, *that as M. had been in quiet and undisturbed possession of the land for forty years, and more especially as it was not quite clear that the estate of W. had been sequestrated,*

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the rule nisi *must be made absolute.*

Ex parte McGrath 870

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Action against messenger of the Magistrate's Court — Interpleader suit.
Where property seized in execution is claimed by a third party, and no steps are taken to have the claim determined by way of interpleader suit, the claimant may sue the messenger for the recovery of the property.
Ndube v. Holmes 813

Action for Account, *see* Practice 1053

Actual Cost, *see* Condition precedent 103

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Administering liquidator—Trust funds—Investment.
The directors of a certain Company having decided to liquidate the Company, appointed one H. as administering liquidator. In 1883, H. deposited the funds in his hands with defendants, who agreed to pay interest half-yearly at the rate of 5 per cent. per annum on such moneys. In 1888, the defendants gave notice that they would reduce

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the rate to 4 per cent., which they accordingly did. In 1895, they gave notice that in future they would pay no interest on these moneys. They again agreed to pay interest from 1899 at 4 per cent., to be reckoned yearly. The plaintiffs now sued the defendants for an amended account.
Held, *that as the directors of the plaintiff Company had consented to the course pursued by the defendants, the account rendered by the latter must be held to be true and correct.*
Liquidator of the Life Branch of the South African Fire and Life Assurance Company v. Board of Executors 1019

Adiation, *see* Joint Will 554

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Admission, *see* Attorney ... 254, 337

Admission of Attorney—Act 30 of 1892.
An official intimation having been made to the Court that the Governor does not intend to specify any examination in statute law for Transvaal attorneys, inasmuch as no examination is required in the Transvaal for attorneys of this Court.
Held, *that the applicant, who had been admitted in the Transvaal and had complied with all the provisions of the 2nd section of Act 30 of 1892, except those contained in subsection d, was entitled to be admitted as an attorney of the Supreme Court.*
Ex parte Hofmeyr 728

Admission of Notary — Examiners.

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The applicant passed the notary's examination before two advocates of the Supreme Court and a notary duly admitted by the Supreme Court, but the examination took place in Rhodesia. The applicant having been duly admitted as notary by the High Court applied to the Supreme Court for admission to practice in this Colony.

Held, *that as the Act required two notaries and one advocate to be the examiners, the applicant was not entitled to admission.*

Ex parte Blayney 1089

Adultery—Damages.

In an action for damages against the co-defendant who had committed adultery with the defendant, the wife of the plaintiff, it was proved that the plaintiff had frequently used foul language towards his wife. No damages were awarded, but the co-defendant was ordered to pay the costs of the action.

Clifford v. Clifford and Another 180

Adultery — Non-access — Non-cohabitation.

The plaintiff did not cohabit with or even have access to the defendant, his wife, for two years, at the end of which time she gave birth to a child.

Held, *that this constituted sufficient proof of adultery.*

Hickman v. Hickman ... 659

Affidavit—Application to compel Attorney-General to produce an affidavit made by a witness in a criminal case refused.

A Judge may, in the interests of justice, call a witness not summoned by either the Crown or the prisoner. Such witness may, with leave of the Judge, be cross-examined by counsel for the party against whom the witness has testified, but only in so far as the evidence of the witness is adverse and no further.

Rex v. Conrad Cohen and four Others 1171

Affidavits, *see* Interdict 207

Affidavits, *see* Practice 97

Age of Child-bearing, *see* Minors 213

Agency, *see* Contemplation of insolvency 751

Agency—Attachment of registration of trade mark *ad fundandam jurisdictionem.*

Bartram and Son v. Atkins and Lovet, Christmas and Co.
Bartram and Son v. Campbell, Shearman and Co. ...1055

Agency—Estoppel.

One D., a servant of the Colonial Government, had ordered certain goods from the plaintiffs for public purposes. The orders were made out on Town Council forms, and plaintiffs having sued the Council in the Magistrate's Court for the price of these goods, the Magistrate granted "absolution from the instance," with costs.

Held on appeal, *that as the goods had not been ordered by any official of the Town Council, the Council could not be held responsible, and that as no Town Council official had held out the Council as liable, the Council were not estopped from denying liability, and that the Magistrate's judgment must, therefore, be affirmed*

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and the appeal dismissed, with costs.

Smith and Son v. Cape Town Town Council 947

Agent, *see* Counsel 843

Agent, *see* Liquor laws 214

Agent's signature, *see* Election petition 459

Agreement to give lease and occupation — Time — Essence of contract.

The defendant agreed to give a five years' lease of certain premises to the plaintiff, who paid a quarter's rent in advance. At the time of the agreement the premises were not completed, and the defendant agreed to give occupation at a certain date. On the arrival of the date the premises were not completed, and the time was further extended to a fixed date which the Court found to be an essential part of the agreement. At the expiration of such extended time the defendant gave the plaintiff the keys, but after the plaintiff had taken possession an objection was raised by the municipal inspector to occupation without an occupation licence, and the defendant told the plaintiff to leave until such certificate could be obtained. The plaintiff vacated the premises, and refused to take occupation ten days afterwards when an occupation licence was forthcoming.

Held, *that the defendant's failure to give possession at the time agreed upon released the plaintiff from the obligation of taking a five years' lease, and that the plaintiff was entitled*

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to recover back the rent which he had paid in advance.

Levy v. Rose 290

Agreement to give time, *see* Provisional sentence 296

Agreement as to Water, *see* Municipality 949

Alteration of surname—Rectification of transfer.

The applicant having changed his name after land had been transferred to him, applied for a rectification of the transfer in the Deeds Office.

Held, *that he was not entitled to the assistance of the Court.*

Ex parte Van Rooyen ... 668

Animus furandi, *see* Theft ... 650

Anticipation of return day, *see* Arrest 191

Appeal, *see* Redhibitory Action ... 216

Appeal, *see* Act 48 of 1882 ... 899

Appeal, *see* Costs 940

Appeal in criminal case—Leave to prosecute appeal.

The defendant, in a criminal case having allowed a full term of the Court to elapse after conviction, applied for leave to proceed with the appeal.

Held, *that in the absence of any statement of the grounds on which the special leave was asked for, the application should be refused.*

Rex v. Ratowsky 1165

Appeal — Question reserved — Theft by means of false pretences — Variance—Theft by member of firm.

On the trial of an attorney for theft by means of false pretences the false representation alleged in the indictment was

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that the accused had stated to the prosecutor that he had paid certain money received by him on behalf of the prosecutor to his Cape Town attorneys, whereas the evidence shewed that he, without the knowledge of the other members of the firm, had stated that the firm had paid such money to its Cape Town Attorneys.

Held, on question reserved, *that such variance was no ground for setting aside the conviction.*

Held, further, *that the fact of the accused having committed the theft on behalf of the firm was no ground for disturbing the verdict to the effect that he was himself guilty of the theft.*

Rex v. Krige 1195

Appeal, *see* Resident Magistrate's Court 857

Appeal—Weight of evidence.

Rex v. McCully 886

Appeal — Privy Council — 37th Rule of Court.

The plaintiff, in a civil suit, lodged a petition for leave to appeal to the Privy Council within fourteen days after final judgment, but failed to give notice to the defendant of the lodging of the appeal in manner required by the 37th Rule of Court. On application for leave to appeal, the defendant objected on the ground, inter alia, *that the terms of the Rule had not been complied with.*

Held, *that although it might be competent for the Court with strict compliance with rules relating to appeals to the Supreme Court itself, it should not grant leave to appeal to another tribunal unless the requirements of the Rule have been complied with.*

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Hills v. Colonial Government 1122

Appeal to Privy Council—Final judgment—Decision on exceptions.

In an action brought by the cessionary of a mining lease against the lessor to have it declared that the rights under the lease were vested in the lessor, the defendant excepted to the declaration on the ground that it disclosed no cause of action. The Court having disallowed the exception, the defendant applied for leave to appeal to the Privy Council.

Held, *that the decision overruling the exception was not a final judgment in terms of the 50th section of the Charter of Justice until the plaintiff obtained the benefit of the decision by a judgment in his favour on the declaration.*

Henderson and Another v. Hanekom 894

Arbitration—Act 29 of 1898—Construction of deed of submission.

The F. Co. had agreed to take over the business of the B. Co. on certain terms. Disputes having subsequently arisen between the parties as to whether the B. Co. had not misrepresented its profits to the F. Co., it was agreed to refer the matter to arbitration. On the matter being brought before the arbitrator, the B. Co. alleged that the F. Co. had abandoned all claim to compensation in respect of any misrepresentation made by the B. Co., in consideration of the

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latter abandoning certain claims against the former. This abandonment was alluded to in the Deed of Submission, but was therein excluded from the scope of the arbitration. The arbitrators now asked for the ruling of the Court as to whether it was competent for them to receive evidence regarding the abandonment by the B. Co. of the said claims.

Held, *that this evidence was admissible.*

Buffalo Supply Co. v. Federal Supply Co.... 924

Arbitration—Award—Expropriation for railway purposes.

In deciding upon the amount of compensation to be paid to the owner of a farm for the expropriation for railway purposes of a portion of the homestead arbitrators are justified in estimating such portion at a much greater value than the rest of the farm.

Redelinghuys v. Colonial Government 248

Arbitration — Award — Enlargement of time fixed for award —Waiver—Remuneration.

A deed of submission provided that the award should be given within a period of three months, but owing to the evidence taking up more time than was anticipated, it was agreed by the parties verbally and in the presence of the arbitrators to extend the time without however fixing any period. After that several months passed without any award being given and one of the arbitrators had to go to Europe for four months for the benefit of his health. On his return one of the parties to the submission applied for an order directing fresh proceedings and appointment of arbitrators.

Held, *that the applicant had waived his right to take advantage of the fact that the award had not been given within the time agreed upon and the application was accordingly refused.*

Town Council of Cape Town v. Cape Government Railways 11

Arbitrator — Award — Evidence—Irregularity — Mistake of arbitrator.

It is no valid objection to the award of an arbitrator that the arbitrator heard the evidence of a witness of one party to the submission in the absence of the other party if the evidence was so heard with the previous consent of both parties. Nor is it a valid objection to the award that the arbitrator has made a mistake in his award unless the mistake is so gross and manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator.

Landeshut v. Koenig ... 23

Architect—Delay in completion of contract—Final certificate.

Where delay was caused by the architect in not supplying necessary and proper details when asked by the contractors to do so, and where the building-owner caused further delay by not delivering certain ironwork, which he had undertaken to do.

Held, *that the building-owner could not claim liquidated damages provided for by the contract from the contractors by reason of the noncomple-*

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tion of the building by the stipulated time.

Held further, *that, by the terms of the contract between the building owner and the contractors, the former was not precluded by the architect's final certificate from instituting a claim for liquidated damages against the contractors.*

Hendricks and Soeker v. Atkins 517

Arrest—8th Rule of Court—Confirmation—Provisional Order of Sequestration — Anticipation of return day—Release from imprisonment—Ord. 6 of 1843, sec. 23—Security.

R., who was indebted to the bank in a sum of over £4,000 was arrested at the instance of the bank manager under the 8th Rule of Court while attempting to quit the Colony under an assumed name. The bank now applied for a confirmation of the writ of arrest. This was opposed on behalf of R. on the ground that he had obtained a provisional order of sequestration and he now claimed his discharge from prison, but consented to the return day of the provisional order being anticipated and the order at once made final

Held, *that the Court had discretion under Section 23 of the Insolvent Ordinance either to grant or to refuse the confirmation of the order for civil imprisonment. In the circumstances the Court in this case ordered the prisoner's discharge on his finding security to attend the meetings of his creditors in £500 and granted a final order of sequestration.*

Ross v. National Bank ... 191

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Assault, *see* Injury to property ... 708

Assignment of lease — Mineral lease—Agricultural lease.

The defendant, being the owner of a farm, entered into a contract with L., giving him the sole and exclusive right to prospect for and win minerals and precious stones for a period of five years, with a right of renewing the contract for eighteen further periods of five years. L. assigned all his right, title and interest in the contract to the plaintiffs, who gave notice of such assignment to the defendant.

Held, *on appeal from the High Court of Griqualand, that L. could legally transfer his rights to the plaintiffs, so as to give them a right of action against the defendant.*

De Vries v. Alexander *(Foord's Rep. 43) distinguished.*

Henderson and another v. Hanekom 834

Attachment of Trade Mark, *see* Agency 1055

Attorney—Admission—Act 30 of 1892.

An attorney who had been enrolled in the late South African Republic applied to be admitted as an attorney of the Supreme Court. He, however, had not passed the examination prescribed by Sec. 1 (b) of Act 30 of 1892.

Held, *that as the Governor had not and did not intend to exercise the power vested in him by the aforesaid Act the applicant was entitled to admission.*

Ex parte Hofmeyr 337

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Attorney—Admission—Rhodesian examiner.

On the application of an attorney, who, after examination in Rhodesia, had been admitted to practice there; the Court admitted him to practice as an attorney of the Supreme Court.

Ex parte Holderness... ... 254

Attorney—Re-instatement.

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Attorney—Re-instatement—Costs.

Ex parte Scholtz 255

Attorney—Examiners outside the jurisdiction of the Court.

Examiners residing outside the jurisdiction of the Court who possess the qualifications required by Rule 293, appointed to examine an applicant residing outside the jurisdiction of the Court, with a view to his admission, as an attorney of the Court.

Ex parte Duff 877

Attorney—Service of articles—Military service—Holiday.

M., an articled clerk, had been absent from the service of his principal for three months on active military service. Application was now made to have this period of three months reckoned as a reasonable holiday, and deducted from applicant's period of service.

Held, *that the application must be refused and the applicant ordered to complete an extra three months' service.*

Ex parte Maasdorp 765

Auctioneer—Principal and agent Breach of trust — Culpable insolvency — Insolvent Ordinance.

An auctioneer who does not within a reasonable time pay over to his principal money realised by him on behalf of his principal commits a breach of trust and if he becomes insolvent without having paid the money he is guilty of culpable insolvency in having incurred a debt by reason of a breach of trust.

Rex v. Simmons and Williams 1159

Autrefois acquit, *see* Criminal appeal 642

Autrefois acquit, *see* Scab Act ... 474

Award, *see* Arbitration ... 11, 248

„ *see* Arbitrator 23

Award of arbitrators—Costs.

Hills v. Colonial Government 661

Back entrance, right to, *see* Lease 600

Bailee of goods—Landing agent—Proof of loss—Invoice.

In an action against a landing agent for the alleged loss of certain articles from a case landed by the defendant, the plaintiff failed to produce the person who packed the case nor did he produce the invoice relating to the goods, but he produced a pencil memorandum made by his own clerk at the time when the case was opened in the presence of the defendants' claim's clerk, such memorandum not being signed or initialled by the latter. The claims clerk stated that he never saw the memorandum, and that, as the invoice was not produced at the opening, he could not make a note of

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the articles alleged to be missing.

Held, *that there was not sufficient proof of the loss of the articles.*

McKenzie v. Harbour Board 547

Bailment, *see* Deposit 683

Barman, *see* Liquor Laws ... 214

Bechuanaland Proclamations Nos. 64 and 113—Bastards.

Bastards are included in the term Native under Proclamation No. 64. It is not essential to prove that Bastards are descended from aboriginal natives or are living as members of a native community or kraal. Consequently the Court upheld a conviction for the sale of liquor to Bastards in the district of Gordonia.

Rex v. Stern 917

Belligerents, *see* Conspiracy ... 596

Bequest to a class, *see* Joint Will 62

Bill of Exchange, *see* Provisional Sentence 1091

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Breach of Contract—Damages.

Isaacson v. Walsh and Walsh 794

Breach of trust, *see* Auctioneer ...1159

Brick-making, *see* Expropriation for Railway purposes ... 468

Brokerage.

A broker instructed to sell property who introduces a client to his principal is entitled to brokerage, even though the principal may afterwards deal with the client and sell the property to him through another broker.

Watson v. Von During ... 475

Brokerage.

Wolters v. Goodman ... 558

Broker's note, *see* Sale and purchase 378

Builder's lien—Retention money—Security.

Ex parte Rose 226

Builder's right of retention—Spoliation.

Applicant having been clandestively deprived of possession of a house in which he, as builder, has performed certain work, and which he claimed the right to retain until he was paid his costs and charges. The Court ordered the owner to restore possession, pending proceedings by him to recover possession.

Sterner v. Morom 802

Building contract.

Van der Westhuysen v. Lochner 1046

Building contract — Extras — Novation—Contemplation of parties.

The plaintiff in the Court below had entered into a contract with the defendants to erect certain buildings for £60. It was admitted that a certain wall was badly constructed, but the defendants alleged that in consideration of their not being called upon to re-build this wall the plaintiff agreed to do any extra work which the defendants might order "gratis." This agreement the plaintiff denied: he, however, did the

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extra work at a cost amounting to nearly a third of the original contract price. Plaintiff then sued the defendants for £20 for extra work, they tendered £1 15s., and the Magistrate gave judgment for the amount tendered.

Held on appeal, *that even if plaintiff had entered into the said agreement he would not thereby be bound to do an indefinite quantity of extra work "gratis," but only such work as was in the contemplation of the parties when the original contract was thus novated. That the appeal must, therefore, be allowed and judgment entered for the appellant for £13 6s., with costs.*

Aspeling v. Shear and Ryan 1016

Building regulations — Building line — Municipality — *Ultra vires*—Interdict—Sec. 4 (*h*) of Act 20 of 1896.

In contravention of certain building regulations of the Municipality of G. and S., and notwithstanding warning received from the municipal authorities, the respondent had proceeded with the erection of certain buildings without having previously had his plans approved of by the Municipality. The Municipality now sought to have him interdicted (1) from proceeding with the said buildings until the plans thereof should have been duly approved; (2) from building within 7 feet of the centre of the road.

Held *that, as under Sec. 4 (h) of Act 20 of 1896, the Municipal regulation as to approval of plans was* intra vires, *the respondent must be interdicted from proceeding with his buildings*

Held further, *that in the absence of fuller information as to the general line of buildings, the Court should not grant the second part of the interdict for which application was made.*

Green and Sea Point Municipality v. Sebba and others 497

Building regulations, *see* Municipal regulations 823

Building regulations, *see* Interdict 1119

Burthen of proof, *see* Negligence 1034

Cancellation, *see* Lease 526

Cash found on prisoner, *see* Fraud 1129

Cession of rights by Lessee, *see* Prospective lease 806

Charter party—Bill of lading—Demurrage.

A charter party was entered into between the plaintiff and B., who consigned part of the cargo to the defendants under bills of lading, which made no reference to the charter party. There was no evidence that B. acted as the agent of the defendant.

Held, *that in so far as the bills of lading differed from the charter party the defendants were liable under the bills of lading and not under the charter party.*

The bills of lading provided that the consignees should take delivery as quickly as the goods could be delivered in the ship's slings from the ship. Owing to the crowded state of the port, there was considerable delay in the discharge, and the evidence showed that it was

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impossible for the defendants, owing to lighters being unobtainable, to hasten the discharge.

Held, *that the defendants were not liable for demurrage.*

The "Marga" v. Searle and others 713

Charter Party, *see* Demurrage ... 690

Children, *see* Legitimacy 620

„ *see* Joint Will 62

Coal—Discharge—Custom of the port—Negligence.

The plaintiffs sued the defendant in respect of damage by breakage done to a certain cargo of house coal occasioned by its having been negligently delivered into lighters by means of shoots and not in bags according to the alleged custom of the port.

Held, *that as neither the custom of the port nor injury to the coal done by the mode of discharge had been sufficiently proved, and as discharge of coal by shoots was no evidence of negligence; judgment must be given for the defendant with costs.*

McKenzie & Co. v. The "Hydaspes" 562

Codicil, *see* Will 455

Collision—Negligence—Motor car.

A cart and horse belonging to the defendant were standing in a public road on the proper side when the plaintiff's motor car came from behind and frightened the horse, which began to swerve from side to side. The coachman was a skilful driver and did everything he could to pacify the horse, but the motor continued on its course and endeavoured to pass just as the horse was nearly across the road. In so doing the motor struck the shoulder of the horse, causing damage to the motor as well as to the horse.

Held, *that the plaintiff was guilty of negligence, that the defendant was not guilty of negligence or contributory negligence, and that the plaintiff was not entitled to recover damages for injury to the motor, but that the defendant was entitled to damages for injury to the horse.*

Held further, *that if the driver of a motor car sees or ought to see that an animal is frightened by the motion or noise of the motor, and that a collision is likely to result unless he slackens speed or stops altogether, he is guilty of negligence if he does not regulate his speed accordingly.*

Adams v. Clarke 407

Collision on road—Negligence.

South African Breweries v. Table Bay Harbour Board 733

Common employment, *see* Master and Servant 729

Common or party wall—Urban servitude—Interdict.

The respondents, with the view to erect a higher building, pulled down a building belonging to them, with the exception of a party wall, which was common to the applicant and respondents' premises, and the consequence was that the common wall became less safe than it had been before, although it was sufficiently safe for the purpose of the applicant's building. The respon-

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dents having been directed by the Town Council either to render the common wall safe or to pull it down, proceeded to take it down.

Held, *that the applicant was entitled to an order restraining the further demolition of the common wall.*

Franck v. Sachs, Ginsberg and others 1166

Commission *de bene esse — Res judicata*—Play rights.

The applicant having applied for a commission to take certain evidence which he alleged to be material in an action to be brought; the respondent objected on the ground that the question to be decided in the said action was res judicata.

Held, *that as the question as to whether the said evidence was material or not could not be decided without going into the merits of the case, the application should be granted, but that the question of costs must stand over for further argument.*

Koenig v. Landeshut ... 592

Company — Dividend — Profit — Income tax.

The defendants being directors of a joint stock company registered and carrying on its diamond mining operations in this Colony, declared a dividend and informed the shareholders resident in this Colony, including the plaintiff, of such declaration, but, before payment, received notice from the Imperial revenue authorities that income tax was claimed upon the whole of the company's profits. The directors informed the plaintiff that they would resist the claim in the English Courts, and that in the mean time they would deduct the amount of the income tax from the dividend, but would refund the amount if the decision should be against the Crown. The company carried on its business of disposing of the diamonds in England, but the diamonds were delivered and paid for in this Colony. The question was not raised in the special case whether the Supreme Court could prevent the enforcement by the English Courts of the payment of income tax out of the dividend coming to shareholders resident in the Colony.

Held, *that pending a final judicial decision as to whether income tax is or is not legally claimable from the company it was justified in withholding from the plaintiff a proportionate share of the dividend.*

Estate McGregor v. De Beers Consolidated Mines 501

Company—Winding up—Liquidator—General bond—Preferent claim.

In the winding up of a mining company the defendant claimed to be ranked as a preferent creditor in respect of a general bond against the company passed in his favour by two life governors, of whom he was one, to secure advances alleged to have been made or to be made by him to the company.

Held, *that the liquidator was justified in refusing to admit the preferent claim in competition with other creditors of the company without clear*

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proof of the money claimed having been actually advanced.

The Liquidator of Contat's Collieries v. Contat ... 382

Company—Voluntary winding up—Compulsory winding up—Liquidator — Staying proceedings in winding up.

A special resolution having been passed for the voluntary winding up of the B. Company, three liquidators were duly appointed. Subsequently a majority of the shareholders, including the applicant, who was one of the liquidators, desired to stay proceedings in the winding up for the purpose of resuscitating the Company, and they passed a resolution to the effect that the applicant alone should control the liquidation without the intervention of the two other liquidators, and should apply to the Court for an order staying proceedings in the voluntary winding up. On such application being made, the two other liquidators, supported by a substantial minority of the shareholders and by the bulk of the creditors, opposed the application, and moved for the compulsory winding up of the Company.

Held, *that although it might be competent for the Court, under the 143rd and 186th sections of the Companies' Act, 1892, to stay proceedings in a voluntary winding up, such a course was not advisable under the circumstances.*

Held further, *that in view of the facts that the Company had, by resolution of shareholders, been ordered to be wound up voluntarily, that the liquidators had arrived at a*

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deadlock in the winding up, and that a substantial minority of the shareholders and the great majority of the creditors were opposed to a resuscitation of the Company and in favour of a compulsory winding up, it was just and equitable that the Company, although perfectly solvent, should now be wound up compulsorily.

Ex parte Creditors of the Colonial Building Corporation 1125

Company prospectus, *see* False representation 621

Compensation, *see* Magistrate's jurisdiction 219

Compensation, *see* Trespass ... 51

Competition in Trade, *see* Master and servant 1131

Compulsory sequestration—Deed of assignment.

At a meeting of creditors of G. the creditors present agreed to sign a deed of assignment of G.'s assets for the payment of his debts. Subsequently a large creditor refused to sign the deed of assignment, whereupon the plaintiff on proof of G.'s insolvency obtained a provisional order for the sequestration of G.'s estate.

Held, *that the plaintiff was entitled to an order of final sequestration.*

Gourlay, Cavanagh and Co. v. Gromer 1090

Condition precedent—Obligation Fulfilment — Meaning of words "actual cost."

The condition of an obligation is taken to be accomplished when the debtor, who is obliged

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under such condition, has prevented its accomplishment.

The plaintiff entered into a contract with the Government for the construction of a line of railway by which it was provided that in case of certain defaults on the part of the contractor, the Government should be at liberty to take over the incomplete work and pay to the contractor the "actual cost" thereof, which was to be ascertained by the certificate of the Government engineer, who was to be at liberty to inspect the contractor's books.

Held, *that such "actual cost" was the cost actually incurred by the contractor in constructing the work; and did not include (1) interest on payments, or (2) expenditure wasted in consequence of any part of the work having been condemned by the engineer, or (3) any work or material of which the Government had not received the benefit.*

The Government having taken over the work, a correspondence ensued between the Government and the contractors, from which it appeared that the Government placed a different construction upon the words "actual cost," and was prepared to pay only for the value of the work as appearing from certain scheduled prices. The engineer accordingly tendered to the contractor a certificate which did not purport to be a certificate of actual cost but was based upon the scheduled prices as contended for by Government. **Held,** *that, although the production of an engineer's certificate was a condition precedent to the plaintiff's right to recover the actual cost, the refusal of the Government to pay the amount of actual cost dispensed with the necessity of providing such certificate and entitled the plaintiff to recover upon independent proof of actual cost.*

Hills v. Colonial Government 103

Condition in a perpetual quitrent grant—Magistrate's decision on facts reversed.

Where the finding of a Magistrate is against the weight of evidence, the Court will depart from the rule not to disturb the finding of a Magistrate on questions of fact.

Where a perpetual quitrent grant contained a condition "that all roads and thoroughfares running over the land shall remain free and uninterrupted."

Held, *(1) that, upon the facts, the road claimed by appellant was a road or thoroughfare at the time and within the meaning of the grant; (2) that appellant, although the diagram attached to the grant did not shew a certain road or thoroughfare claimed by him, could prove by evidence* aliunde *the existence of such a road or thoroughfare at the time of the grant.*

Niekerk v. Wakefield ... 490

Conflict of evidence—Magistrate's finding as to credibility of witnesses.

Rex v. Ospowat 769

Conflict of evidence—Magistrate's finding on facts.

Van Noordwyk V. Rothman 777

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Consideration—Promise to extend time of payment—Defence.

The defendant, being indebted to the plaintiff in the sum of £225, offered to pay £100 in cash and to give a promissory note for the balance, which offer the plaintiff accepted. Thereafter the defendant tendered £100 in cash and a promissory note made by himself, but the plaintiff refused the tender and sued the defendant for provisional sentence. The plaintiff held no security for the original debt.

Held, *that as the tender was in terms of a definite agreement between the parties, the plaintiff was not entitled to provisional sentence.*

Luyt v. Hough 681

Consideration, *see* Offer to sell ... 670

Consideration—*Nudum pactum*—Father of minor child—Lying in expenses.

The father of a minor daughter incurred expenses for her lying in and thereafter entered into an agreement with her seducer for the payment of a certain sum as damages.

Held, *that there was a valid consideration for the agreement*

Duma v. Pumene 77

Consideration, *see* Contract ... 446

„ *see* Transfer of Land 397

Conspiracy — Unlawful assembly —Belligerents.

The defendant, a British subject joined a commando of the Boer forces after they had invaded the Colony and after they had been recognised as belligerents. The commando, acting under the instructions of their superior officer, took away the plaintiff's horse for use in the campaign, but the defendant derived no personal benefit from the taking beyond riding it for a few hours while it was brought to the superior officer.

Held, *that the defendant was not civilly liable in damages for the taking of the horse.*

The case of Steenkamp v. Kyd *(15 S.C. R. 221) distinguished.*

Watson v. Bradley 596

Constitution Ordinance—Election petition—Office of profit—Acting appointment.

The office of messenger of a Resident Magistrate's Court is an office of profit under the King in terms of the 47th section of the Constitution Ordinance.

A person holding such office, although only acting, is not eligible to be elected a member of the House of Assembly.

The office of Deputy-sheriff is not an office of profit under the Crown.

Headley v. Cilliers 482

Construction, *see* Will 586

Contemplation of insolvency—Act 38 of 1884, Secs. 6 and 84 — Undue preference — Pledge—Agency.

The trustees of O.'s insolvent estate sued H. for £10, paid to H. when (as it was alleged) O. contemplated insolvency. The payment was made within six months of the date of sequestration. The trustee further demanded the restoration of certain goods which had

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been pledged to H. by O. and delivered.

Held *that as at the time O. made payment to H. of the said £10, he expected to be able to satisfy his liabilities, such payment was not an undue preference.*

Held further, *that as on the evidence it appeared that the goods aforesaid had been handed to the defendant that he might raise money by selling them and not as a pledge, the agency of defendant terminated on O.'s insolvency, and that consequently the said goods formed part of the insolvent estate.*

Estate Otgaar v. Haupt ... 751

Contempt, *see* **Order of Court** ... 377

Contempt of Court—Costs.

On application for attachment of a trustee of an insolvent estate for contempt of Court in not filing an account as ordered by the Court, it appeared that he had filed an account with the Resident Magistrate which, however, was very incomplete. No order was made for attachment, as the trustee was held to have acted in good faith, but he was ordered to pay the costs.

The Master v. Dickson ...1118

Contract — Consideration — *Animus contrahendi* — Request— Vagueness of contract.

The defendant, a merchant in Cape Town, being on a visit to Chicago, U.S.A., was consulted by the plaintiff, a nephew of his residing there, as to the prospects for a young man at the Cape, and after the defendant had left Chicago the

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plaintiff wrote to him, making further inquiries. In answer, the plaintiff wrote: "If you care to come to Africa, I am prepared to find you employment as a traveller in town or any such work as you may be suited for." About seven months afterwards the plaintiff came to the Cape, and finding, as he said, that the defendant did nothing for him, he found employment for himself at £10 a month. Subsequently he lost this employment and brought an action against the defendant for damages for breach of contract. The evidence shewed that it was the plaintiff's own desire to come to the Cape to improve his position, and that beyond the terms of the letter the defendant conveyed no request to the plaintiff to come.

Held, *that the alleged promise was too vague to be enforced, but that even if it had been more definite, it was not supported by sufficient consideration.*

Spiegel v. Eilenberg ... 446

Contract — Motion — Action — Forfeiture.

The respondent as concessionary of certain lines of railway agreed with the applicant that he would complete the railway in two years. It was further provided that if the line was not completed within that time, unless the delay was proved to the satisfaction of the applicant to have been occasioned by certain specified causes, the agreement should cease and the applicant might enter upon the uncompleted line and the respondent should forfeit any security lodged by him with

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the applicant. The respondent having failed to complete the line, the applicant after three years applied to the Court, by motion, for an order, declaring that the agreement was at an end, and authorizing him to enter on the incompleted line.

Held, *that as there were no facts in dispute, the Court might, on motion, make such an order.*

Colonial Government v. Hills 504

Contract, *see* Fiduciary relation ... 31

Convenient time, *see* Pounds and Trespasses Act 884

Copyright Act 18 of 1895.

The English Act 5, 6 Vict. protects the holders of an English copyright throughout the entire British Dominions.

Boosey and Co. v. Simmonds 1138

Corroboration, *see* Sale of Liquor 644

Costs, *see* Award of Arbitrators 661

" *see* Resident Magistrate's Court 857

Costs—Appeal.

The plaintiff having suffered much inconvenience from the public trespassing on his land, gave public notice that a certain road over his land was not a public road, and he placed an obstruction of stones across the road. The defendant's son, however, drove the defendant's wagon and oxen over the road, and the plaintiff brought an action in a Magistrate's Court for trespass against the defendant, who pleaded several exceptions and the general issue. The Magistrate gave judgment for the plaintiff for one shilling damages, but

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ordered each party to pay his own costs.

Held on appeal, *that as the plaintiff had properly brought his action to assert a substantial right and had succeeded, the Court below ought to have awarded him his costs.*

Labuschange v. Mulligan ... 940

Costs, *see* Obstructing public thoroughfare 42

Counsel—Agent—Reasonable disbursement.

The defendant, being charged with a criminal offence, employed a law agent to instruct Counsel for his defence. The trial lasted three days, and the defendant was acquitted. Counsel's fee for the first day was paid by the defendant. On the second day Counsel demanded a refresher fee, which was also paid by the defendant. On the third day no demand for a refresher fee was made, but the defendant admitted, that if it had been made on that day, he would have paid it. Subsequently Counsel demanded the fee for the third day from the plaintiff, who paid it.

Held, *that the plaintiff was entitled to recover the amount from the defendant in the absence of any proof that the fee was unusual or exorbitant.*

Shaw v. Fock 843

Counter-claim, *see* Magistrate's jurisdiction 219

Court of appeal in criminal cases—Special entry—Question reserved—Misdirection of Judge—Verdict of Jury.

Although it is a salutary practice on the part of judges presiding at criminal trials,

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where witnesses give evidence adverse to the accused and differing from their evidence given at the preparatory examination, to point out the danger of convicting on such adverse evidence, the omission to do so does not constitute a misdirection or illegality, if the discrepancy was brought to the notice of the jury.

After two witnesses had given such adverse evidence differing from their previous evidence the counsel for the accused asked the judge whether he would be allowed to call a Mrs. B. to contradict the statement of the two witnesses that she had intimidated them before they gave their evidence at the preparatory examination, to which the Judge assented. Thereupon counsel for the prosecution asked whether, in such case, he would be allowed to call rebutting evidence, to which the Judge also assented. The counsel for the accused accordingly did not call Mrs. B., but after a verdict of guilty he raised the question for the consideration of the Court of Appeal whether judgment should not be arrested on the ground that the judge's ruling was wrong.

Held, *that as Mrs. B. was not produced as a witness the judge's alleged ruling as to what he would do in case she should be examined could not be called in question.*

Rex v. Du Plessis 1183

Court of Chief Magistrate of Griqualand East, *see* Edictal citation 214

Credibility of witnesses, *see* Sale of liquor 644

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Criminal appeal—Plea of *autrefois acquit*—Evidence of accomplice.

The conviction of a prisoner, found guilty under Act 35 of 1893, of the theft of horses, the property of some persons unknown, by the Resident Magistrate, was set aside on review on the ground that at the trial the owners of the horses appeared to give evidence and no amendment of the charge had taken place. The prisoner was subsequently tried again for stealing the same horses, the property of certain persons set out in the charge. He pleaded autrefois acquit. *This plea was disallowed by the Resident Magistrate, and the prisoner was convicted and sentenced to imprisonment with hard labour.*

Held, *on appeal, that the plea of* autrefois acquit *was bad.*

The Court is averse to accepting and acting on the uncorroborated evidence of an accomplice.

Rex v. Twalatinga 642

Culpable Insolvency, *see* Auctioneer 1159

Curator of lunatic—Transfer of quit-rent title.

R. had obtained a licence on behalf of his son H. R. for the grant of certain Crown land on quit-rent tenure, and effected certain improvements thereon. Thereafter H. R. was declared a lunatic, and the curator to his property took out a quit-rent title to the land in question. R. now applied for an order of Court, ordering H. R.'s curator to transfer this land to him (R.)

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Held, *that the order must be refused.*

Semble : *that if R. had made a reasonable offer as consideration for the value of the land, the Court would, in view of the improvements which had been effected by R., have ordered transfer if they considered that it would be in H. R.'s interest that R.'s offer should be accepted.*

Rohland v. Rohland's Curator 900

Curator, *see* Lunatic 194

Custom of the Port, *see* Coal ... 562

Damages—Negligence.

The plaintiff, being a passenger in a tram-car, signalled to the driver to stop, and as the car was just going round a curve, the driver slackened speed, with the view of stopping at the further end of the curve. The plaintiff went to the platform of the car and, while standing there, fell, owing, as he said, to a jerk of the car, but he was unable to say whether or not he was holding on to the rail at the time.

Held, *that the mere fact that there was a jerk as the car rounded the curve was not sufficient proof of negligence on the part of the Tramway Company's servants, so as to render the Company liable for damages for injuries sustained by the plaintiff.*

Kilgour v. Cape Town Tramway Co. 1149

Damages, *see* Breach of contract 794

„ *see* Deposit 683

„ *see* Injury to Property 708

„ *see* Lessor and Lessee ... 686

„ *see* Sale 421

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Damage to house—Negligence of owner of adjoining property.

Through the defendant's negligent construction of a house on his land the house fell and part of the debris struck the roof of the plaintiff's house, which adjoined the new building. The roof was so much damaged that it became necessary to place a practically new roof on the plaintiff's house, and there was no evidence to show that the value of the house was increased by reason of the new roof.

Held, *that the measure of damages was the cost of placing the roof as nearly as practicable in the condition in which it was before the accident, and that the plaintiff was entitled to recover the amount which he had paid to the contractor for the repair of the roof.*

Abrahams, v. Kaiser Bros. ... 184

Damages, *see* Adultery 180

Damages, *see Injuria* 154

Dead Bond, *see* Liquidation account 257

Death in consequence of illegal acts, see Life policy 847

Debentures—Act 43 of 1895—Preference.

In an action to have it declared that the plaintiff, as the holder of debentures of a certain company, has a preference against the assets of a certain partnership, which, after the date of the issue of the debentures, had taken over the assets and liabilities of the company, it appeared that the assets were not mentioned and described in the debentures as required by Act 43 of 1895, and that the creditors of the partnership

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were in no way represented in the action.

Held, *that it would be premature to declare such a preference, even if it could legally be claimed, until the estate of the partnership had been sequestrated or execution had issued at the suit of the debenture holder.*

African Banking Corporation v. Hills and Another ... 994

Debtor and creditor—Onus of proof — Receipt — Proof of debt from books of creditor's agent.

The defendant, who owed a certain sum of money to plaintiff, alleged that he had paid in full to one L., plaintiff's agent. Though he had told various persons he had proofs of this payment in his possession, he was unable to produce either a receipt or any other documentary evidence at the trial. L., whose account of what took place on occasion of the alleged payment and whose evidence on certain collateral points was confirmed by that of defendant, produced a pocket book containing entries made on the said occasion, showing that there was still an outstanding balance due from defendant to plaintiff.

Held, *that as the onus of proving payment of an admitted debt was upon the defendant, which onus he had failed to discharge, judgment must be given for plaintiff for the amount claimed with costs.*

Moolman v. De Wet ... 790

De communi dividundo.

Ex parte Du Plessis and Others 971

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Deed of assignment, *see* Compulsory sequestration ...1090

Deed of Sale, *see* Principal and Agent 725

Defamation—Injury—Dishonourable conduct.

To a declaration claiming damages for defamation the defendant excepted on the ground that the words complained of were not defamatory the words being as follows: "I do not like his mean tricks. I told him he could go elsewhere with his dirty mean tricks."

Held, *that as the words were capable of the meaning that the plaintiff had been guilty of dishonourable conduct, the exception should be overruled.*

Ries v. Willetts 855

Defamation—Report of trial—Newspaper comments—Functions of judge and jury.

A preliminary examination having taken place against the plaintiff for a criminal assault on a young girl the defendants published in their newspaper a report of the trial with some comments thereon. These comments were capable of the construction that in the opinion of the writer the plaintiff was guilty of the offence. The plaintiff was acquitted at the subsequent trial and thereupon brought an action against the defendants for defamation. The defendants excepted to the declaration on the ground that it disclosed no ground of action.

Held, *that as the comments were capable of the construction, placed on them by the*

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declaration, the Court should not, on exception, decide the question as to whether the article was defamatory or not but leave the question to be decided at the trial, whether the trial should take place before the judges or be held before a jury.

Walpole v. Palmer and Others 70

Defamatory words, *see* Slander ... 811

Defective premises, *see* Lessor and Lessee 686

Delivery, *see* Sale 1029

Demurrage—Charter party—Reasonable diligence — Custom and facilities of port of discharge.

A charter party provided that the discharge of the ship at C. dock should be according to the custom and facilities of the port and that for each day's detention threepence per ton register should be paid. By the custom of the port the landing of goods was done exclusively by the Harbour Board. The Board provided no sheds at the docks for the storage of goods other than general cargoes, and did not employ a sufficient number of vehicles for removing goods as fast as the ships in port could discharge them, but the defendants, the charterers, owing to the large number of cargoes of wheat which were being landed for them, and to their failing to provide sufficient appliances for coping with their increased business, could not receive the cargo from the plaintiff's ship as fast as the vehicles could deliver it.

Held, *in an action for demurrage that the defendants having contributed to the delay by their want of diligence were liable for the detention beyond the time when, with the exercise of reasonable diligence, they might have taken delivery of the whole cargo.*

Crown of Denmark v. S. A. Milling Company 690

Demurrage, *see* Charter party ... 713

Deposit—Bailment—Sale by depositary — Negligence — Damages.

It is no valid defence to an action by a depositor for the return of the goods deposited or for damages that the depositary has sold them unless it is clear that the sale was under the circumstances necessary and for the benefit of the depositor in which cases the depositary would only be liable for the price realised.

Medallie and Schiff v. Rous 683

Derelict Lands Act—Opposition to rule.

A Municipality, within the jurisdiction of which derelict erven are situated, has a locus standi *to bring to the notice of the Court any valid objection to a rule issued under the 7th section of Act 28 of 1881, for the registration of title to such erven being made absolute.*

Ex parte Winterbach ...1054

Devolution of property, *see* Succession duty 852

Dipping, *see* Scab Act 474

Discovery, *see* Rule 333D ... 911

Disorderly conduct, *see* Expulsion from licensed premises ... 22

Dissolution, *see* Partnership 428, 431

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Distribution of Estate. *see* Minors 213

Dividend, *see* Company 501

Division of Goods in Community, *see* Judicial separation ... 300

Divisional Council, *see* Expropriation of land 168

Divorce—Domicile—Jurisdiction.

Jurisdiction in the matter of divorce is founded on the domicile of the husband.

Wright v. Wright 881

Documentary evidence, *see* Lease 757

Domicile, *see* Lunatic 194

Domicile, *see* Restitution of conjugal rights 101

Dominium, Change of, *see* Martial Law 139

Dowry cattle, *see* Native custom 224

Edictal citation—Court of Chief Magistrate of Griqualand East.

The Court of the Chief Magistrate has no power or authority to direct service of process on a defendant by edictal citation.

Stork v. Stork 214

Ejectment — Motion — Rights of Partners.

Dalvi and another v. Ahmed 1203

Ejectment, *see* Landlord and Tenant 198, 510

Ejectment, *see* Lease for life ... 75

Election petition—Signature of agent—Act 9 of 1883,

The language of Section 4, Sub-section 1 of Act 9 of 1883, is peremptory. Where, therefore, an election petition was signed by the agents of the petitioner and not by the petitioner personally.

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Held, *that the petition was invalid.*

Orpen v. Cilliers 459

Election petition, *see* Constitution Ordinance 482

Enlargement of time, *see* Arbitration 11

Essence of Contract, *see* Agreement 290

Estoppel, *see* Agency 947

Evidence — Surrounding circumstances — Interpretation of written agreements.

The defendant purchased a certain farm from the plaintiff, and by two written agreements it was agreed that a portion of the price should be paid in cash, and that, as to the balance, it should be paid within six months in case tranquillity should be restored, but that in any case a bond for the amount should be passed. After tranquillity had been admittedly restored a third agreement in writing was entered into, providing that the provisions of the two previous agreements should be considered as therein inserted word for word, and that a bond for three years certain should be passed.

Held, *that the three agreements should be construed as a whole, and that those provisions of the two earlier documents which were in conflict with the latest document were intended to be superseded.*

Held further, *that even if the matter were in doubt, the fact that tranquillity had been restored at the date of the latest document was one of those surrounding circumstances which might be taken into consideration*

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for the purpose of ascertaining the intention of the parties.

Van der Post v. Tywfelhoek Diamond Prospecting Syndicate 318

Evidence, *see* Manager 775

Evidence, *see* Remit to New Magistrate 638

Evidence from spoor.

Rex v. Botes 1005

Evidence — Stock theft — *Bona Derelicta.*

The accused had been convicted by a certain Assistant Resident Magistrate of the theft of a horse from the military authorities. It appeared from the evidence that the horse had been left in charge of a certain farmer by one of the Border Scouts. Eventually the horse got into the pound, being then in very bad condition. The accused released it, fed it up and at the request of one A. sold it to him for £6, at the same time saying it was not his own horse and therefore he could not well sell it. The evidence showed that one of the military officers had given permission to the accused to take the horse and use it if it "picked up."

Held, *on appeal, that as the horse was practically derelict, and as the accused had acted quite openly in the matter, the conviction must be quashed.*

Rex v. Clarke 67

Evidence, *see* Arbitrator 23

„ *see* Interdict 207

„ *see* Partnership ... 87

„ *see* Will ... 95, 164

Examiners, *see* Attorney ... 877

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Excussion, *see* Surety ... 945, 1154

Exception to summons—R. M. Court practice—Specific performance.

The same precision is not necessary in drawing a R. M. Court summons which would be required by the Supreme Court. A magistrate does not exceed his jurisdiction by ordering a litigant specifically to deliver up certain articles if he orders him in the alternative to pay their value.

Tien, Son v. Assignee estate Farrow 975

Executor's commission, *see* Fiduciary relation 31

Executor — Native custom — Interdict.

A native, who had been married in Griqualand East in 1874 according to Christian rites, died in 1902, and the applicant was appointed as executor. The respondent, who was the eldest son of the deceased, retained possession of the property, claiming to be entitled to such possession under native law and custom.

Held, *that as long as the appointment of the applicant was not revoked he was entitled to administer the property, and the respondent was accordingly interdicted from parting with the property unless and until the appointment should be set aside, and leave was given to the respondent to proceed by motion for that purpose.*

Sekelini v. Sekelini 302

Executor—Specific bequest—Sale of land bequeathed—Minor—Sureties.

An executor is not justified in

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selling any property specifically bequeathed unless the sale is necessary for the payment of the debts of the estate.

A sale is not necessary where there are sufficient assets not specifically bequeathed or where the legatee is ready and willing to pay the executor a sufficient sum for the payment of the debts and costs of administration.

Where it has become necessary to sell property specifically bequeathed the legatee is entitled to the surplus of the proceeds after payment of the debts.

Where a debtor obtains restitution on the ground of a real defect in the obligation itself, such as fraud or mistake, the rescission of the obligation discharges the sureties, but if the rescission is founded upon reasons personal to the principal debtor, as for instance his minority, the obligation of the sureties remains in force.

Where, however, an executor held a sale by auction of land specifically bequeathed to a minor who bought the land after protesting against the sale and offering to pay all the debts of the estate,

Held, *that as there were no creditors interested in enforcing the conditions of sale as against the sureties for the minor, the executor, who failed in his action for enforcing conditions of sale against the minor, as principal debtor, was not entitled to enforce them against the sureties for the minor.*

Held further, *that if the executor had been guilty of any* mala fides *he would not have been entitled to any fees, but that as he had acted in good faith he should receive such fees as he would have been entitled to if he had acted on the offer of the minor.*

Estate van der Lith v. Conradie and Estate Koortz... 399

Expropriation for railway purposes—Brick-making.

The applicant had obtained a judgment of the Supreme Court, declaring that the respondents were not entitled to use certain land save for necessary railway purposes. Against this judgment the respondents had appealed to the Privy Council. Applicant now asked for an interdict to restrain them from making bricks on the said land.

Held, *that the respondents might burn the bricks already made, but that pending the judgment of the Privy Council they must be interdicted from making any further bricks.*

Logan v. Colonial Government 468

Expropriation for railway purposes, *see* Arbitration ... 248

Expropriation, *see* Railway ... 770

Expropriation of land—Railway acts—Siding—Main Road—Divisional Council—Interdict.

The Government on purchasing the Wellington line of railway under Act 15 of 1872 from the company which constructed it under Act 20 of 1857 acquired no greater rights than it could itself have conferred on the company. Such company acquired no right under the Act of 1857 to expropriate land for the purpose of making a siding near Cape Town for the conveyance of stores required for

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workshops erected for the manufacture and repair of carriages, engines and trucks for use on the railway system beyond Wellington.

The Divisional Council held entitled to an interdict restraining the Commissioner of Public Works from constructing such siding across a main road.

The Cape Divisional Council v. The Colonial Government 168

Expulsion from licensed premises — Disorderly conduct — Act 28 of 1883, Sec. 78.

Under the term "disorderly conduct" employed in Sec. 78 of Act 28 of 1883, is included the use of language which would tend to create a breach of the peace in the bar of a hotel. The hotel proprietor is justified in ejecting any person using such language, even if he is sober.

Rex v. Stanley 22

Extension of lease, *see* Landlord and tenant 198

Extradition — Supercession of Colonial Order of Sequestration and of civil imprisonment—Transmission of insolvent's Colonial assets to foreign trustee.

R.'s estate had been finally sequestrated by the Supreme Court as insolvent, and on failure to find security that he would attend the meetings of his creditors he had been committed to civil imprisonment. Thereafter proceedings had been instituted against him in the Transvaal, where his estate had also been sequestrated for fraudulent insolvency, and an

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order had been granted for his extradition thither. His only creditor in this Colony was the National Bank and his assets were in the Orange River Colony and in Basutoland. On the application of the chief local agent of the bank, and with the consent of the curator bonis *to the insolvent estate, the Court granted an order discharging the Colonial order for sequestration and the order for the civil imprisonment of the insolvent, and directing the* curator bonis *to hand over any assets in his hands to the trustee appointed in the Transvaal.*

National Bank v. Ross ... 225

Extras, *see* Building contract ...1016

False imprisonment, *see* malicious prosecution 674

False representation—Prospectus of company—Taking shares of company—Companies Act, 1893, § 86—Rectifying register of shareholders.

The applicant, on the faith of a statement in the prospectus by a company to the effect that 20,000 out of 30,000 shares had been subscribed for, informed the secretary that he would take 1,000 shares, but, upon afterwards discovering the fact that only about 18,000 had been subscribed for, he refused to become a shareholder without having derived any benefit from the shares.

Held, *on an application for the rectification of the register that the applicant was entitled to have his name deleted.*

Burnard v. African Mercantile Company 621

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Fees, *see* Medical practitioner ... 489

Fiduciary relation — Contract—Independent advice—Executor's commission.

On the death of his brother, the plaintiff, who was an Attorney-at-law, agreed with the defendant, who was his brother's widow and executrix, that he would administer the estate and that, in consideration of such administration, she should allow him the executor's commission of 5 per cent. on the gross assets of the estate.

Held, *that the contract was not voidable by reason of the plaintiff not having seen that the defendant had independent legal advice before entering into the contract.*

Yates, v. Estate Yates ... 31

Final Certificate, *see* Architect ... 517

Final judgment, *see* Appeal to Privy Council 894

Foreign judgment — Provisional sentence—Fraud.

The Court will not enforce a foreign judgment where such enforcement would constitute a fraud upon the person against whom it is sought to be enforced.

Goodman v. Goodman ... 612

Forfeiture of Lease — Relief against, *see* Lease 526

Forgery, *see* Fraud 87

Fraud — Defence of prisoner — Cash found on prisoner.

The applicant being in gaol, awaiting trial for fraud, applied to the Court for an order on the police, who had taken possession of all the money found on his person at the time of his arrest, to hand over to the applicant's attorney a part of the money for the purpose of enabling him to provide for his defence. The Court ordered the sum of £20 to be so paid over to the applicant's attorney.

Ex parte Palmer 1129

Fraud—Relief—Prescription.

A person who has been defrauded is not deprived of his right to relief by reason of thirty years having expired since the fraud was committed, provided that this action is brought within a reasonable time after discovery of the fraud.

Bydien v. Estate Samao ... 667

Fraud—Forgery.

B. had been convicted of having obtained a bottle of brandy from a licensed dealer by means of a forged order purporting to be signed by Mrs. W. B. had handed this order to a third person, by whom the brandy was obtained and delivered to Mrs. W.

Held, on review, *that as there was no satisfactory evidence that the order had not been signed by Mrs. W., and as no person had been defrauded, the Magistrate's conviction must be quashed.*

Rex v. Bostander (*alias* Philips) 87

Fraud, *see* Obtaining goods by false pretences 144

Funds, to prosecute action for judicial separation, *see* Marriage 16

Future rights, *see* Magistrate's jurisdiction 1151

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Gaol-breaking—Theft of prison clothes.
Rex v. Meinz and another ... 146

General Bond, *see* Company ... 382

Gift to minor child—Revocation of gift.
W. had made a donation of £200 to a minor son and secured the money by lending it on mortgage. W. had to borrow the £200, which he subsequently repaid. The mortgage was in the son's name. W. now applied for an order, authorizing him as natural guardian of his son to cancel the said mortgage.
The Court refused the order.
Ex parte De Wet 1209

Hand-dressing, *see* Scab Act ... 474

Handwriting, *see* Will 95

Hire of premises—Use of sign-board.
Hartman v. Dart 206

Hire purchase, *see* Sale 1029

Holder of Licence, *see* Liquor Laws 214

Holiday, *see* Attorney 765

Ignorantia juris, *see* Rule 329D ... 904

Illegal proclamation, *see* Liquor licence 1162

Imitation, *see* Trade Mark ... 825

Implements of housebreaking—Section 8, Sub-section 1, Part I, Police Offences Act, 1882.
An accused found walking at night in a public street in company with another person in whose pocket two skeleton keys were found, and overheard to say to such person, "if we had a jemmy with us we might have lifted the sash,"

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Held, *not to be in possession of implements of housebreaking.*
Rex v. Savage and another ... 459

Impounding (illegal), *see* Trespass 594

Income Tax, *see* Company ... 501

Independent contractor, *see* Negligence 1069

Injury, *see* Defamation 855

Injury to property — Assault—Damages.
Revelas v. Power 708

Injury to person—Negligence—Damages.
Reynolds v. New Cape Central Railways, Ltd. ... 966

Injuria—Attempt on the chastity of a woman—Damages.
In an action for damages against the defendant for having entered the bedroom of a young unmarried woman, with criminal intent; it was found as a fact that the defendant had entered the room without knowledge of the circumstance that it was occupied by the plaintiff.
Held, *that the defendant was not liable.*
Littlejohn v. Kingswell ... 154

Insolvency—Undue preference—Act 38 of 1884, Sec. 8.
Insolvent Estate Musters v. Van der Spuy 356

Insolvent estate — Trustee — Accounts—Delay in filing liquidation and distribution account.
Where there is an undue delay on the part of the trustee of an insolvent estate in filing his final account of distribution, the insolvent is entitled to call upon him to file such account.

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The fact that the trustee alleges that he has a claim against the wife of the insolvent is no justification for undue delay if the trustee has had ample time for enforcing such claim.

Cragg v. Bolton 241

Insulting language—Public place.

Rex v. Classen; Rex v. Potgieter 223

Interdict– Evidence—Affidavits.

In an application for an interdict to restrain the lessee of a farm from keeping an excessive number of animals on such farm, there should be clear evidence that the number of animals is excessive, and for that purpose the area and capacity of the farm should be stated, and, if possible, the purposes for which it had been leased.

Executors of Estate Rhodes v. Gamble 207

Interdict, *see* Expropriation of land 168

Interdict, *see* Trespass 51

„ *see* Building regulations 497

„ *see* Executor 302

„ *see* Lights 552

Interdict.

The Court granted an interdict restraining the Colonial Government from paying over to the respondents any portion of a sum of money which the Court had found to be due to the manager of the Grand Junction Railways, pending an action to be brought by the applicants to recover certain moneys alleged by them to be owing to them by the respondent.

African Banking Corporation v. Cape Junction Railways 664

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Interdict—Discharge.

A. had instituted an action against B. for the recovery of certain bricks, and at A.'s instance a Judge in Chambers had interdicted B. from selling them pending the result of the action. B. now applied to have this interdict set aside.

Held, *that as A. now consented to the sale of the bricks without prejudice to his right in them, the interdict should be discharged, the bricks sold and the proceeds paid into the hands of B.'s trustee pending the action. Costs to follow the result of the action.*

Graham v. Firth 726

Interdict—Natural flow of water —Embankment.

The respondent removed an embankment on his own land which had been constructed about twelve years before by his predecessor in title, the effect of the removal being to allow more rainwater to flow in its natural course on to the applicant's land than had flowed while the embankment stood.

Held on motion, *that the applicant was not entitled to an interdict restraining such removal.*

Enslin v. Zuidmeer ... 749

Interdict, *see* Title to land ... 727

„ *see* Trade Mark ... 634

Interdict – Costs—Raising of road —Public utility.

The Government, in the course of constructing an overhead bridge over one of its railways, found it necessary to raise a divisional road leading to the bridge, and this was done with

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the consent of the Divisional Council. In consequence of the raising of the road the applicant's property, which bordered on the road, was deprived, in part, of convenient access to the road.

Held, *that although the applicant might be entitled to compensation for depreciation in the value of her property, she was not entitled to an interdict restraining the raising of the road.*

Syme v. Colonial Government 1004

Interdict — Municipality — Building regulations.

Certain building regulations framed under the Municipal Amendment Act of 1896, described the materials which should be used in the construction of new buildings within the Municipality to ensure the stability of such buildings. The respondents, in laying the foundations of certain buildings, used materials prohibited by the regulations, and likely, in the opinion of the Court, to endanger the stability of the erection and the safety of future inmates and probably of the general public, and they refused to comply with the request of the municipal engineer that they would use proper materials.

Held on motion, *that the Municipality was entitled to an interdict, restraining respondents from erecting walls on such foundations unless and until the structure of the same should be such as not to endanger the safety of any buildings erected thereon, but leave was reserved to the respondents to institute an action to have such interdict set aside.*

Green and Sea Point Municipality v. Morris 1119

Interest — Usury — Provisional sentence.

Provisional sentence granted for the amount of a promissory note with interest at 25 per cent. as stipulated for in the note, the defendant raising no objection and the amount of interest claimed not exceeding the capital.

Cloete v. Roberts 655

Interpleader suit, *see* Action against Messenger 813

Interpleader—Pledge—Delivery.

A., being indebted to the claimant in the sum of £30, gave him as security two mules, which, however, A. retained in his possession. Subsequently B. having obtained judgment against A. the mules were attached by the messenger.

Held, *in an interpleader suit that the claimant was not entitled as against B. to claim the benefit of the pledge.*

De Klerk v. Holtman ... 354

Investment of Trust Funds, *see* Liquidator 977

Irregularity, *see* Review ... 234, 236

Irregularity, *see* Arbitrator ... 23

Iter, *see* Servitudes 465

Joint Will — Children—Bequest to a class—Vesting.

W. and his wife, by a certain joint will, bequeathed a certain portion of their landed property to the children of their son G. C. W. At the time of the testator's death, G. C. W. had five children, now represented

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by the plaintiffs: since that time six other children had been born to him. The plaintiffs contended that only such children of G. C. W. as were in esse *at the time of the testator's death were entitled to share in the inheritance. The defendant contended that the children of G. C. W. born after the death of the testator were also entitled to share; and that, inasmuch as G. C. W. was still alive, and might have further issue, that no distribution of the estate could be made until his death.*

Held, *that as by the terms of the will the property immediately vested in the then children of G. C. W. and that as these terms were inconsistent with the postponement of the distribution of the estate; judgment must be entered for the plaintiffs in terms of their contention.*

Van der Westhuizen v. Estate Van der Westhuizen ... 62

Joint will—Construction—Adiation.

By their joint will N. and his wife, married in community, before proceeding to the appointment of heirs, directed that on the death of the survivor the landed property should be put up to public auction between their three sons, and that the proceeds should belong to the estate of the survivor. Proceeding to the election of heirs, they nominated the children as heirs of the first dying subject to a usufruct in favour of the survivor of the entire joint estate, "and directed that upon the death of the survivor the joint estate shall be equally divided among the children."

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N. died first, and his wife remained in possession of the joint estate in terms of the will. By agreement between her and the three sons the landed property was sold during her life time.

Held, *that on her death the proceeds formed part of the joint estate and should be divided equally among the children.*

Nel v. Estate Nel 554

Judicial separation—Division of goods held in community—Suspension of community—Marital power—Husband and wife.

On a decree of judicial separation and division of goods owned in community it is competent for the Court to interdict the husband from dealing with his wife's share or with property acquired by her, but not to dissolve the community altogether.

Neale v. Neale 300

Jurisdiction, *see* Divorce 881

Kaffir beer, *see* Proclamation ... 646

Kinderberwys, *see* Mutual Will ... 367

Land agent—Remuneration.

The plaintiff, a land agent, who had been requested by the defendant to find a purchaser for a certain property, informed the defendant that B. was willing to buy for £3,500, but the defendant said he wanted £4,500. The plaintiff informed B. of this price, and some days afterwards the defendant asked B. whether he would buy the property, to which B. consented on obtaining a reduction of the price to £3,900. The Court, finding

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that the defendant had entered into communication with B. in consequence of the introduction of A.

Held, *that the plaintiff was entitled to his commission.*

Fisher v. Atkins 778

Landing Agent, *see* Bailee of Goods 547

Landlord and Tenant—Lease—Ejectment—Damages.

Wood v. Lovegrove 510

Landlord and tenant—Extension of lease—Ejectment.

Preswich v. Koenig & Co. ... 198

Lashes — Previous conviction — Act 20 of 1856.

Under Sec. 42 of Act 20 of 1856, a magistrate may not punish a prisoner who has been previously convicted with lashes unless the previous conviction took place within two years of the subsequent one.

Rex v. Swart... 707

Latent defect, *see* Redhibitory Action... 216

Lease for life—Monthly tenancy —Ejectment.

The plaintiff, being the owner of a farm, allowed the defendant to build a house on it on condition that the defendant should pay one shilling a month as rent for his occupation and should not be entitled to compensation on leaving the premises. After the defendant had been in occupation for some years he received a month's notice to quit. The defendant refused to quit maintaining that he was entitled to remain in occupation for the term of his life,

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Held, *affirming the Magistrate's decision that the defendant was only a monthly tenant and that, in the absence of any fraudulent conduct on the part of the plaintiff, he was entitled to eject the defendant from the premises.*

Van Raht v. Van Breda ... 75

Lease—Documentary evidence.

Jeffery v. Kotze 757

Lease, Agricultural, } *see* assignment
Lease, Mineral, } of Lease ... 834

Lease—Evidence—Credibility of witnesses.

Middlewick and Another v. Brodie 1006

Lease — Cancellation — Nonpayment of rent for two years—Equitable relief against forfeiture.

The lessee of certain mining rights for a period of twenty years having failed to pay rent for three consecutive years, the lessor gave him notice that if the rent was not paid within twenty-one days an action would be brought against him for cancellation of the lease. The lessee had, long before such notice, sublet his rights, as he could do under the agreement of lease, but had not given notice of the sublease to the lessor. After the notice he neglected to pay the rent, believing, as he did, that the sublessees were liable and would pay, whereupon the action was instituted against him, of which he forthwith informed the sublessees, who immediately tendered payment to the lessor of the arrears of rent and costs. The tender not being accepted, the sub-

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lessees were allowed to intervene as co-defendants, and repeated their tender in the plea.

Held, *that the Court was not bound by any positive rule of law to decree a cancellation of the lease on failure by the lessee to comply with the notice, and that, as there was nothing in the conduct of the lessee to indicate an intention to abandon or repudiate the lease or to defy the rights of the lessor, it was competent for the Court, under all the circumstances disclosed in the case, to relieve the lessee against the consequences of his neglect.*

Estate Thomas v. Kerr and Another 526

Lease—Tenant's right of back entrance to premises leased—Damages.

A lease of premises includes everything necessary for the due and proper enjoyment and occupation thereof.

Where, therefore, a house with yard and stable was let to the plaintiff.

Held, *that she was entitled, in the absence of anything to the contrary, to a right of way through the yard of the defendant, such being the only exit from her yard and stable to a public thoroughfare.*

The defendant, as lessor, who had obstructed the plaintiff in the due and reasonable enjoyment of this right of way, held liable in damages for the loss and inconvenience caused thereby.

McNeill v. Eaton 600

Leave to prosecute appeal, *see* Appeal in Criminal cases ...1165

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Legacy — Condition — Uncertain day — Vesting — Will — Construction—Gift to children on attaining twenty-one — Intermediate income for maintenance — Discretionary power.

A testator bequeathed to his daughter E. the sum of £20,000 "on attaining the age of twenty-one years," and directed that during her minority the interest or income of the legacy, "or so much thereof as may be necessary," shall be paid to his wife, "such interest or income to be paid or expended for or towards the maintenance or education of the minor." The daughter survived the testator, but died at seventeen, unmarried and intestate.

Held, *that the legacy had vested before her death and was transmitted to her heirs* ab intestato.

Executors of Moodie v. Curator of Moodie ... 742

Legitimacy—Presumption—Children.

The presumption that children born in wedlock are the children of the husband is not rebutted by the wife's admission that they are not his children, or by the fact that she has been found guilty of adultery, or by the fact that at the time of their birth he was over eighty years of age, or by all these facts combined in the absence of any evidence of incompetency on his part or of non-cohabitation with his wife.

Ex parte Venter 620

Lessor and lessee—Obligations of lessor—Defective premises—Damages.

A lessor is liable in damages

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to the lessee in respect of any injury caused to the property of the lessee by the defective condition of the premises leased: provided that the lessor had knowledge of such defect, or by reason of his trade or calling ought to have had such knowledge.

Atkins v. Delpont 686

Lex Commissoria, see Sale ... 451

Liabilities of Joint-estate, *see* Mortgage bond 203

Liability of Landlord, *see* Act 36, 1902 860

Life insurance—Proof of death.

Estate of late Basson v. Law Accident Insurance Co.

Estate of late Basson v. Union Insurance Co. ...1094

Life policy — Public policy — Death in consequence of illegal acts.

B. insured his life with the defendant society, the policy providing that in case "it shall not have become void by the death of the assured by suicide, whether sane or insane, within one year of the date hereof, the said society will pay to the executors, administrators, or assigns of the assured, the sum of £200. After paying the premiums for ten years, B. went into rebellion and was killed in an engagement with the British troops.

Held, *that B's executors were entitled to recover the amount of the policy.*

Burger v. South African Life Insurance Society ... 847

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Lights—Servitude—Party-Wall—Interdict.

Heynes, Mathew & Co. v. Black & Co. 552

Liquidated demand, *see* Magistrate's jurisdiction 219

Liquidation account—Amendment—High Sheriff—Dead bond.

Judgment for the sum of £500 due on certain two mortgage bonds had been granted to the G. A. Company as against one B. The property specially hypothecated having been also declared executable, had been sold in execution, and the High Sheriff had framed a distribution account. It appeared that there was a third uncancelled bond in the office of the Registrar of Deeds on the same property in favour of one L. for £500. The estate of L. had been finally sequestrated, but the trustees had not brought up this bond for £500 as an asset in his estate. The High Sheriff had, however, awarded a balance of the money which the property realized after the other two bonds had been paid off, together with interest for a year and a current year, as an asset in L.'s estate in respect of the £500 bond. On the application of the G. A. Company the Court granted an order directing the High Sheriff to amend his account and to award to the Company the entire balance of the moneys realized by the sale in execution of the said property.

The case of Brink v. The High Sheriff (*12 S. C. R. 414*) *distinguished.*

Guardian Assurance Co. v. Insolvent Estate Lippert... 257

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lessees were allowed to intervene as co-defendants, and repeated their tender in the plea.

Held, *that the Court was not bound by any positive rule of law to decree a cancellation of the lease on failure by the lessee to comply with the notice, and that, as there was nothing in the conduct of the lessee to indicate an intention to abandon or repudiate the lease or to defy the rights of the lessor, it was competent for the Court, under all the circumstances disclosed in the case, to relieve the lessee against the consequences of his neglect.*

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Ex parte Venter 620

Lessor and lessee—Obligations of lessor—Defective premises—Damages.

A lessor is liable in damages

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tion whether the appellant could legally sell liquor to natives.

Rex v. Billinkin 1162

Liquor licence—Selling to native —Increase of penalty by Proclamation after issue of licence.

The applicant obtained a licence for the sale of liquor in a native territory subject to the Proclamation then in force, which prohibited the sale of liquor to natives, and the licence contained an indorsement to the effect that the sale of liquor to natives would subject him to a penalty of £50. After the date of the licence the Governor, by Proclamation, increased the penalty to £100.

Held, *that the appellant, on conviction, was liable to the increased penalty.*

Rex v. Newman 1216

Liquor Licence new—Memorial—Voters' list—Act 25 of 1891. Van Rensburg v. George Licensing Court and Fotheringham 922

Liquor Licensing Act (28) of 1883—Native locations and areas.

On the trial of the appellant in the Resident Magistrate's Court of Komgha for selling liquor to an aboriginal native in contravention of the 22nd section of Act 28 of 1883, the defence was raised that the Proclamation was illegal, but the evidence shewed that there were aboriginal natives resident in the village of Komgha when the liquor had been sold, and that the appellant had consented to take his licence subject to the Proclamation.

Held, *that although such consent might not estop the appellant from setting up the illegality of the Proclamation, it afforded further evidence to prove that aboriginal natives were located or resident in the village, so as to justify the issuing of the Proclamation.*

Rex v. Brown 868

Litis Contestatio, see Rei vindicatio 81

Locus standi, see New liquor licence 628

Lunatic—Curator—Domicile.

S. had been appointed curator to the person and property of his wife, who was of unsound mind. Thereafter a rule nisi *was obtained calling upon S. to show cause why his appointment should not be cancelled. On an application to have this rule made absolute.*

Held, *that as it had not been brought to the notice of the Court that all the said property was situated in the Transvaal and that S. was there domiciled the application must be granted.*

Ex parte Berman 194

Lying-in expenses, *see* Consideration 77

Magistrate's decision on facts reversed, *see* Condition in Quitrent grant 490

Magistrate's finding as to credibility of evidence, *see* Conflict of evidence 769

Magistrate's finding on facts, *see* Conflict of evidence ... 777

Magistrate—Mandamus.

An application for a mandamus, compelling the Magistrate

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Liquidator, *see* Company ... 382

Liquidator—Investment of Trust Funds— *Ultra vires*—Pleading—Exceptions.

On a certain Life Assurance Co. going into liquidation, one H. was appointed as administering liquidator, and in that capacity arranged with a certain Trust Co. to deposit with them such funds of the Assurance Co. as should come into his hands; the said funds to bear interest at 5 per cent., to be reckoned half-yearly. This interest was afterwards reduced to 4 per cent. The Trust Company, on being called upon, rendered an account of these funds, but brought up no interest for 1897 to 1899, and thereafter brought up interest yearly The plaintiff now claimed that this account should be amended and the Company directed to bring up interest half-yearly from 1897, and also to account for certain unclaimed dividends remaining in their hands which had been merged in their funds. The defendant Company pleaded that H. had agreed that no interest should be allowed on moneys deposited by him with the said Company after 1896. That at his request they agreed to allow yearly interest on the said moneys after 1899. They denied that they were bound to open an account for unclaimed dividends or were responsible for the same, but they tendered to pay them whensoever they might be claimed. To this plea the plaintiff excepted as bad and insufficient in law.

Held, *that as a liquidator may require certain funds, which come into his hands, at any moment he is not acting* ultra vires *by not investing these at interest, and further, that as the allegations in the plea, in respect of unclaimed dividends, would (if proved) constitute a good defence, the exception must be disallowed with costs.*

Liquidator of the Life Branch of the S.A. Fire and Life Assurance Co. v. the Board of Executors 977

Liquor laws—Holder of licence—Agent—Barman.

The appellant, the holder of a liquor licence, was charged with a contravention of the liquor licence, and the evidence was to the effect that his barman had effected an illicit sale to a native, that the appellant knew natives were trying to get liquor, and that he did nothing to prevent the sale.

Held, *that, although the appellant was not present at the sale, he was rightly convicted.*

Rex v. Parsons 214

Liquor licence — Condition — Natives — Illegal proclamation.

The Licensing Court of K. granted a licence to the appellant subject to the provisions of a Proclamation issued by the Governor, prohibiting the sale of liquor to natives.

Held, *that the condition imposed by the licence amounted to a prohibition to sell to natives, and that as such prohibition could legally have been imposed independently of the Proclamation, the illegality or otherwise of such Proclamation could not affect the ques-*

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plaintiff took the accordion after he was told it belonged to the defendant.

Held, *in an action for malicious prosecution and false imprisonment that the defendant, in charging the plaintiff with theft of the accordion, had set the law in motion, and was responsible for the prosecution. That under the circumstances he had not acted with malice or without reasonable and probable cause. That he was not liable for false imprisonment, because the police, upon receiving the charge of theft, arrested and imprisoned the plaintiff instead of taking out a summons for his appearance.*

Kroomer v. Lobascher ... 674

Malicious prosecution — Reasonable and probable cause.

In an action for malicious prosecution it was proved that the affidavit made by the defendant in support of the prosecution, although substantially correct, erred in some unimportant details.

Held, *that the plaintiff was not entitled to succeed.*

Price v. Steyn 175

Malicious prosecution — Reasonable and probable cause.

The plaintiff had given to the defendant a certain cheque, and had by so doing obtained money from him. It was admitted that the plaintiff had no funds at the Bank to meet this cheque, and the Court found, as a fact, that the plaintiff had not informed the defendant of this. The defendant, finding the cheque dishonoured, had the plaintiff arrested, as he was about to leave Table Bay.

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The plaintiff was charged before the Magistrate with fraud and was acquitted. Plaintiff now sued the defendant for malicious prosecution and false imprisonment.

Held, *that as the defendant had not acted without reasonable and probable cause, judgment must be given against the plaintiff with costs.*

Solomons v. Rosenberg ... 935

Manager—Sales on credit—Adoption of manager's acts by principal—Evidence.

The appellant had been sued in the Magistrate's Court by the respondents for the price of certain shop goods sold by him while acting as manager of one of the respondents' stores, on credit: (as the respondents maintained), contrary to their instructions. A portion of these book debts had been (with appellant's assistance) recovered by the respondents who, however, had in the Court below obtained judgment against the appellant for the balance of the debts not recovered.

Held, *that as no evidence had been given to show that appellant had been instructed not to give credit, and that even had he been so instructed, the respondents had adopted his acts by themselves recovering, with his aid, a portion of the outstanding debts, he was not liable for the balance, and that the appeal must be allowed with costs in both Courts.*

Taylor v. Lowry Bros. ... 775

Mandamus, *see* Magistrate ... 898

Marital power, *see* Judicial Separation 300

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Marriage — Funds to prosecute action for judicial separation.

A woman who alleged that she had contracted a valid marriage in Russia now applied for an order to compel her alleged husband to furnish her with money to enable her to prosecute an action for a judicial separation from him. The respondent denied the legality of the alleged marriage, but (1) as he produced a document by which he and the applicant had agreed "to come together and marry and be husband and wife" (2) and as after the parties separated the respondent demanded that the applicant should return to him and also that he should have the custody of their children and (3) as the respondent had tendered £20 to the applicant.

Held, *that he should forthwith pay to her £25 towards enabling her to prosecute her action. The Court declined to express an opinion as to the legality of the marriage.*

Finkelstein v. Finkelstein ... 16

Martial Law—Seizure of stock by military—Change of *dominium*.

Plaintiff's farm had been denuded of certain mixed live stock by the military authorities during the subsistence of Martial Law. Plaintiff having been absent from his farm on lawful business at the time of these operations subsequently followed up the military column and was told by the officer in command thereof that he was at liberty to take back his stock, or, should he not be able to find the full number of his own stock, to take any other in charge of the military in order to make up the full number. Thereafter the plaintiff found certain of his own stock in the possession of the defendant; these having been similarly handed over to defendant by the military. Defendant admitted to plaintiff that he had more stock than had originally belonged to him; and plaintiff now sued defendant for the return of such of plaintiff's stock as were in defendant's possession, or their value.

Held, *that by the said seizure under martial law no change of* **dominium** *was effected and that the plaintiff was therefore entitled to judgment as claimed.*

Du Toit v. Marais 139

Master and servant—Competition in trade—Interdict.

Respondent had contracted to serve the applicants under an agreement, by which, inter alia, *he engaged not to enter into trade competition with them anywhere within a radius of twenty miles for the space of five years. After a few months respondent left the service of applicants, and there was some evidence to show that the said agreement was cancelled by mutual consent. Respondent thereafter commenced business on his own account in the same town in which he had served the applicants. Applicants now applied, on motion, for an interdict to restrain him from carrying on his said business.*

Held, *that in face of the evidence produced by the respondent, the interdict must be refused with costs and the*

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applicants left to their ordinary remedy by action.

Armstrong and Co. v. Davidson 1131

Master and servant—Negligence — Common employment — Labour agent.

The defendants entered into a contract with the Military authorities "for the supply of native labour" at certain specified rates of wages. The defendants employed a timekeeper to engage the men, to observe the time during which the men worked and to pay them at the end of every week the wages, which were less by six pence a day per man than the amount agreed on with the Military authorities. The men were employed by the Military authorities to stack bales of forage under the control and supervision of a Military superintendent, and the defendants had no power to give any command as to the manner in which the work should be performed. The plaintiff, who was one of the men engaged by the defendants, sustained an injury through the fall of a bale caused by the negligence of one of his fellow servants.

Held, *that the defendant was not a master of the men and was not liable in damages for the injury.*

Eyssen v. Calder and Co. ... 729

Master and servant—Negligence of servant.

In an action brought by the owner of a horse for an injury done to it by the negligence of the defendant's servant in the course of his employment, it appeared that the servant was paid weekly by E., but that E. did so as a matter of convenience and as agent for the defendant.

Held, *that the defendant was liable.*

South African Mineral Water Co. v. Camp's Bay Tramway Co. 345

Measure of damages, *see* Shipping agent 1061

Medical practitioner — Fees — Proof of status—Sec. 56, Act 34 of 1891.

A medical practitioner who sues for his fees must prove that he is duly licensed to practise as such in this Colony, either by the production of his licence or by a certificate given under the hand of the Colonial Secretary. Louw v. Fryer (*15 S. C. R. 214*) *followed.*

Noumbela v. Culligan ... 489

Member of club — Judgment against members collectively —Execution against one of them.

A judgment has been obtained against the members of a certain club collectively for the balance of an unpaid account. By one of the rules of the Club each member was liable in solidum *for all debts contracted by the Committee: and application was now made for leave to issue execution against one individual member.*

Held, *that as the respondent had not been a party to the suit in which judgment was obtained the application must be refused with costs.*

White, Ryan & Co. v. Hilliard 589

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Minors—Age of childbearing—Distribution of Estate.

A testatrix had bequeathed certain immovable property "to the male children of her son G. begotten and to be begotten from his present marriage." The testatrix had died and G. had had 8 children born to him as issue of the said marriage. He was now 56 and his wife 52 years of age. No children had been born to them during the previous eleven years and a medical certificate showed that there was no probability of further issue. G. as executor of his late mother's estate now asked for an order authorizing the Registrar of Deeds to pass transfer to each of his male children of his portion of the bequest. The Court granted an order as prayed.

Ex parte Kok... 213

Minor, *see* Executor 399

Misconduct of Partners, *see* Partnership 428

Misdirection of Judge, *see* Court of appeal 1183

Monthly tenancy, *see* Lease for life 75

Mortgage Bond — Registrar of Deeds—Liabilities of joint estate.

C. (married in community of property) had during the lifetime of his deceased spouse raised £600 on mortgage in order to enable him to carry through certain transactions in landed property. C. and his wife had executed a joint will whereby the issue of their marriage were instituted heirs to the entire joint estate subject

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to a life usufruct to the survivor. After the death of his wife C. endeavoured to pass the said mortgage bond. This the Registrar refused to do without an order of Court. The Court granted the order as prayed.

Ex parte Claassen 203

Mortgage bond—Notice of payment—Provisional sentence.

The plaintiff sued the defendant for provisional sentence on a bond which was payable upon three months' notice given on either side. The summons alleged that such notice had been given to the plaintiff by the defendant, but the evidence showed that the plaintiff at once wrote refusing to accept such notice.

Held, *that after such refusal the plaintiff could not rely upon the notice given by the defendant, and provisional sentence was accordingly refused.*

Blake v. Cortis 231

Mortgage bond—Three months' notice—Provisional sentence.

To a claim for provisional sentence for the capital of a bond the defence was raised that the three months' notice had been given before the expiration of a year from the time when the interest began to run. The interest was payable half-yearly, and three months' notice was given so as to require payment of the capital after the first six months had expired. Provisional sentence granted.

Katzen v. Moore Bros. ... 657

Mortgage of entailed property—Native custom.

The applicant, a Tembu, was heir-at-law to his father of a

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certain farm, which in accordance with the Tembu law of inheritance, would on his death similarly pass to his heir-at-law. He now sought the leave of the Court to mortgage this property, in order to enable him to meet the demands of certain creditors.

Held, *that as it was not shown that these debts to the said creditors had been incurred in connexion with the preservation of the said property, the application must be refused. No order was made in respect of costs.*

Ex parte Tabata 587

Motion, *see* Contract 504

Motor car, *see* Collision 407

Municipal regulations—Municipal engineer — Building regulations.

On motion for an order compelling the engineer of M. Municipality to issue a certificate of completion of the applicant's building, it appeared that his architect had submitted certain plans to the Municipality, shewing the floor line to be 12 inches above the level of L. road, and that the plans had been approved of, but that the floor line of the house, as built, was on a level with L. road.

Held, *in the absence of any proof of approval of the divergence, the applicant was not entitled to succeed.*

Herbert v. Claremont Municipality 823

Municipal regulations—Sanitation.

Applicants called upon the Municipal Council of R. to show cause why they should not be ordered to pass and approve of plans for certain 22 cottages which the applicants wished to build on a certain piece of land measuring 180 by 200 feet which was their property. The Municipal Council objected to the erection of so many cottages on a small piece of land on the ground that they would be necessarily insanitary, unless one access was given for necessary sanitary purposes to the back of these cottages. The applicants were willing to provide a 6 foot passage but nothing more.

Held, *that the Council had not acted unreasonably in refusing to approve of the plans, and that the Court therefore would not interfere with the exercise of the powers vested in them by the legislature.*

Saacks Bros. v. Rondebosch Municipality 52

Municipality — Powers — Ordinance 9 of 1836—Agreement as to water.

In 1874, the Commissioners of the Municipality of W., which was constituted under Ordinance 9 of 1836, agreed with the Government that water from a stream, to which the inhabitants had a common right, should be allowed, free of charge, for temporary and permanent railway service. The requirements of the Government were for about 9,000 gallons a day, but in consequence of the extension of the Railway system, the requirements increased in 1904 to over 60,000 gallons a day. No regulation existed authorizing the Municipality to supply

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water to others than inhabitants.

Held, *in an action brought by the Municipality against the Government for a declaration of rights, that the Municipality had no power under the Ordinance to enter into the agreement.*

Worcester Municipality and others v. Colonial Government 949

Municipality, *see* **Building regulations** 497

Mutual mistake of seller and purchaser, *see* **Sale** 378

Mutual will—Adiation—Acquiescence—Kinderbewys.

By the mutual will of the testator and his wife, who were married in community, they appointed the survivor and their eight children as heirs of the first dying, and directed that the survivor should have the usufruct of the joint estate, and that on the death of the survivor the joint estate should be divided between the children. The wife died in 1875 and the testator remained in possession of the joint-estate, and about a year after her death, when he was about to re-marry, he framed an account and passed a deed of kinderbewys for the amount of his children's maternal inheritance after deducting his own child's portion under the will. Some of the childrens' maternal portions, including that of the plaintiff, who was one of the children, remained unpaid until the death of the testator, which took place in 1902.

Held, *that there was sufficient proof of adiation on the part of the testator, and that the plaintiff, who had never seen the account or the deed of kinderbewys, was entitled to claim his one-eighth share of the joint-estate on the death of the testator, and that his delay in making his claim could not be construed into acquiescence, seeing that he was justified under the will in not making his claim to any part of the joint-estate until after the testator's death.*

Budge and Another v. Estate Budge 307

Natives, *see* **Liquor Licence** ...1162

Native custom - Dowry cattle—Seizure in execution.

One S. (a Pondo) had received certain cattle as a dowry for his sister. These he handed over for custody to M., his chief and half brother. P., acting as messenger of the Resident Magistrate's Court, had seized certain of these cattle (as was alleged) in execution of a judgment obtained against S. M. brought an action in the Magistrate's Court for the recovery of these cattle. The Magistrate gave judgment for the defendant on the ground that by Pondo custom the son of the chief wife is responsible for his younger brothers. On appeal the Court referred the matter to the Magistrate for a full report as to whether he found as a fact that the cattle had been paid to M. or to S. On its appearing from the Magistrate's report that M. gave up the cattle to the messenger voluntarily, the appeal was dismissed.

Masangwana v. Pratt ... 224

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Native custom, *see* Executor ... 302

Native custom, *see* Mortgage of entailed property 587

Native custom—Tribal tenure.

Certain land within one of the Native Territories had been purchased for the use of a certain Native tribe with funds raised from the contributions of the members of that tribe. Transfer had been passed to the chief and eleven councillors, as trustees for the tribe. These conditions had not been inserted in the Deed of Transfer. Two of these councillors had obtained an order of Court, enabling them to pass transfer of a portion of this land to a certain purchaser. On the application of certain other members of the tribe, who were not represented when the former order was granted, the Court now granted an order, restraining transfer from being passed, pending an action to be forthwith brought by them for the rectification of the original transfer to the chief and his councillors.

Nzobo v. Ndaba and another 1121

Native Location, *see* Vagrancy Act 834

Native Locations and Areas, *see* Liquor Act 868

Native Marriage — Polygamy — Prohibited degrees.

Where native polygamous marriages are recognized as legal, a man may lawfully marry the widow of his maternal uncle and (semble) *may contract any marriage recognized by Native Custom, provided such custom be not contrary to the natural law.*

Rex v. Mawabe 1157

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Natural flow of water, *see* Interdict 749

Negligence—Burthen of proof—Due precautions to prevent accidents—Municipality.

The Municipal Council of W., in the course of excavating a street, left a heap of clay lying in the street, over which the plaintiff stumbled during the night time.

Held, *in an action brought by the plaintiff against the Council for damages for bodily injury occasioned by the fall, that the burthen of proving that due precautions had been taken to prevent the obstruction from being a source of danger to persons lawfully using the street during night time lay upon the Council.*

Farrell v. Woodstock Municipality 1034

Negligence—Collision on road.

Mitchell v. Tramway Co. ... 541

Negligence, *see* Coal 562

„ *see* Collision 407

„ *see* Master and servant 345, 729

Negligence—Rule of the road—Collision — Ordinance 4 of 1846, Sec. 3—Act 27 of 1882, Sec. 7.

The plaintiff's waggon which was being driven along the proper side of the road, as provided by Ordinance 4 of 1846, Sec. 3, and Act 27 of 1882, Sec. 7, Sub-sec. (1), collided with the defendant's waggon, which was coming down the wrong side of the street.

Held, *that by not keeping to the proper side of the street*

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water to others than inhabitants.

Held, *in an action brought by the Municipality against the Government for a declaration of rights, that the Municipality had no power under the Ordinance to enter into the agreement.*

Worcester Municipality and others v. Colonial Government 949

Municipality, *see* **Building regulations** 497

Mutual mistake of seller and purchaser, *see* **Sale** 378

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Held, *that there was sufficient proof of adiation on the part of the testator, and that the plaintiff, who had never seen the account or the deed of kinderbewys, was entitled to claim his one-eighth share of the joint-estate on the death of the testator, and that his delay in making his claim could not be construed into acquiescence, seeing that he was justified under the will in not making his claim to any part of the joint-estate until after the testator's death.*

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Masangwana v. Pratt ... 224

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In ascertaining whether a majority of registered voters of the district have signed a memorial or memorials in favour of granting a new liquor licence, the names of persons who are admitted or clearly proved to be dead, or to have never existed, or to have been registered twice, should be omitted from the voters' list, but not also the names of persons who have removed from the district.

Gibson and Morgan v. Manley (*11 Juta 191*), *and* Potgieter v. The Barkly West Licensing Court (*7 H.C. 147*) *followed.*

Strydom v. the Uniondale Licensing Court and Dassenville and van Rooyen ... 628

Newspaper comments, *see* Defamation 70

Non-delivery—Clerk.

In an action for non-delivery of a case of merchandise or its value; an endorsement was made by defendant's clerk as follows, "less seven cases short; see baggage room."

Held, not to amount to an admission by defendant that the seven cases were in the baggage room.

Lazar v. Table Bay Harbour Board 410

Novation, *see* Provisional sentence 296

Novation, *see* Building contract...1016

Nudum pactum, *see* Consideration 77

Obligation, *see* Condition precedent 103

Obstructing public thoroughfare —Sec. 5 of Act 27 of 1882—Prescription—Costs.

The appellant had been convicted by an Acting Resident Magistrate of having obstructed a public footpath in front of his shop by placing sundry goods thereon. Defendant pleaded that though the public had free access to this footpath he had acquired a prescriptive right to so use the said footpath and that he had so used it during some 22 years, the whole tenancy of the said shop.

Held, *that the said user for 22 years gave the appellant no such prescriptive right and that, while the Court would give no opinion as to the proprietary rights of the owners of the said premises, over the said footpath, the appellant had been rightly convicted and that the appeal must be dismissed. As, however, the Court held the appeal not to be of a frivilous character they refused to make any order as to costs.*

Rex v. Hilliard 42

Obtaining goods by means of false pretences—Fraud.

The prisoner, a coloured person, not being a registered voter, informed a licensed liquor dealer that he was a registered voter, and thus induced the dealer to sell him two bottles of brandy.

Held, *that as the dealer was not prejudiced by the false statement the prisoner could not be convicted of fraud.*

Rex v. Jacobs & Parsons ... 144

Occupation, *see* Registration of voters 373

Offer to sell—Acceptance—Option to buy Consideration.

A promise to keep open an offer to sell for a certain time is not binding in law if no considera-

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defendant's servant had been guilty of negligence, and that judgment must be given for plaintiff, with costs.

Table Bay Harbour Board v. Miller 576

Negligence, *see* Collision on road 733

„ *see* Deposit 683

„ *see* Damage to house 184

„ *see* Damages... ...1149

„ *see* Shipping agent ...1061

Negligence of servant — Railway regulations—Dangerous goods.

H. and his wife were passengers by rail from S.W. to Worcester. On the way a case of dynamite was negligently delivered by one P., who had been permitted by an official of the Railway Department to carry it with him in the train. Owing to negligent delivery by P., the dynamite exploded, thereby inflicting serious injuries to H. and his wife.

Held, *that the said official had been guilty of negligence by not strictly enforcing the regulations of the department and that the department was liable for his tort.*

Van der Horst v. Colonial Government 1038

Negligence — Servant — Scope of employment — Independent contractor.

The defendant had contracted with one I. to do certain work, and he gave his foreman D. general instructions to do "any little job" on the premises which I. might require. Pursuant to these instructions D. cut down a certain tree and left a portion of it lying across a public footpath. The plaintiff fell over this in the dark and sustained serious injuries.

Held, *that D. had been guilty of negligence, and that as he was a servant of defendant (an independent contractor and not a servant of I.), and had in cutting down the tree acted within the scope of his employment, the defendant was liable for his negligence.*

Semble: *If an employer instructs his servant to do any service for another and the servant is guilty of negligence in the performance of that service, his ordinary employer must be held liable, unless he can show that at the time the work was done his servant was under the direction and control of such third person.*

Wells v. Delbridge 1069

New liquor licence—*Locus standi* —Local option clause, Act 25 of 1891, § 13—Memorial not signed by majority of registered voters—Voters' list.

A registered voter for Divisional Council purposes has, under the local option clause of Act 25 of 1891, a sufficient interest in the matter to entitle him to move the Supreme Court to set aside the granting of a new liquor licence granted by the Licensing Court for his district.

A new liquor licence can not be granted by a Licensing Court, unless a memorial in favour of the granting of such licence, signed by a majority of registered voters, has been duly lodged with the Resident Magistrate, as required by section 13, sub-section 1 of Act 25 of 1891.

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with the assistance of the defendant, who became surety for the repayment of the loan. The money thus borrowed was paid to the defendant, and thereupon a bank account was opened in the name of the partners, notice of the partnership was published in the newspapers and sent to the customers, and the plaintiff took an active part for three months in the business of the firm. He failed, however, to repay the loan, and the defendant was obliged, as surety, to pay it. The defendant thereupon repudiated the existence of any partnership, and the plaintiff brought an action for the dissolution of the partnership and the appointment of a receiver to liquidate the concern.

Held, *that as a partnership had in fact been created, the circumstance that the defendant had to pay the £1,000 as surety did not entitle him to repudiate the existence of co-partnership, and that the plaintiff was entitled to his share of the assets, including the goodwill, after deducting from such share the sum of £1,000, but that as the business belonged to the defendant at the time of the plaintiff's admission, the defendant should retain the business with the goodwill on payment to the plaintiff of his share.*

No written agreement of the partnership had been signed, but a document was produced at the trial which had been prepared by the solicitor of the parties on their instructions for their signature. By this document the defendant purported to cede the whole business to the plaintiff, who admitted, however, that it was understood that the defendant should retain a half interest in the business.

Held, *that as a partnership can be constituted without any writing, the existence of a colourable document such as that agreed upon did not prevent the creation of the partnership if the facts showed what the real nature of the transaction was.*

Robertson v. Moss 431

Partnership—Terms—Evidence.
De Kock v. Weintrob ... 87

Party wall, *see* Lights 552

Place of payment, *see* Promissory note 866

Pleading — Replication — New cause of action.

The plaintiff by his declaration claimed damages from the Cape Railway department for non-delivery of certain luggage at Johannesburg. The plea alleged that the luggage had been duly conveyed to Johannesburg and there according to custom left in the custody of the Transvaal Railway department, and that by plaintiff's direction the Transvaal department was requested to return the luggage to Cape Town. The plaintiff then by his replication alleged that the defendant had contracted for hire to deliver the luggage at Cape Town.

Held, *that such new matter raised a fresh cause of action, and that, as the declaration relied upon a contract to deliver at Johannesburg, the plaintiff could not by his replication*

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tion is given for the promise, but it has the effect of an offer to sell, which can be withdrawn at any time before acceptance, and the acceptance of which before withdrawal within a reasonable time concludes a contract of sale.

The acceptance must be upon the same terms as the offer.

On the 24th April the defendants gave the plaintiffs the option of buying their shop until Monday, the 29th of April, at 12 o'clock. No consideration was given by the plaintiffs. The offer was accepted by the plaintiffs before noon on Monday.

Held, *that although the defendants were not bound to keep open the offer till Monday, the contract of sale was concluded upon the acceptance of the offer before its withdrawal upon the conditions upon which the offer had been made.*

Garvie and Co. v. Wright and Donald 670

Office of Profit, *see* Constitution Ordinance 482

Onus of proof. *see* Debtor and Creditor 790

Option of purchase, *see* Transfer of land 397

Order of Court—Contempt.

Van Onselen v. Landman and Another 377

Order of Superior Officer, *see* Soldier 56

Ordinance 9 of 1836, *see* Municipality 949

Ordinance 6 of 1843, sec. 23, *see* Arrest 191

Ordinance 4 of 1846, *see* Negligence 576

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Ownership, *see* Vindication 220, 284

Partnership — Dissolution — Misconduct of partners—Direction by will to carry on business.

A testator by his will directed his shop business to be carried on after his death, and bequeathed it to the two applicants and the respondent on certain conditions, which indicated a desire on the testator's part that the business should not be discontinued without the consent of all the partners. The legatees accepted the bequest and carried on the business in partnership, but after about eighteen months the applicants became dissatisfied with the respondent's conduct in occasionally absenting himself during business hours, and they offered to purchase his share if he would retire from the firm. On his refusal they applied, by motion, for a decree of dissolution and the appointment of a receiver.

Held, *that in the absence of any evidence of such misconduct as would render the continuance of the partnership practically impossible, the Court should not interfere with the directions contained in the will by decreeing a dissolution against the wish of one of the partners.*

McKay and Another v. McKay 428

Partnership — Dissolution—Referee.

The defendant being the owner of a licensed victualler's business agreed with the plaintiff to admit him as a partner on payment of £1,000. The plaintiff borrowed the money

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as his arbitrator, found that his neighbour was ill; M. then drove into Stellenbosch to secure another arbitrator. On arriving on the land trespassed upon with his arbitrator, M. found the Field-cornet and the other arbitrator moving off the land, and they informed him he was too late and that the damage had already been assessed. The Magistrate held that under the circumstances a sufficiently convenient time had not been allowed. On appeal, the Court refused to reverse the Magistrate's decision.

Rutherford and Mason v. Myburgh 884

Power of attorney—Revocation of agency.

The plaintiff ceded her boarding-house business to M., and gave him a power of attorney, authorizing him to dispose of the business and pay her debts. M. employed the defendant to sell the business and pay his creditors out of the proceeds. The defendant, who knew that the plaintiff was the real principal, sold the business and proceeded to pay the plaintiff's creditors, and was about to pay a debt claimed by one R. from the plaintiff, when the plaintiff informed him that she denied the debt and warned him not to pay it. In spite of the warning he paid the debt

Held, *that the plaintiff was entitled to claim an account from the defendant of his dealings with the proceeds, and that the defendant was liable to pay the amount of the claim which he had paid to R.*

Van Nierop v. Kidney ... 985

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Practice — Action for account— Reference to an accountant as referee.

The plaintiff obtained judgment for an account against the defendant who paid the costs of the action. The defendant rendered an account verified by affidavit in which he also stated that he claimed the balance shewn in such account to be in his favour. The Court referred the account to an accountant as referee who found that there was a large balance in the defendant's favour.

Held, *an application to confirm the finding of the referee that the defendant was entitled to judgment for the amount of such balance with costs of the reference without any fresh proceedings.*

Estate Weidner v. Brand ...1053

Practice — Affidavits — Size of paper.

Austen & Hodges v. Hodges 94

Preference, *see* Debentures ... 994

Prescription, *see* Obstructing public thoroughfare 42

Prescription, *see* Redhibitory action 216

Prescription, *see* Act 3 of 1879 ... 870

„ *see* Fraud 667

„ *see* Servitudes ... 465

„ *see* Water 321

Presumption as to possibility of issue, *see* Will 147

Presumption, *see* Legitimacy ... 620

Presumption of innocence.

Conviction of an accused by a Resident Magistrate set aside, there being on the evidence a

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raise a claim based upon a contract to return the goods to Cape Town.

Faisht v. Colonial Government 313

Pleading—Tender—Payment into Court.

P. having been sued by A. for a certain sum of money, tendered, a less sum "in full satisfaction" in his plea. This tender A. refused to accept, but asked for an order to have all mention of the tender struck out of the plea, as irrelevant matter; or in the alternative, an order to defendant to pay the amount tendered into Court.

Held, *that as the granting of the first prayer would involve the trial of part of the principal case, on motion, and moreover as there was no rule to compel a defendant to pay the amount of his tender into Court, both the prayer and alternative prayer must be refused, and the plaintiff left to deal with the question of tender in his replication.*

Semble: *In certain special cases the Court might order the amount of a tender to be paid into Court.*

Allie Bros. v. Porter and Bousdorf 1135

Pleading, *see* Redhibitory action 216

„ *see* Will 205

Pledge—Sale—Condition.

A. borrowed from M. the sum of £20 and, in order to secure the loan, he let to M. a small erf for a period of two years at a rent equivalent to the interest on the loan, and further agreed that should he fail to repay the amount within that period the land should become the property of M., and the amount of the debt should be considered to be the purchase price thereof. A. failed to pay the debt within the two years, and M. remained in possession of the land for several years, paid the rates and taxes, and was treated by A. as the owner in every respect except that transfer was not passed. After the death of A. a rule was obtained by M., under the Land Titles Act of 1881, for the registration of the land in M.'s name. The rule was opposed by A.'s heir, who tendered the amount of the debt, but did not allege that the price agreed upon was in any way unjust or unreasonable at the time when the sale was to take effect. The Court, finding under the circumstances that the price must be considered to be fair and reasonable, made the rule absolute.

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Ex parte Mabunya 239

Pledge, *see* Contemplation of Insolvency 751

Pledge, *see* Interpleader 354

Polygamy, *see* Native marriage ...1157

Pounds and Trespasses Act, 1892, section 36, sub-section (5)—Convenient time.

A Field-cornet at 4 p.m. appointed 9 a.m. the following day for the purpose of inspecting the land trespassed upon, and sent a message to M., the owner of the cattle which had trespassed, to that effect. This message did not reach M. until 8 p.m. The next morning M., on proceeding to a neighbour, for the purpose of getting him to act

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does not affect the validity of the proclamation in regard to other localities which were properly included.

The giving of Kafir beer to an aboriginal native in a proclaimed area constitutes a contravention of the 22nd section of the Act.

Rex v. Mathebus 646

Prohibited degrees, *see* Native marriage 1157

Promise to extend time of payment, *see* Consideration ... 681

Proof of death, *see* Life Insurance 1094

Proof of debt—Contingent claim—Partnership.

A partner, having a claim against his co-partner, cannot prove in respect thereof against the separate estate of the co-partner while any of the joint creditors are unpaid.

Dell v. Estate Ricci 906

Proof of status, *see* Medical practitioner 489

Promissory note—Place of payment.

A promissory note made by the defendant in favour of the plaintiff was payable at the office of S. The defendant did not pay the note when it fell due, but some weeks afterwards he paid the amount at the office of S., *no intimation having in the meantime been made to the defendant that the amount was to be paid elsewhere. Application for provisional sentence was refused with costs.*

Heydenrych v. Hoctor, Heydenrych v. Jeffery ... 866

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Promissory notes.

G. owed L. certain sums of money and gave to L. promissory notes to the amount of such sums owing. G. now contended that these were accommodation notes, but the Court held that they were given as security for moneys owing by G. to L., and granted provisional sentence against G. on the notes.

Lithman & Co. v. Goodman, 494

Prospective lease—Abandonment—Cession of rights by lessee.

On November 3rd, 1900, defendant entered into an agreement with one M., whereby he gave to M. the sole right of prospecting on certain land for certain minerals and precious stones for a term of three years, M. to have the power of ceding his rights on certain conditions. In April, 1901, M. ceded his rights to the plaintiff, but the stipulated conditions were not fulfilled till June, 1903, or thereafter. Defendant thereupon refused to recognize M.'s right of cession or to acknowledge plaintiff as the concessionary, alleging that M. had abandoned his rights previous to June, 1903. In the absence of evidence of abandonment by M. or of acceptance of such abandonment by defendant or of any neglect on M.'s part to perform all his duties under the contract, save as to the payment of rent. The Court held that by such neglect he had not abandoned his rights as a concessionary, that defendant was not justified in refusing to recognise the cession to plaintiff and to allow him to prospect, and that conse-

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reasonable doubt in favour of the accused.

Rex v. Swarts 638

Previous conviction—Aggravation of sentence.

Where a person is charged with a criminal offence committed before the date of his conviction of a similar offence, such conviction cannot be used as evidence for the purpose of aggravating his sentence.

Rex v. Abrahamson 1140

Previous conviction, *see* Lashes ... 707

Principal and agent—Authority—Liability.

The defendant, purporting to act as the agent of M., bought certain goods from the plaintiff who debited M. with the price and afterwards claimed the amount from him. M., however, had in the meantime paid the price to the defendant and repudiated his liability. The plaintiff thereupon sued the defendant, who refused to pay, on the ground that he had not purchased the goods on his own behalf, but he failed to prove that he had been authorized by M. to pledge his credit.

Held, *that the plaintiff was entitled to recover the amount from the defendant.*

Wright v. Williams (*8 Juta, 166, followed*).

Du Plessis v. Dall 1147

Principal and agent, *see* Auctioneer 1159

Principal and agent.

Bryant v. Henderson ..1056

Principal and agent.

Smit v. Brinkman 1044

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Principal and agent—Deed of sale—Retention by agent.

Estate Berens v. van Wyk ... 725

Principal and agent — Agent's authority.

Hennessy v. Cortis 942

Privilege, *see* Rule 333D 911

Privy Council, *see* Appeal ...1122

Proclamation—Aboriginal natives—Proclaimed areas.

The Governor, by Proclamation, declared the districts of Victoria East and Stutterheim to be an area under the 21st section of Act 28 of 1883. At the date of the Proclamation the appellant was the holder of an unexpired licence for the sale of liquor in Alice without any condition as to the sale to aboriginal natives. The town of Alice, according to the record, is a seat of magistracy. The appellant having been convicted of illegally selling liquor to a native after the date of this Proclamation.

Held, *that the Governor had no power to include a town with a European population and a seat of magistracy in such an area, and that the conviction should be set aside.*

Rex v. Florinquy 652

Proclamation—Aboriginal natives—Proclaimed areas—Section 21 of Act 28 of 1883—Kafir beer.

The Governor has no power to include in any area proclaimed under the 21st section of Act 28 of 1883 any town or tract of country mainly occupied by Europeans, but the fact that an area so proclaimed improperly includes any locality

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does not affect the validity of the proclamation in regard to other localities which were properly included.

The giving of Kafir beer to an aboriginal native in a proclaimed area constitutes a contravention of the 22nd section of the Act.

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quently plaintiff was entitled to a declaration of rights and to an extension of five months beyond the time allowed by the original contract.

Coley v. De Villiers 806

Provisional order of sequestration --Return of *nulla bona*--Act of insolvency.

On the return day of a provisional order of sequestration a creditor of the defendant opposed the granting of a final order on the ground that the plaintiff was not a creditor. The plaintiff was a judgment creditor but the defence was that the judgment had been obtained by fraud and collusion.

Held, *that until the judgment was set aside it must be held to be valid, and that as no proceedings had been taken to set it aside the plaintiff should be regarded as a lawful creditor.*

Douglas and Douglas v. Glass 1173

Provisional Order of Sequestration, *see* **Arrest** 191

Provisional sentence — Bill of exchange—Novation—Agreement to give time.

The defendant, being sued for provisional sentence on certain overdue bills of exchange accepted by him, raised the defence that the plaintiff had agreed to accept payment in instalments, but the evidence showed that, although there had been negotiations for such a settlement, no definite agreement had been arrived at.

Held, *that the plaintiff was entitled to provisional sentence.*

Scholefield, Goodman & Son v. McDonald & Co. ... 296

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Provisional sentence, *see* **Mortgage bond** 231

Provisional sentence — Bill of exchange.

To a claim for provisional sentence against the acceptor of a bill of exchange, the defence was raised that the consideration for the bill was the delivery of 2,000 bags of oats, each bag containing 150 lbs., whereas the oats were actually tendered in bags containing a smaller quantity. It appeared, however, that the plaintiffs had rendered to the defendant, before he accepted the bill, an account shewing on the face of it that the bags contained less than 150 lbs.

Held, *that as the price of the oats was at so much per 100 lbs. and not per bag, provisional sentence should be granted, leaving it to the defendant to raise his defence in the principal case.*

Bergl v. Conrad 1091

Provisional sentence — Account stated.

Provisional sentence granted on account which plaintiff had objected to as incorrect and which defendant had thereupon withdrawn. Subsequently in an action defendant had pleaded that this account was true and correct and the Court had found that it was so.

S.A. Fire Co. (in liquidation) v. Board of Executors ...1179

Provisional sentence —Security.

On a claim for provisional sentence the defence of compensation was raised, but as the evidence of the existence of a valid counter claim was not

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satisfactory, provisional sentence was granted. The plaintiffs, residing outside the jurisdiction of the Court, were ordered to give sufficient security over and above the ordinary security de restituendo.

Lewis and Sacks v. Goodman 864

Provisional sentence, *see* Foreign judgment 612

Provisional sentence, *see* Mortgage Bond 657

Provisional sentence—Promissory note—Accommodation.

Weintrob v. Weintrob and another 94

Public place, *see* Insulting language 223

Public utility, *see* Interdict ...1004

Purchase on behalf of a Company, *see* Transfer duty 1142

Quanti Minoris, *see* Sale 421

Question reserved, *see* Appeal ...1195

" " *see* Court of Appeal 1183

Railway Acts, *see* Expropriation of land 168

Railway—Servitude—Expropriation—Amended title under Act 9 of 1879.

In 1873 the Government expropriated certain land forming portion of a farm for railway purposes, and paid due compensation to the owners. The portion expropriated was cut off from the rest of the land by means of fences, but the Government did not use the whole of the land so expropriated and no transfer of the portion expropriated was made to the Government, although a diagram shewing the portion cut off was attached to the transfer in the Deeds Office. The plaintiffs bought the farm with knowledge of the fact that portion had been cut off for railway purposes. In 1902 the plaintiffs obtained an amended title under Act 9 of 1879, which included the land expropriated, but stated that the grant was subject to conditions contained in previous transfers and the diagram attached to the grant shewed the portion expropriated for the railway.

Held, *that the plaintiffs were not entitled to eject the Government or to claim compensation for expropriation.*

Hansen and Schrader v. Colonial Government ... 770

Railway regulations, *see* Negligence of servant 1038

Reasonable diligence, *see* Demurrage 690

Reasonable and probable cause, *see* Malicious prosecution 175, 985

Rebel—Booty—Spoliation—*Onus probandi.*

During the late war the Military had seized a certain horse, the property of J. No receipt was given to show that the horse had been duly "requisitioned." After passing through various hands the horse was sold by one of the military to W. J. had joined the enemy before the horse was seized, but there was no evidence to show that the military were aware of this fact at the time of seizure. After peace had been proclaimed, J. had taken his horse out of W.'s custody, whereupon W. sued him in the

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Magistrate's Court for redelivery of the horse (or its value) and damages. The Magistrate gave judgment for the plaintiff.

Held on appeal (*1*) *that the private property of alien enemies, or even of rebels, is not* "*booty.*"

(*2*) *That the* onus *lay on W. to show a good title to the horse, and that as he had failed to discharge that* onus, *and the horse was therefore (to all appearance) illegally seized, J. was* spoliatus.

(*3*) *That the appeal must, therefore, be allowed with costs.*

Johnson v. Van der Walt ... 931

Receipt, *see* Debtor and Creditor 790

Rectification of Transfer, *see* Alteration of surname ... 668

Rectifying regist r of shareholders *see* False representation ... 621

Redhibitory action — Sale and purchase — Latent defect — Prescription—Pleading—Appeal—Final judgment.

Within seven days after the plaintiff had purchased two oxen from the defendant, they sickened of lungsickness and within three days afterwards they died. The expert evidence shewed that the disease, although latent, had been contracted before date of sale.

Held, *that the Magistrate's Court properly decided that the plaintiff was entitled, by means of the redhibitory action to recover back the price he had paid.*

The action was instituted more than six months after the date of sale, but no objection was taken on the ground of lapse of time. On appeal to the Chief Magistrate, however, the objection was taken and disallowed on the ground that it ought to have been taken in the lower Court.

Held, *that the defence ought to have been raised before final judgment in the l wer Court and that, not having been so raised, it could not be raised on appeal.*

Haviside v. Jor lan 216

Redhibitory Action, *see* Sale and purchase 364

Referee, *see* Partnership 431

Registration of Voters—Qualification—Occupation.

Actual occupation of the requisite premises during the whole of the qualifying period is sufficient to entitle the occupier to be registered as a voter even if he was only a tenant at will. Where the alleged occupier has been absent from the premises during a portion of the qualifying period and it is proved that during such absence he was lawfully excluded from the premises, he cannot be legally regarded as having been in actual occupation during the whole of the qualifying period.

Where, however, there has been no break in the right of occupation, the absence of the occupier during a portion of the qualifying period does not legally constitute a break in his actual occupation, provided that there has been personal occupation for such a portion of the qualifying period as would fairly entitle him to be regarded

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as one of the inhabitants of the division.

Alhert's case ... ... }
Michau's case ... } 373
Bailey's case ... ... }

Registration, *see* Trade Mark ... 825

Re-instatement, *see* Attorney, 255, 306

Rei vindicatio—Litis contestatio—Loss or destruction of thing claimed.

A horse belonging to the plaintiff having been lost he found it in the possession of the defendant who had released it from the pound alleging and possibly believing that the horse belonged to him (the defendant). The defendant refused to restore the horse although the plaintiff afforded him proof which, in the opinion of the Court, ought to have satisfied the defendant that the horse belonged to the plaintiff. The plaintiff brought an action for the restoration of the horse or its value, and after the pleadings had been closed the horse died.

Held, *that the plaintiff was entitled to succeed and that, as the defendant retained the horse after he had sufficient reason to know that it belonged to the plaintiff, he was liable for its full value notwithstanding its death.*

Hadley v. Leonard 81

Rei vindicatio—Value—Procedure in Magistrate's Court.

The plaintiff sued the defendant in a Magistrate's Court for delivery of a mule belonging to the plaintiff or its value. The plaintiff proved his ownership, but omitted to prove the value. After his case had been closed, the plaintiff applied for leave to prove the value, but the Magistrate refused leave and granted absolution from the instance. On appeal, the case was remitted to the Magistrate, to be tried on its merits, with leave to the plaintiff to prove the value of the mule.

Theron v. van der Merwe ... 846

Release from civil imprisonment, *see* Arrest 191

Relief, *see* Fraud 667

Remission, *see* Servitude 783

Remit to new Magistrate—Act 3 of 1861, § 29—Plea of guilty—Evidence.

A Magistrate to whom a criminal case has been remitted for trial must, if not the same Magistrate who took the evidence against the accused at the preparatory examination, take evidence de novo *against the accused as required by Section 29, Act 3, 1861, even where the accused pleads guilty.*

The Queen v. Strydom (*1 Juta 60*) *followed.*

Rex v. Mpala and others ... 638

Remittal of cases by Attorney-General—Section 29 of Act 3 of 1861—Reading of evidence taken at preparatory examination.

The reading at the trial of a case remitted to a Resident Magistrate of depositions taken at a preparatory examination, is left to the discretion of such Magistrate by the 29th section of Act 3 of 1861, but such discretion must be judicially exercised.

If at the trial the accused pleaded guilty and the evidence

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taken at the preparatory examination establishes such guilt, it would be a judicial exercise of the Magistrate's discretion not to read the evidence aloud in the presence of the accused.

Rex v. Clarence 1163

Removal of bar — Specific accounts—Costs.

Where a defendant applied for a removal of bar on the ground that he had been unable to plead owing to certain detailed accounts not having been furnished by the plaintiff, which accounts the plaintiff alleged had been furnished from time to time; the Court removed the bar and ordered the plaintiff to again furnish specific accounts. Costs of the application to be costs in the cause.

Table Bay Harbour Board v. Bergl 588

Remuneration, *see* Award ... 11

Remuneration, *see* Land Agent ... 778

Replication, *see* Pleading 313

Report of trial, *see* Defamation ... 70

Res judicata, *see* Scab Act ... 474

Resident Magistrate's Court — Dismissal of claim—Appeal Costs—Remitting case to Court below—*Res judicata*

In an action in a Magistrate's Court for goods sold and delivered, the Court dismissed the claim although there was evidence in support of it. On appeal, the case was remitted to the Magistrate's Court, to be tried on its merits but, as the case had been dismissed by the Magistrate without being thereto requested by the defendant, the costs of appeal were ordered to abide the result in the Court below.

Kaeding v. M'Bunja ... 857

R.M. Court practice, *see* Exception to summons 975

Restitution of conjugal rights—Domicile.

A wife who does not reside within the jurisdiction is entitled to a decree of restitution of conjugal rights against a husband whose domicile is in this Colony and who has maliciously deserted her.

Jacks v. Jacks 101

Retention money, *see* Builder's lien 226

Return of *nulla bona*, *see* Provisional order of sequestration 1173

Review — Irregularity — Resident Magistrate.

On an application for a review of proceedings in a Magistrate's Court it was alleged that the Magistrate had refused to hear the witnesses for the plaintiff. The Magistrate denied the allegation on oath, and there was nothing to show that an application had been made to him to enter on the record a refusal to hear the evidence.

Held, *that in the absence of proof of irregularity on the face of the record, clear proof* aliunde *was required.*

Norbye v. Bensimon ... 234

Review — Irregularity — Resident Magistrate.

In a civil case, tried in a Magistrate's Court, a document in the possession of the defendant to which great importance was attached was shown by his agent to a witness, who acknowledged

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having previously seen the document in the possession of the defendant. The document was not, however, put in as evidence, and after judgment of absolution from the instance had been given, the Magistrate obtained a certain document from the defendant as being the document which had been shown to the witness. The document thus obtained was inserted in the record as being part of the evidence On review, the Clerk of the Court and the witness denied on oath that the document thus inserted had ever been shown to the witness.

Held, *that the irregularity was such as to entitle the plaintiff to have the proceedings set aside.*

Vickers v. Mason & Co. ... 236

Revocation of gift, *see* Gift to minor child 1209

Revocation of agency, *see* Power of Attorney 985

Right of way, *see* Servitudes ... 465

Rule of Court.

The Court refused to make a certain agreement between the petitioner and the Municipality of M. a rule of Court.

Ex parte Robertson 1003

Rule of Court No 8, *see* Arrest ... 191

Rules of Court of 1903—Postponement of cases.

Douglas and Another v. Glass, ...1109

Rule 319—Damages.

The defendants had undertaken to finance the plaintiff by raising a certain loan for him. This they failed to do. He now sued them under Rule 319 (inter alia) *for damages on the ground that they had prevented him by their default from completing a certain contract. The Court refused to give damages (1) on the ground that the damages claimed were not liquid; (2) that the defendants had not guaranteed a loan.*

Nolan v. Sibbett and Stephan 1000

Rule 329D—*Ignorantia Juris.*

Judgment having been obtained under Rule 329d against the applicants by the respondent, the Court refused, upon their application, to set aside the judgment and give them leave to plead.

Achmatt and Another v. Bruyns 904

Rule 333D—Discovery—Privilege.

In obedience to an order for discovery under Rule 333, the respondent in an affidavit stated that he has in his possession "voluminous departmental correspondence," and objected to disclose this on the ground that such correspondence is privileged. In an application to compel the respondent to disclose and produce this correspondence.

Held (*1*) *that official correspondence as such is, in the absence of some further or special circumstances, shewing that it would be contrary to the policy of an Act of Parliament or injurious to the public interest, not privileged from disclosure;*

(*2*) *that sufficient information should be*

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given with regard to the documents comprising the correspondence, in order to enable the Court to judge whether any or all such documents are privileged.

The Court consequently directed that the respondent should file a further and more complete affidavit, setting forth with sufficient accuracy the particular grounds for such objection.

Chester & Gibb v. The Big Ben G.M. Company (*4 H. C. 374*) *followed.*

Van der Horst v. The Colonial Government 911

Rule *nisi* discharged.

The Court discharged a rule nisi, *calling upon the Government to shew cause why it shall not be restrained from proceeding with the construction of a certain overhead bridge until the plans thereof had been submitted to and approved by the applicant, and why the respondent shall not be restrained from breaking up a main road, on the ground* (*1*) *that the applicant had not first applied for and been refused an inspection of plans by the respondent, and* (*2*) *that as the applicant was plaintiff in an action, in which it was ordered that the bridge should be made by the respondent, it must be taken to have consented to the work necessary for commencing the construction of the bridge.*

Cape Divisional Council v. Colonial Government ... 902

Rule of the road, *see* **Negligence** 576

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Sale—Breach of contract—Damages—*Quanti minoris.*

The plaintiff, who lived at K. in the Transvaal, ordered from the defendant, a manufacturer in the Cape Colony, three wagons of different qualities at different prices and paid the full price. The defendant sent the wagons by railway to K. and on their arrival the plaintiff accepted two of them, but although he took charge of the third he refused to accept it on the ground that it did not answer to the description ordered.

Held, *that although under ordinary circumstances the plaintiff would be entitled to claim a wagon such as that ordered, or on refusal might retain the wagon and claim back the purchase price as well as damages, yet that, under the special circumstances, as the defendant refused to deliver a wagon such as that ordered, as the plaintiff did not by his declaration tender the wagon delivered, and as the expense of returning the wagon to the Colony would be very great, the proper course was to let the plaintiff retain the wagon and recover damages—the measure of damages being the difference in the market values at K. between a wagon of the description contracted for and a wagon of the description actually delivered.*

Kinnear v. Huxham... ... 421

Sale—Delivery—Hire purchase—Means of knowledge.

The plaintiff sold a bicycle to A. on condition that the bicycle should remain the plaintiff's property until the price was

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paid. A document embodying this condition was given to A. A. sold the bicycle to the defendant and shewed him the document, but, according to the defendant, he did not read it. The defendant sold the bicycle to another person, but was unable or unwilling to give the name of the purchaser.

Held, *that as the defendant had the full means of knowing the condition on which, as between the plaintiff and A. the property was to vest in the latter, he was liable for the value of the cycle notwithstanding that he had parted with the possession.*

Sadie v. Standard Bank (7 *Juta 87) approved.*

Smith and Another v. Sharenovitz 1029

Sale—Re-sale—*Lex commissoria.*

In 1860 the Town Council of P. sold two lots of land to G. on condition (among others) that on failure by the purchaser to pay any instalment of the price within a certain time the vendors should be at liberty to re-sell the lots at the expense and risk of the purchaser. G. took occupation of the lots and paid the municipal rates thereon, but he failed to pay some of the promissory notes given by him in payment of the price. He sold the lots to the respondent, who for a time paid the rates, and was recognized by the vendors as the owner, but no transfer was ever passed. The respondent, after a few years, left P. and ceased to pay rates. The Town Council, forty years after failure of G. to pay the promissory notes, applied for an order cancelling the sale on the ground that the purchase price had not been paid in terms of the conditions of sale, and the respondent tendered to pay the price still owing and interest due thereon.

Held, *that until re-sale by the applicants in terms of the conditions the respondent was entitled to tender the price and interest, and thus prevent any re-sale or cancellation of the sale.*

Port Elizabeth Town Council v. Rigg 451

Sale of land bequeathed, *see* Executor 399

Sale—To whom was credit given.

Goods were supplied to a business carried on under the style of Godfrey & Co., upon condition that the defendant should be regarded as principal in the purchase of the goods.

Held, *that credit was given to the defendant as principal debtor, and that he was liable to the plaintiffs for the price of the goods.*

Heynes, Mathew and Co. v. Zweigenhagt 704

Sale of liquor to natives—Trap—Corroboration — Credibility of witnesses.

Rex v. McDonald 644

Sales on credit, *see* Manager ... 775

Sale by military, *see Vindicatio* ... 220

Sale, *see* Pledge 239

Sale and purchase—Broker's note—Mutual mistake of seller and purchaser.

T. purchased from C. certain cottages. C. subsequently alleged that certain two cottages

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had been included in his broker's note by mistake. T. now sued C. for a pro rata *return of the price already paid in respect of these two cottages.*

Held, *that as the evidence disclosed that defendant's broker had led plaintiff to believe that he was buying the two cottages in question, defendant's mistake could not be set up as a defence against plaintiff's claim.*

Semble: *Had the mistake of plaintiff and defendant been mutual the latter would have had a good defence.*

Trevor v. Chetty 378

Sale and purchase—Latent defect —Redhibitory action.

The purchaser of certain gramophone slot machines accepted them and credited the seller with the price, but after keeping them for several weeks he claimed the right to return them on the ground that they were in a defective condition. The defect complained of was not latent, but could have been discerned on the slightest examination, and, moreover, the purchaser knew that the machines were sold because they did not work properly.

Held, *that the purchaser was not entitled to succeed in the redhibitory action.*

Davis Bros. and Been v. Doyle & Co. 364

Sale and Purchase, *see* Redhibitory action 216

Sanitation, *see* Municipal regulations 52

Scab Act—Hand dressing of sheep —Dipping—*Autrefois acquit.*

The owner of scab-infected sheep does not in terms of the 21st section of Act 20 of 1894 "make proper and diligent efforts to cleanse them," if he dresses them by hand without curing them.

The accused was charged in a Resident Magistrate's Court with failing on a certain date to make proper and diligent efforts to cleanse his sheep, and was acquitted. A week afterwards he was charged in the same Court with committing the same offence between certain dates, including the date mentioned in the first summons, but the offence, if any, was proved to have been committed at that date.

Held, *that he could not be convicted on the second charge.*

Rex v. Bailey 474

Scope of employment, *see* Negligence 1069

Sea protest, *see* Stamps Act ... 49

Security, *see* Arrest 191

" *see* Builder's lien ... 226

" *see* Provisional sentence 864

Seizure of stock. *see* Martial Law 139

Service of Articles, *see* Attorney 765

Servitude—Remission—Permitting acts inconsistent with servitude.

In an action for an interdict restraining the defendant, the owner of land over which the plaintiff had a duly registered right of road, from placing a fence across the road, the evidence shewed that the defendant had for two or three years made a garden on the strip of land set apart for the road, but the strip of land was

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fenced off from the rest of the defendant's property, and there was no evidence that the owner of the plaintiff's property knew of the trespass.

Held, *that the work done on the strip of land was not of so permanent or substantial a nature as to justify the inference that the plaintiff had relinquished his right of road, and held consequently that the servitude had not been lost by reason of the owner of the dominant tenement having permitted acts inconsistent with the servitude.*

Braun v. Powrie 783

Servitude, *see* **Railway** 770

Servitudes, urban and rural—*Non-user* — Prescription —

Right of way—*Iter*—*Actus.*

Rural servitudes are lost by non-user during the period of prescription, whereas urban servitudes, such as that of lights, are only lost by non-user if, in addition to such non-user on the part of the owner of the dominant tenement the acts of the owner of the servient tenement have been inconsistent with the existence of the servitude.

Where a person, who is entitled to a right of way for vehicles as well as for going on foot, uses the road only for going on foot, he does not on that account only lose the servitude by non-user.

Sed quaere *where, although the road is used by foot passengers, it is blocked by an obstruction and trees were allowed to grow on it for the period of prescription which prevented the road from being used for vehicles?*

Brawn v. Powrie 465

Servitude, *see* **Lights** 552

„ *see* **Water** 321

Shipping agent — Negligence — **Measure of damages.**

Defendants, a firm of shipping agents, having received and accepted instructions to forward certain goods with all possible speed by passenger train to plaintiff at V., neglected for more than a month to do so.

Held *(1) That defendants had been guilty of negligence and that plaintiff was entitled to damages.*

(2) That the measure of such damages should be the difference in value at V. of the goods between what it would have been had they been timeously forwarded and their value when they actually arrived.

(3) That as there was no evidence on this point only nominal damages could be awarded.

Frier v. Divine, Gates and Co. 1061

Siding, *see* **Expropriation of land** 168

Signboard, use of, *see* **Hire of premises** 206

Slander—Defamatory words.

Where words may have an innocent or a defamatory meaning, the Magistrate was wrong in allowing an exception that the words were not defamatory. He should try the case on its merits and determine whether under the circumstances the words were defamatory.

Knoesen v. Theron 811

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Slander—Justification.

Where justification is pleaded to an action for defamation charging the plaintiff to have committed a criminal offence the plea must fail unless the offence is clearly proved to have been committed by him.

Le Roux v. Zeeman 338

Slander—Magistrate Court costs.

Braun v. Cohen 352

Slander.

Ries and Others v. Willetts 1078

Soldier — Obedience — Order of Superior Officer.

The defendant being a soldier received an order from his superior officer to collect the mules which the Boers during the recent war had left behind and to take them to G. Among the mules so left behind was a mule which the Boers had taken from the plaintiff and which the defendant now collected with others, and took to Guries. The plaintiff did not get back his mule and sued the defendant for his wrongful act in taking the mule.

Held, *that the order given to the defendant was not a manifestly illegal one and that as he was bound to obey the order he was not liable for damages.*

Kaplan v. Hanekom 56

Spare diet.

By the Governor's regulations published in Circular No. 11 of 1881, no juvenile offender under the age of 16 years can be sentenced to spare diet.

Rex v. Maritz 1130

Specific bequest, *see* Executor ... 399

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Specific performance, *see* Exception to summons 975

Spliting of charge.

Rex v. Wiseman and Another 45

Spoliation.

Strydom v. Markotter ... 842

Spoliation, *see* Builder's right of retention 802

Spoliation, *see* Rebel 931

Stamps Act—Noting of protest by master of ship—Sea Protest.

On the 8th of September, 1902, the master of a ship which had just arrived in Table Bay, signed a document in the presence of a notary public notifying his intention to execute a sea protest. On the 25th of November a formal Notarial protest was executed by and in presence of the Notary

Held, *that the Sea Protest was executed on the 25th of November and that as the document bore an adhesive stamp for 10s. and was tendered for execution on that day, it was not subject to treble stamp duty.*

Arderne v. The Treasurer-General 49

Stock theft, *see* Evidence ... 67

Sub-division, *see* Valuation ... 197

Succession duty—Act 5 of 1864—Devolution of property.

A testator, who was in partnership in business with the appellant, by will gave the usufruct of the residue of his estate to the appellant, and appointed him and certain other persons as heirs of such residue in certain proportions, but as to the partnership property he

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directed that the partnership should continue, and that in case the appellant should sell any portion thereof he should receive a larger proportion than of the rest of the residue. The testator further directed that the remaining heirs should be paid their shares of the partnership property according to the valuation of the inventory to be framed on his death, but that in case the appellant should sell the whole of the partnership property, they should be entitled to share as heirs according to the original proportions. On the death of the testator, the Master of the Supreme Court assessed the duty payable by the appellant in respect of his usufruct only, and such duty was duly paid. Afterwards the appellant sold a portion of the partnership property for a larger sum than that at which the property was valued in the inventory.

Held, that on obtaining his share of the proceeds under the will the succession duty payable by the appellant should be upon such increased value after deducting the sum paid by him in respect of his usufruct.

Stephan v. Colonial Government 852

Superannuated judgment—R.M. Court—Revival.

In the absence of any authority the Court refused to revive a R.M. Court judgment which had become superannuated.

Colley v. Parkins 991

Supercession of Colonial order of sequestration and of civil imprisonment, *see* Extradition... 225

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Surety — Co-principal debtor — Excussion.

The plaintiff had supplied certain goods to the mother of the defendant with whom the defendant lived. The Court found on the evidence that the defendant had guaranteed payment for the goods already supplied, but had made no promise as to payment for future supplies.

Held on appeal, *that plaintiff's promise did not constitute him a co-principal debtor.*

Held further, *that as it had not been shown that he had received any consideration for such promise, he was not legally bound thereby.*

Semble: *Had he guaranteed payment for future supplies, and had the plaintiff in consideration of such promise continued to supply goods, he would have been liable as a surety, but would have been entitled to avail himself of the* beneficium excussionis.

Groenewald v. Howe ... 945

Surety and principal debtor — Excussion—Pleading.

A surety, on being sued by the creditor in a Magistrate's Court, denied the suretyship by pleading the general issue but, failing such defence, he claimed the benefit of excussion. The evidence clearly established the contract of suretyship, notwithstanding the defendants' denial, and the Magistrate held, that as the defendant had deliberately postponed his claim to excussion until after issue had been joined, he could not claim the benefit after the issue had been found against him. The

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Court, on appeal, upheld the judgment.

Mason and Co. v. Booth and Co. 1154

Tender, *see* **Pleading** 1135

Theft—*Animus furandi.*

The taking of the goods of another does not constitute a theft if all the circumstances show that it was done without any **animus furandi.**

Rex v. Rossouw 650

Theft of prison clothes, *see* **Gaol-breaking** 146

Title to land—Interdict—Motion.

Bobbins v. Le Roux ... 727

Trade mark—Registration—Imitation.

In 1893, the applicant registered a trade-mark for pills in the following terms: "Dr. Williams' pink pills for pale people," and no application was afterwards made to expunge the mark from the register. In 1903, the respondent sold pills, in wrappers and boxes, of a different colour from applicant's, but with the label "Dr. Wilson's pink pills for anæmic people."

Held, *that as the similarity was calculated to deceive intending purchasers of the applicant's pills, he was entitled to an interdict restraining the sale.*

Dr. Williams' Medicine Co. v. Tothill 852

Trade-mark, infringement of—Interdict—Action—Principles which guide the Court in granting an interdict to restrain the infringement of a trade-mark.

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Where respondents, as agents of a principal residing in England, sold a certain medicine "Rheumaticide," which applicant complained was an infringement of his registered trade-mark "Rheumaticure."

Held, *that as the respondents had sold both Rheumaticide and Rheumaticure for the last 16 months, and alleged that no one had been deceived nor that applicant had sustained any loss thereby, and as moreover the respondents had not had sufficient time to communicate with their principal, who might have a good defence, no interdict should be granted, but that applicant, who under the circumstances had not produced evidence of deception, should be left to his remedy by action.*

Jones v. Petersen & Co. ... 634

Transfer of property, *see* **Will** ... 147

Transfer of property sold—Contempt.

Where the vendor of certain property had been ordered to pass transfer, but stated that the title deeds were not in his possession, the Court ordered him to pass transfer by a certain date or to show cause on or before that date why he should not be committed for contempt of Court.

Werner v. Kukard 248

Transfer of land—Option of purchase—Withdrawal of option—Damages for breach of contract—Consideration.

H. had given to G. an option of purchase of certain land to be exercised by a given date. Before that date arrived, G., not having availed himself of this option, H. withdrew it.

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G. now sued H. for transfer, or, in the alternative, for damages.

Held, *that had G. exercised the option before it was withdrawn, a contract of sale and purchase binding on both parties would have been concluded, but that no consideration having been given by G. for the option, H. was at any time previous to its acceptance by G. at liberty to withdraw it.*

Gous and Another v. Van der Hoff... 397

Transfer duty—Purchase on behalf of a Company.

It having been clearly proved that the purchase of a farm had been made by the applicant on behalf of a Company which had been formed but not registered at the time of the purchase, the Court authorized the Registrar of Deeds to allow transfer to be passed, after registration of the Company, by the seller directly to the Company.

Ex parte Botha 1142

"Trap," *see* Sale of liquor ... 644

Trespass—Illegal impounding—Act 15 of 1892.

A person who finds cattle trespassing on his land can recover compensation only by either (1) sending the cattle to the pound and claiming trespass money under Schedule C. to Act 16 of 1892, or (2) having the damage assessed by the field-cornet, or (3) by action at Common Law. In any case he must notify his intention to the poundmaster, and having once selected his remedy he cannot abandon it and pursue another.

Mason v. Dihning 594

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Trespass—Interdict—Town Council—Act 26 of 1893, Sec. 133—Compensation.

The Town Council of C. had entered upon applicant's property for the purpose of constructing certain drains. They were willing to pay compensation for any damage done, when the work should have been completed, but not before. Applicant now sought to have a rule nisi *which had been granted, interdicting the Council from trespassing on applicant's land made absolute.*

Held, *that as the Council was justified in its action by Sec. 133 of Act 26 of 1893 and as it was a responsible body well able to pay such damages as might be awarded to applicant, the rule must be discharged.*

Liebbrandt v. The Town Council of Cape Town ... 51

Trust funds, *see* Administering Liquidator 1019

Trustee in insolvency—Contempt of Court.

Leave given respondent to file an affidavit in answer to applicant's replying affidavit, which introduced new and material matter. The Court does not lightly presume that a person failing to do a specific act ordered by the Court neglected to do so ex contemptu.

Assignee of Insolvent Estate Weidner v. Brand ... 616

Ultra Vires, *see* Liquidator ... 977

Uncertain day, *see* Legacy ... 742

Undue preference, *see* Contemplation of Insolvency ... 751

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Unlawful possession—*Bona fides.*

Where the defendant had admittedly been found in unlawful possession of certain ostriches, which by his orders had been plucked "green" and branded with his principal's brand.

Held (on appeal), *that the fact that the defendant had,* per incuriam, *not observed that these birds were not the property of his principals and that he had therefore acted* bona fide, *was not a good defence in a civil action.*

De Wit v. Luyt 66

Usury, *see* Interest 655

Vagrancy Act, 1879—Native location.

Squatters trespassing upon land set apart as a native location cannot be convicted of a contravention of the 9th section of the Vagrancy Act of 1879, until after, having been directed by order of the Resident Magistrate, to remove from the land, they have disobeyed such order.

Rex v. Certain Natives ... 834

Valuation—Section 93 of Act 26 —Subdivision.

The property of the applicant, on which there were a restaurant and a store, was valued for £3,000. After such valuation, he made additions to the store, whereupon the Town Council, at an interim valuation, increased the valuation not only of the store but also of the restaurant on the alleged ground that there had been a subdivision of the property.

Held, *that there was no such subdivision in terms of the 93rd Section of Act 26 of 1893 and that the Council had no right at such interim valuation to revalue the restaurant in respect of which there had been no improvement or change of tenancy.*

Firth v. Town Council of Cape Town 197

Vesting, *see* Joint Will 62

Vesting, *see* Legacy 742

Vesting of bequest, *see* Will ... 741

Vindicatio—Ownership—Sale by military authorities—War.

During the recent war some British soldiers removed a mule belonging to the defendant from his farm and, after the proclamation of peace, the Magistrate held a public sale of cattle including the mule in question which was sold to C. and by him sold and delivered to the plaintiff. The mule subsequently came into the possession of defendant whereupon the plaintiff brought an action against him for the restoration of the mule or payment of its price:

Held, *that in the absence of any proof of authority given to the Magistrate to sell the mule the plaintiff was not entitled to succeed and judgment of absolution from the instance was entered accordingly.*

Kotze v. Prins 220

Vindication—Ownership—*Jus tertii.*

The plaintiff was directed by his father, who was the owner of several horses, to fetch them on the plaintiff's farm. The plaintiff said the defendant might take them on his own responsibility, and he subsequently sued the defendant for

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the return of the horses or payment of their value.

Held, *that the defendant was entitled to set up his father's ownership and directions as a defence to the action.*

Visser v. Van Zyl 284

Voters' list, *see* New liquor licence 628

Waiver, *see* Arbitration 11

War, *see Vindicatio* 220

Water—Servitude—Prescription Accustomed flow—Rights of owner of dominant tenement.

A servitude had been imposed on the tenement of defendant's predecessor in title in the following terms:—"That the proprietor shall not be entitled to use more of the water coming down from the kloof than what is required for domestic purposes and not to lead off more than a stream of one inch, and that he shall be obliged to allow the remainder of the water to pass free and undisturbed, and not to be allowed to alter or displace any water-course by which the free run of the water might be impeded." *In or about 1862 the river water had been diverted from the previous course of the river, and the then owners of plaintiff's farm cut a new furrow. Plaintiff now complained that the defendant had interfered with and damaged this said furrow, and had unlawfully diverted water therefrom. Plaintiff now claimed (1) a declaration that he was entitled to the sole free and undisturbed use of the water of the said river, and to that of the furrow*

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traversing defendant's land, to maintain the said furrow, to have access thereto, and to take materials necessary for that purpose from defendant's land; (2) a perpetual interdict restraining defendant from interfering with the said river, the said furrow or the water therein, and (3) judgment for £1,000 by way of damages.

Held, *that (1) the plaintiff was entitled to the free and undisturbed use of the water in the said furrow and to reasonable access for the purposes of cleaning and repairing the same; that he was not justified in taking materials from defendant's land (save in the immediate vicinity of the furrow) for the purpose of executing such repairs; (2) that no interdict could be granted; (3) that, inasmuch as the furrow had been damaged by the defendant, the plaintiff was entitled to some damages, which the Court assessed at £50.*

Steyn v. Zeeman 321

Weight of evidence, *see* Appeal... 886

Will—Vesting of bequest.

Strydom v. Strydom (11 Juta, 425) followed.

Ex parte Dixon and Another 741

Will, *see* Legacy 742

Will—Distribution of estate—Life usufruct of surviving spouse.

Ex parte Du Plessis... ...1206

Will — Allegation of fraud — Pleading.

Hiddingh v. Executors Estate Hertzog 205

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Will—Codicil—Beneficiary interest—Sec. 4 of Act 22 of 1876.

A testator had by will appointed I. P. and A. D. to be her executors and A. D. to be the guardian of her minor children. By a subsequent codicil the testator revoked the appointment of I. P. and appointed A. L. to act with A. D. in his stead. This codicil was witnessed by A. D.

Held, *that as the will and the codicil must be treated as two distinct instruments, the fact that A. D. had attested the codicil did not invalidate his appointment as executor and guardian under the will and that Sec. 4 of Act. 22 of 1876 did not apply.*

Doman & Lewis v. The Master 455

Will—Construction—"Such children as may be born."

The testator, having two children, C. and the plaintiff, made a will in 1861, nominating as heirs C. and such other children as may be born of his marriage.

Held, *that the will applied to the plaintiff as well as to C.*

Cranko v. Cranko 586

Will—Construction of, *see* Joint Will 554

Will—Evidence—Handwriting.

Herholdt v. Estate Herholdt 95

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Will — Transfer of property—Presumption as to possibility of issue—Age.

Where the heir to a certain life usufruct on whose lawful issue it was provided that the corpus *of the estate should devolve, asked for an order authorizing the executor to pass transfer to his nephew, the petitioner having no issue and his wife being 70 years of age. The Court refused the application on the ground that on the death of his wife he might remarry and have issue by his second wife.*

Ex parte Francis 147

Will—Witnesses—Evidence.

Where it was sought to set aside a will which ex facie *appeared to have been regularly executed, but which the plaintiff alleged had not been signed by the witnesses in the presence of the testator: the Court held that as the onus of proving his contention was upon the plaintiff and that the evidence of his two witnesses (the witnesses to the will) was unsatisfactory, judgment must be given for the defendants.*

De Wit v. Estate De Wit ... 164

Winding up, *see* Company ... 382

Witnesses, *see* Will 164

Written agreements—Interpretation of, *see* Evidence ... 318

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